General remarks: public consultation & Member state survey

The RoHS Directive aims at preventing the release of hazardous substances during the use and waste treatment of EEE by restricting the use of selected hazardous substances. In doing so, the objectives are to contribute to the protection of human health and the environment. The revised RoHS should add to this, by facilitating the prolongation of the functional life of EEE through re-use, repair and refurbishment, as well as the recycling of WEEE. In this light, the Netherlands would welcome the scope of the RoHS provisions to be extended so as to incorporate circular economy approaches in a due manner. This will help reduce the dependency on and use of virgin materials (and the corresponding environmental and health impacts of such usage). In addition, this should guarantee the right to repair, stimulate the uptake and usage of spare parts and secondary materials retrieved from WEEE, but should, of course, in no case lead to the release of hazardous substances during use and waste treatment. It is necessary to transition to a circular economy as soon as possible. Virgin resource extraction and the processing and transportation it involves have a big impact on climate change and the loss of biodiversity. It is therefore unequivocal that the use and dependency on virgin resources must be limited. As a first step, the revised RoHS could provide incentives for closed loop return systems for EEE, by providing certain advantages for EEE that still need to contain an Annex II substance for their required functionalities. Such advantages could, for instance, be a longer time limit for the granted exemptions, and should only be given where the return system explicitly provides for the full control of the risk of the Annex II substance used. Such an exemption does not jeopardize the achievement of the first objective of the RoHS, viz. the protection of human health and the environment, while it enhances the achievement of the second objective, viz. the environmentally sound recovery of waste EEE. Producers of EEE can consider for themselves whether the benefits of using an Annex II substance (in terms of functionality, reliability, lifetime, etc.) outweigh the costs of an audited return system.

For the Netherlands, the use of recycled materials containing hazardous substances that cannot be removed from the material, should be decided on the basis of a case-by-case analysis. Such material can be reused, but only in specific applications where the risks for human health and the environment are negligible, and provided that the reuse has an overall advantage from a health, environmental and climate perspective, taking into account the full life-cycle of the products in which reuse may take place and which would otherwise require the use of primary material. The prerequisite of the absence of a negative impact should obviously also pertain to recycling workers' safety. Determining the overall advantage of reuse from a health, environmental and climate perspective should also take into account the possible disadvantage of recycling leading to an increased amount of contaminated materials (i.e. dilution of the hazardous substance). Essential is to also ensure that the presence of hazardous substances in materials is communicated in a transparent manner, that the use of such materials is only allowed in clearly defined and isolated applications, that these applications remain traceable, and that arrangements are in place for collection upon end-of-use for safe recycling. The case-by-case examination could comprise a stepwise methodology with the following steps: 1) determining the options to be compared (landfilling, incineration, mechanical recycling, and relevant types of chemical recycling); 2) assessing overall health and environmental impacts of all relevant options; and 3) selecting preferable options to minimize risks to health and environment[1].

Public consultation specific remarks

Transposition issues related to exemptions (questions 5-6)

The report 'Support for the Evaluation of Directive 2011/65/EU…' highlighted the difficulties experienced with the exemption process. The process of handling the exemption requests, both new and renewals, is complex and time consuming. Whilst fully aware of the complexity of determining the validity of the exemption requests, and the required capacity to handle the increased amount of exemption requests, it should be further determined whether the revised

[1] For more information, see: European Commission. (2019). CleaR – Clean material Recycling project – study for the development of an evidence-based approach as support to regulators when assessing how to manage the presence of substances of concern in recycled materials. Retrieved from: https://op.europa.eu/en/publication-detail/-/publication/26e22c04-5b62-11e9-9c52-01aa75ed71a1/language-en/format-PDF

