



Council of the
European Union

Brussels, 30 January 2017
(OR. en)

5708/17

Interinstitutional File:
2017/0013 (COD)

ENV 76
MI 74
CODEC 112

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	26 January 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 38 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment

Delegations will find attached document COM(2017) 38 final.

Encl.: COM(2017) 38 final



Brussels, 26.1.2017
COM(2017) 38 final

2017/0013 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2011/65/EU on the restriction of the use of certain hazardous
substances in electrical and electronic equipment

(Text with EEA relevance)

{SWD(2017) 22 final}

{SWD(2017) 23 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Reasons for and objectives of the proposal

Directive [2011/65/EU](#) (RoHS 2) sets out rules on the restriction of the use of certain hazardous substances in electrical and electronic equipment (EEE). RoHS 2 provisions apply to all EEE placed on the EU market regardless of whether they are produced in the EU or in third countries. RoHS 2 affects mainly industrial manufacturers, importers and distributors of EEE, as well as EEE customers.

RoHS 2 addresses the waste hierarchy's highest priority, waste prevention. Waste prevention includes measures that reduce the content of harmful substances in materials and products. Decreasing the amount of hazardous substances in electrical and electronic waste benefits the management of such waste as a result. It promotes the reuse of products and the recycling of used materials, which supports the circular economy.

RoHS 2 is necessary to prevent barriers to trade and the distortion of competition in the EU, which could happen in case of disparities between the laws or administrative measures on restricting the use of hazardous substances in EEE in various Member States. It also contributes to the protection of human health and to the environmentally sound recovery and disposal of electrical and electronic waste.

RoHS 2 is a recast of the earlier RoHS Directive [2002/95/EC](#) (RoHS 1). Both RoHS directives have stimulated a reduction in hazardous materials all over the world: several countries, including China, Korea and the US, have developed RoHS-like legislation.

RoHS 2 introduced new definitions and expanded the scope to cover medical devices and monitoring and control instruments. The impact of these provisions was assessed with the Commission's proposal in 2008. However, RoHS 2 also introduced further changes: the 'open scope' through a new category 11: "Other EEE not covered by any of the other categories". Those changes make the Directive applicable to all EEE (except equipment that is explicitly excluded) and give a broader interpretation of EEE, based on a new definition of the dependency on electricity. These 'open scope' provisions were not specifically assessed when introduced in RoHS 2.

The Commission has a mandate to examine the need to amend the Directive's scope in respect of the EEE definition and of additional exclusions of product groups covered by RoHS 2 by virtue of the open scope introduced with the 2011 recast. The Commission has carried out this assessment and identified a number of issues related to the scope of RoHS 2 that need to be addressed to avoid the legislation having unintended effects.

In absence of a Commission proposal, the following problems would arise after 22 July 2019:

- the interdiction of secondary market operations (e.g. reselling, second-hand market) for new-in-scope EEE. This is known as the 'hard-stop';
- the stop of the possibility to repair with spare parts a subset of new-in-scope EEE once legally placed on the market before that date;

- the different (distorting) treatment of cord-connected non-road mobile machinery in comparison to otherwise identical machinery powered by a battery or an engine (currently excluded from RoHS scope);
- the de-facto prohibition of pipe organs placement on the EU market (as not RoHS-compliant due to the lead used to produce the wanted sound).

These four problems could affect the EU market, manufacturers and citizens and trigger negative economic, environmental, social and cultural impacts.

The Commission's proposal therefore tackles scope problems that cannot be resolved by either substance substitution or exemptions and guidance, e.g. for specific product groups with permanent compliance problem or where scope provisions generate market distortions, namely:

- secondary market operations for RoHS 2 EEE which fell outside the scope of RoHS 1;
- spare parts for RoHS 2 EEE which fell outside the scope of RoHS 1;
- traction-drive cord-connected non-road mobile machinery;
- pipe organs.

The proposal also addresses lessons learnt from implementing RoHS 2, in line with its overall objectives and legal clarity requirements.

This initiative is not part of the REFIT agenda.

Consistency with existing policy provisions

By addressing secondary market operations, the proposal aims to reinstate RoHS 2 full coherence with the EU's general principles of product legislation. In particular, as set out in the Blue Guide providing horizontal guidance on the role of market placement in the EU's product legislation¹: *'When made available on the market, products must be in compliance with the Union harmonisation legislation applicable at the time of placing on the market. Accordingly, new products manufactured in the Union and all products imported from third countries — whether new or used — must meet the provisions of the applicable Union harmonisation legislation when placed on the market i.e. when made available for the first time on the Union market. Compliant products once they have been placed on the market may subsequently be made available along the delivery chain without additional considerations, even in case of revisions to the applicable legislation or the relevant harmonised standards, unless otherwise specified in the legislation'*. 'Making available on the market' and 'placing on the market' are defined in RoHS 2. Secondary market operations, such as reselling of EEE, which may involve also repair, spare parts replacement, refurbishment and reuse, are already allowed for most (but not all) of the EEE.

- (1) RoHS 2 allows EEE that was outside the scope of RoHS 1, but which would not comply with RoHS 2, to continue to be made available on the market until 22 July

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:272:TOC>

2019. After that date however, both the first placing on the market and secondary market operations (e.g. reselling) of non-compliant EEE will be prohibited. EEE affected by this 'hard-stop' of secondary market operations are medical devices, monitoring and control instruments and other new-in-scope EEE. This barrier to secondary market operations is not consistent with the general harmonisation of EU product legislation. For this reason, the Commission proposes to remove the hard-stop of secondary market operations.

- (2) RoHS 2 creates an exception (to the general substance restriction) for cables and spare parts for the repair, reuse, updating of functionalities or upgrading of capacity of the groups of EEE gradually becoming subject its scope. However, newly-in-scope EEE other than medical devices and monitoring and control instruments are not listed. This leads to the impossibility to use spare parts after 22 July 2019 and to an unjustified difference in treatment. The Commission therefore proposes to introduce a specific provision to exclude spare parts from substance restriction, so to allow the repair at any time of all EEE in RoHS 2 scope, which were placed on the EU market.
- (3) RoHS 2 lists 10 specific kinds of equipment that are excluded from the 'open scope' provisions. One kind of equipment that is excluded ('non road mobile machinery made available exclusively for professional use') only includes machinery with an on-board power source. This provision leads to types of machinery that are otherwise identical to be under two different regulatory regimes for the only reason of their power source being different (on board or external). The Commission proposes to amend the definition of '*non road mobile machinery made available exclusively for professional use*' to also capture traction-driven machinery.
- (4) The Commission also proposes to add pipe organs to the list of excluded equipment due to the lack of alternatives for substitution.

Under RoHS 2, exemptions to substance restriction should have a defined limited duration, and therefore start and end dates for exemptions are given either explicitly in the entries of Annexes III and IV or implicitly through the maximum validity period in Article 5(2). Under the current Article 5(2), however, there is no maximum validity period specified for category 11.

Although Article 5(5) does not provide a specific deadline for the Commission's decision on applications for new exemptions, the timeframe for the Commission to decide on applications to renew an exemption is set for at the latest 6 months before the exemption expires, and this has proven to be unfeasible in practice. Combined with the requirement that an application for renewal must be made no later than 18 months before the exemption expires, the deadline means that the Commission must make its decision on applications to renew existing exemptions within twelve months after the application is submitted, unless specific circumstances justify a different deadline. Complying with this deadline is de facto unfeasible

due to the several mandatory procedural steps needed for the evaluation of an application for renewal. The deadline brings no additional value beyond the existing transparent procedure for assessing requests for renewal and retaining a deadline which has proven unfeasible in practice does not contribute to predictability for business and stakeholders. Business continuity is in any case ensured since market operators can rely on an existing exemption to remain valid until a decision is taken on the renewal request. Therefore, the provision fixing a timeframe for the Commission to decide on application for renewing exemptions should be removed.