RoHS could introduce certain provisions that prevent that a timely exemption request is not reviewed in time. For instance, the Revised Directive could contain a provision to automatically and temporarily grant requested exemptions if and only if substances have been newly added to Annex II whilst requests to be exempted from this restriction have not yet been decided upon. Such a provision could lift unnecessary pressure to quickly decide on exemption requests, whilst simultaneously providing temporary certainty for those that have requested an exemption. To counterbalance the increased amount of exemption requests, the Revised Directive could grant generic exemption for EEE of which the total (EU) sales introduce only a negligible amount of Annex II substance(s) to the economy. In these cases, the workload of applying for and assessing the justification of an exemption request for an exemption is disproportional in regard of the achievable benefit for the protection of human health and the environment. For these EEE the RoHS could provide for a generic exemption in Article 4. Additional conditions for benefitting from this generic exemption can be envisaged, for instance, (i) the producer has notified the respective Annex II substance in a product passport, including an indication of the product part in which the substance is present, and including an explanation why it is indispensable for the products functionality; (ii) the EEE is subject to an auditable closed loop system that ensures the Annex II substance presents a negligible risk.

RoHS Scope (questions 7-8)

The current scope of the RoHS in terms of EEE categories is already quite extensive. Further extending the scope should only be considered in combination with measures that aim to solve the aforementioned exemption request problems.

Coherence of RoHS with other regulation (question 9)

The report 'Support for the Evaluation of Directive 2011/65/EU…' highlighted that the methodology used to review and amend the list of restricted substances deserves further clarification. Doing so may provide stakeholders with more certainty with regards to the grounds on which new substances may be restricted and which exemptions may be adopted. Such clarification could be provided by the better incorporation of the 'one-substance-one-assessment' principle, for instance, by bringing the assessment of the socio-economic impact of substitution of an Annex II substance in EEE, required in RoHS Article 5.1.(a), in line with such assessments under REACH (in the evaluation of applications for authorization or exemptions from restrictions). To this end it could be examined how and if the REACH socio-economic assessment committee (SEAC) can be involved in the assessment of RoHS exemption requests. However, delegating tasks to the European Chemical Agency (ECHA) can only be effective if resources are allocated accordingly.

RoHS & Transition towards a Circular Economy (questions 10-13)

The introduction of incentives for EPR arrangements could possibly also be provided by further increasing the interplay between the criteria for restricting a substance (article 6.1.(a-d)) and the conditions for granting exemptions (article 5.1.a). In the current RoHS, the conditions for granting an exemption are most closely related to the restriction criteria of article 6.1. (d), thereby focusing mainly on possibilities for substitution, whilst direct impacts on waste management processes seem to be less leading (6.1.(a-c)). In theory, a substance can be restricted on the basis that its presence leads to unacceptable exposure of workers involved in the waste EEE collection and treatment processes (criteria 6.1.(c)), whilst there is no ground to exempt an application when the presence of this substance does not lead to such unacceptable exposure (for instance when measures are in place to prevent such exposure). To account for this, the RoHS revision could, for instance, introduce new exemption conditions that are more closely related to the grounds to restrict a certain substance, for example, when sufficient measures are in place that effectively limit the risk generally generated by that substance. More specifically, if a substance is added to annex II on the basis of criteria 6.1.c. (regarding the exposure of workers involved in the waste EEE collection and treatment processes), manufacturers of certain applications could be granted an exemption if and only if they can continuously guarantee and independently prove such exposure does not occur for their products or applications (for instance because the manufacturers have signed contracts specifying their extended producer responsibility and these contracts are effective, waste collection occurs in a closed B2B environment, and workers involved in waste

collection and treatment are sufficiently and fully protected from exposure risks). The granting of exemptions on the basis of these new conditions should be only considered if substitution of the substance is not possible, so as to ensure the RoHS maintains its purpose to stimulate substitution. The granting of exemptions on the basis of preventing negative impact of hazardous substances on waste management and re-use is likely to stimulate investment in innovative waste management processes (advanced sorting, decontamination and (chemical) recycling). These techniques reduce the negative impacts hazardous substances may have on the treatment of waste, thereby contributing to both non-toxic environment and circular economy goals.