Consistency with other EU policies

The changes subject to the current proposal do not alter the fundamental approach of RoHS 2 and its consistency with other legislation. RoHS 2 and the REACH Regulation are consistent in terms of policy interaction. In particular, a provision on coherence with REACH is provided for both restricting new substances and granting exemptions from restriction.

RoHS 2 is also consistent with other product-related legislation, such as Directive 2012/19/EU of the European Parliament and of the Council on waste electrical and electronic equipment and Directive 2000/53/EC of the European Parliament and of the Council on end-of-life vehicles. Other EU legislation, for example on medical devices or occupational health and safety, may contain independent obligations in relation to the use phase of EEE, but there are no overlaps with RoHS 2 requirements.

2. LEGAL BASIS, SUBSIDIARITY, PROPORTIONALITY AND LEGAL ELEMENTS OF THE PROPOSAL

The legal basis of RoHS 2 and of this initiative is Article 114 of the Treaty on the Functioning of the European Union (TFEU), the objective of which is to ensure the functioning of the internal market by approximating provisions laid down by law, regulation or administrative action in Member States on the functioning of the internal market.

The problems addressed by the current proposal cannot be solved without changing the scope of RoHS 2, as they originate in the current legal formulation of the RoHS 2 scope and related provisions. Only a solution at EU level can solve the problems, as provisions regarding the restriction of the use of hazardous substances in EEE being placed on the EU market have a direct impact on the EU single market and cannot be drawn up at Member State level without leading to distortion.

The proposals are the only policy options capable of fully addressing the identified problems which affect the EU single market as a whole. All the other possible policy options would neither solve the identified problems permanently and in their entirety, nor ensure legal certainty.

The impact assessment report includes further indications on proportionality of the proposals. This initiative concerns a review that is required by the Directive. The directive revision is introduced through an amending directive, the content of which is explained below:

Articles 1(1)(a) and 1(3)(a) change the transition deadline specified in the current RoHS Article 2(2) relating to the making available on the EU market of newly-in-scope EEE into a compliance date for placing on the EU market the same EEE specified in RoHS Article 4(3).

This follows the same approach as for all the other product groups already included in that provision. The amendment ensures legal clarity and consistency and removes the ‘hard-stop’ for secondary market operations, according to which such operations would not have been possible any longer after 22 July 2019 for the products concerned.

Article 1(1)(b) excludes pipe organs from the scope of RoHS 2.

Article 1(2) broadens the definition of non-road mobile machinery to include machinery powered by a cord-connected traction drive, in addition to similar machinery powered by an on-board power source. As a consequence, non-road mobile machinery powered through a traction drive will be excluded from the scope of RoHS 2.

Article 1(3)(b) states that cables or spare parts for the repair, the reuse, the updating of functionalities or upgrading of capacity are exempt from restrictions for all newly-in-scope EEE. This applies the same approach followed for other product groups.

Article 1(4)(a) establishes the maximum validity period for exemptions applicable to the ‘open scope’ category 11 (i.e. other EEE not covered by any of the other categories). The validity period for exemptions is already specified for the other categories.

Article 1(4)(b) deletes the deadline for the Commission’s decision on the renewal of existing exemptions, reflecting practical experience and the fact that such deadline in practice does not bring additional certainty to applicants.

3. STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

Stakeholder consultations

Stakeholders were consulted in the carrying out of three preparatory Commission studies² through specific websites; three 12-week open stakeholder consultations and four stakeholder meetings were held in 2012-2015.

Around three hundred experts, representatives from Member States, industry associations, manufacturers of EEE, environmental NGOs, consultancy companies and institutes, and other types of organisations (e.g. universities) were contacted. Responses from around forty participants were received and made publicly available. Respondents represented mostly business and public authorities.

When asked about their preferences for addressing the problems concerned, most respondents preferred:

- for the secondary market problem, removal of the ‘hard stop’ to secondary market operations for all newly-in-scope EEE and the transformation of the transition period into a compliance requirement by the same date;
- for the spare parts problem, introduction of a repair-as-produced provision;

²

http://ec.europa.eu/environment/waste/rohs_eee/studies_rohs4_en.htm

- for the non-road mobile machinery problem, exclusion from the RoHS scope of cord-connected twin machinery;
- for the pipe organ problem, a scope exclusion provision for pipe organs.

Those options are seen as efficient, effective and safe solutions, and they have been reflected in the Commission proposal.

Impact assessment

Three Commission studies were conducted in 2012-2015. Related studies from Member States were also taken into account. The impact assessment report received a positive opinion from the Regulatory Scrutiny Board and is described in the impact assessment summary sheet.

The Commission's proposed measures would solve the four identified problems and would lead to the benefits discussed below; any negative impact would be limited or negligible.

Restoring the secondary market and increasing spare part availability for certain EEE will have the following positive impacts:

- A reduction of costs and administrative burden both for business, including SMEs, and for public authorities;
- Positive economic impact in terms of additional market opportunities given to the repair industries and secondary selling;
- Positive social impact, including for EU hospitals, which would save about €170 million after 2019, due to maintaining the possibility to resell and buy used medical devices;
- Environmental benefits in terms of reduced overall waste generation: the possibility of prolonging the use of EEE will postpone their end-of-life and disposal, thus delaying the generation of hazardous waste (WEEE). In most cases, the environmental impact of producing additional spare parts is negligible in comparison with the advantage of keeping the entire equipment in use. This measure will prevent the creation of more than 3000 tonnes of hazardous waste per year in the EU, which would support the circular economy initiative. The longer lifetime of EEE would also lead to additional savings of energy and raw materials.

The **exclusion of pipe organs** from the Directive's scope will help avoid the loss of up to 90% of jobs in the sector and the annual loss of up to €65 million by 2025. A significant cultural loss — the pipe organs manufacture, maintenance and, gradually, also their use being abandoned — is also avoided.

The **exclusion of non-road mobile machinery powered through a traction drive** from the Directive's scope will support industry development in the sector by removing distortion in the treatment of machinery. In the EU cleaning machinery sector, for example, the proposal will allow 14 000 cord connected units to be placed on the market each year (with a turnover of 300 million €), preventing any risk of eliminating these machinery models from the EU market. It will also reduce costs and unnecessary administrative burden both for business, including SMEs, and for public authorities.

4. BUDGETARY IMPLICATIONS AND OTHER ELEMENTS

This legislative proposal has no budgetary implications.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee³,

Having regard to the opinion of the Committee of the Regions⁴,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 24(1) of Directive 2011/65/EU of the European Parliament and of the Council⁵ on the restriction of the use of certain hazardous substances in electrical and electronic equipment (EEE) requests that the Commission examine the need to amend the scope of Directive 2011/65/EC in respect to the EEE therein covered and, if appropriate, present a legislative proposal with respect to any additional exclusions related to that EEE.
- (2) Secondary market operations for electrical and electronic equipment (EEE), involving repair, replacement of spare parts, refurbishment and reuse, should be facilitated to promote a circular economy in the Union. A high level of protection of human health and the environment should be ensured, including through the environmentally sound recovery and disposal of waste electrical and electronic equipment. Unnecessary administrative burden on market operators should be avoided. Directive 2011/65/EU

³ OJ C , , p. .

⁴ OJ C , , p. .

⁵ Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ L 174, 1.7.2011, p. 88).

allows EEE that fell outside the scope of the previous Directive 2002/95/EC of the European Parliament and of the Council⁶, but which would not comply with Directive 2011/65/EU, to continue to be made available on the market until 22 July 2019. After that date, however, both the first placing on the market and secondary market operations of non-compliant EEE are prohibited. Such prohibition of secondary market operations is inconsistent with the general principles underlying Union measures for the approximation of laws relating to products and should therefore be removed.