In addition, it should be determined how the usage of spare parts could be increased, because the availability of spare parts is of great importance to extend the lifetime of EEE. The RoHS provides certain provisions for the usage of spare parts with hazardous substances, but evidence of the use of these provisions is not clear. We are only aware that producers of complex medical devices and monitoring and control instruments have repair and refurbishment as a regular business model, however without any data on absolute usage. In practice, the vast majority of EEE is never repaired or refurbished, nor used as a source of spare parts, and at best end up shredded with the aim to recover some metals and plastics, and otherwise incinerated or landfilled. These issues will continue to exist, when producing new EEE remains much cheaper than repairing old EEE. Until then, the recovery of parts from obsolete EEE with a view to their reuse is not a viable business model. Whereas the current RoHS directive, dealing with restriction of hazardous substances, does not allow to directly influence the costs of new-production, repair and refurbishment, it can provide stimuli in cases where repair and refurbishment do potentially provide a viable business model. Such stimuli should also take enforceability of the provisions into account, which could be achieved through the streamlining of the current provisions. .

Criteria for exemptions and for restricting substances (questions 14-31)

With regard to the usage of restricted substances in innovative technologies, the question is what constitutes an innovative technology. Is it for instance required that such a technology has a positive impact on society, and does this automatically also include the environment? It could well be that the positive impact of an innovation should be determined on a case-by-case basis, where the overall environmental and health impacts of granting an exemption for the innovation could be leading.

Question 16 (availability of substitutes):

Two components could be guiding. The first relating to the duration of an exemption, and the second related to the granting of an exemption (in general). The duration of an exemption could be influenced by the fact a substitute is currently under development, given that this is already an effective and technically viable substitute (for instance by granting an exemption for 3 years instead of 5 years). A substitute could be labeled as 'available', and thereby also leading to the non-granting of an exemption, when it is available to only a single manufacturer on the EU market only when other manufacturers have access to the substitute (for instance: price is competitive, no additional barriers for certain manufacturers). Regarding the use of critical raw materials (CRM) (question 18), the granting of an exemption could be considered justified when it is sufficiently determined that the usage of the restricted substance is advantageous from an overall environmental and health perspective. This should take into account the whole life-cycle of potential impacts for both the restricted substance and the CRM-containing substitute. In general, the use of a CRM should always be limited to products in which it is sufficiently justified, for instance, when its use is necessary for the required functioning of the product which in itself contributes greatly to health and environmental ambitions.

Regarding question 22-24 (those that should be allowed to apply for an exemption + exemption validity). It could be determined whether it is possible to limit those that can apply for an exemption to those that have most direct interest with the granting of said exemption. In addition, it could be determined whether it is possible to also directly link the usage of the exemption to the specific applicant. This could potentially provide pressure to make a convincing and compelling case as to why the exemption is required, and therewith help convince stakeholders to provide the required information and to cooperate sufficiently. Such a distinction between niche applications and general applications could be specified more clearly within the Revised RoHS. In addition, different expiry dates could be granted for different categories of EEE which use more generic

applications. Of course, only when it has been sufficiently argued that a longer expiry date is indeed necessary. Related to the exemption validity, it would be highly appreciated if the Revised RoHS could provide additional clarity on the validity of exemptions in its annexes, especially for those exemptions which are past the date of expiry in the Annexes but for which a renewal application has already been submitted.

Question 30-31 (the lowering of the maximum concentration values listed in Annex II):

These values should only be lowered when sufficiently argued that such lowering will contribute to the objectives of the RoHS (including also an increase in recycling) . Determining whether a value can be lowered could also be greatly dependent on the total environmental and health impacts of such a lowering, including also the negative impacts it might have on the uptake of recycled materials derived from WEEE treatment, including the negative environmental and health impacts thereof.

E-commerce & surveillance (questions 32-35)

Improvement of the enforceability of the Directive is urgent, with special attention to e-commerce. It is, of course, important that such efforts lead to an overall increase of the effectiveness of the Directive. To facilitate surveillance upon the correct application of exemptions (specific or generic, including exemptions for spare parts), EEE benefitting from an exemption should be linked (e.g. through a digital product passport) to relevant information sources, such as the SCIP database. Overall, the revised RoHS should provide enforcement clarity and reduced complexity. Lastly, regarding RoHS non-compliance, it has proven very difficult to determine non-compliance, as this can only be determined through performing an analysis of the EEE. Such analysis is not performed easily.