- (3) Certain niche product groups should be excluded from the scope of Directive 2011/65/EU as their inclusion would bring negligible environmental or health benefits and introduce unresolvable compliance problems or distortion that cannot effectively be addressed through the exemption mechanism provided for in that Directive.
- (4) Pipes in organs are built using a specific type of lead-based alloy, for which no alternative has been found so far. Most pipe organs are kept in the same place for centuries and their turn-over rate is negligible. Pipe organs should be excluded from the scope of Directive 2011/65/EU as their inclusion would bring negligible benefit with regard to the substitution of lead.
- (5) Directive 2011/65/EU does not apply to non-road mobile machinery with an on-board power source and made available exclusively for professional use. However, for certain types of non-road mobile machinery, two versions are produced in the same production line, with the power source (on-board or external) being the only difference. Those versions should be treated in the same way under that Directive. Non-road mobile machinery with a traction drive powered by an external power source should therefore also be excluded from the scope of Directive 2011/65/EU.
- (6) As exemptions from the restriction on the use of certain hazardous substances should have a limited duration, the maximum validity period for existing exemptions should be clearly defined for all relevant EEE categories, including for category 11 as set out in Annex I to Directive 2011/65/EU.
- (7) When an application for renewal of an exemption is submitted, the Commission is required to take a decision no later than 6 months before the expiry date of the existing exemption, unless specific circumstances justify a different deadline. No deadline is specified for the Commission to take a decision on applications for new exemptions. According to the report from the Commission to the European Parliament and the Council on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Directive 2011/65/EU⁷, that deadline has proven to be unfeasible in practice, due to the several mandatory procedural steps needed for the evaluation of an application for renewal. While the deadline brings no additional value to the existing procedure of examination of requests for renewals, it entails uncertainties for businesses and other stakeholders due to its impracticability. Business continuity is ensured since market operators may rely on an existing exemption

⁶ Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ L 37, 13.2.2003, p. 19).

⁷ COM(2016) 215 final of 18 April 2016.

remaining valid until a decision is taken on the renewal request. Therefore, the provision related to the deadline should be removed.

- (8) Since the objectives of this Directive to contribute to the protection of human health and the environmentally sound recovery and disposal of waste electrical and electronic equipment by the means of restriction on the use of hazardous substances in EEE cannot be sufficiently achieved by the Member States as disparities between the laws or administrative measures adopted by the Member States could create barriers to trade and distort competition in the Union and thus have a direct impact on the internal market, but can rather, by reason of the scale of the problem and its implications in respect of other Union legislation on recovery and disposal of waste and areas of common interest, such as human health protection, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2011/65/EU is amended as follows:

(1) Article 2 is amended as follows:

- (a) paragraph 2 is deleted;
- (b) in paragraph 4, the following point (k) is added:
'(k) pipe organs.';

(2) in Article 3, point (28) is replaced by the following:

'(28) 'non-road mobile machinery made available exclusively for professional use' means machinery, with an on-board power source or with a traction-drive, the operation of which requires either mobility or continuous or semi-continuous movement between a succession of fixed working locations while working, and is made available exclusively for professional use.';

(3) Article 4 is amended as follows:

(a) paragraph 3 is replaced by the following:

'3. Paragraph 1 shall apply to medical devices and monitoring and control instruments which are placed on the market from 22 July 2014, to in vitro diagnostic medical devices which are placed on the market from 22 July 2016, to industrial monitoring

and control instruments which are placed on the market from 22 July 2017 and to all other EEE that was outside the scope of Directive 2002/95/EC which is placed on the market from 22 July 2019.’;

(b) in paragraph 4, the following point (ea) is inserted:

‘(ea) all other EEE that was outside the scope of Directive 2002/95/EC and is placed on the market before 22 July 2019.’ ;

(4) Article 5 is amended as follows:

(a) in paragraph 2, the second subparagraph is replaced by the following:

‘For the exemptions listed in Annex III as at 21 July 2011, unless a shorter period is specified, the maximum validity period, which may be renewed, shall be:

(a) for categories 1 to 7 and category 10 of Annex I, 5 years from 21 July 2011;

(b) for categories 8 and 9 of Annex I, 7 years from the relevant dates laid down in Article 4(3);

(c) for category 11 of Annex I, 5 years from 22 July 2019.’;

(b) in paragraph 5, the first sentence of the second subparagraph is deleted.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [\[insert date ten months after the entry into force of this Directive\]](#) at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President