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## Successfully countering online free-riders

Response to the consultation regarding the study to support the preparation of the Commission's guidance for extended producer responsibility schemes



Thirty-six producer responsibility organisations (PRO) in Europe, Australasia and North America, as represented by the WEEE Forum, are at the forefront of turning the extended producer responsibility principle into an effective electronic waste management policy approach across the world. Representative of the whole spectrum of the electrical equipment manufacturing industry, they have acquired know-how on the technical aspects of collection, logistics and processing of WEEE, and therefore of the basic elements of eco-design. Since their foundation, the PRO of the WEEE Forum have collected, de-polluted and recycled or sent for preparation for re-use 21 million tons of WEEE.

The PRO of the WEEE Forum acknowledge that the European Commission is keen to identify existing practices and experience, and possible solutions, to tackle free-riders, i.e. market operators that circumvent extended producer responsibility and related obligations, such as registration and payment of fees. Recommendations will be collated in a Guidance on these topics and will be presented at a workshop for stakeholders which is planned to take place in late June 2019. This paper seeks to present the main considerations to be taken account of when developing the Guidance.

## **Main messages**

Online free-riding is an issue of great concern. Online (often distance) sellers not registered and not undertaking take back, or not paying for collection and reprocessing, impose an unfair cost on other producers and retailers, distort the market, make compliant companies less competitive and result in an overstatement of WEEE collection rates

*The WEEE Forum is of the opinion that the solution to this problem is:*

- ▶ *Updated regulatory measures, at EU and/or Member State level, to define online platforms as the 'producer' of all products for which they facilitate, by whatever means, the import or entry into the Member State territory".*
- ▶ *Better enforcement and enhanced, structured co-operation between producer responsibility organisations, on the one hand, and enforcement agencies, customs and other authorities, home delivery companies and marketplaces, on the other.*
- ▶ *Awareness campaigns to educate market operators about their EPR obligations.*

## Context

Under Directive 2008/98/EC on waste, as amended by Directive 2018/851, in relation to the minimum requirements for EPR schemes, paragraph 5 of Article 8a states the following:

*Member States shall establish an adequate monitoring and enforcement framework with a view to ensuring that producers of products and organisations implementing extended producer responsibility obligations on their behalf implement their extended producer responsibility obligations, including in the case of distance sales, that the financial means are properly used and that all actors involved in the implementation of the extended producer responsibility schemes report reliable data.*

The producer responsibility organisations (PRO) of the WEEE Forum acknowledge that the European Commission is keen to identify existing practices and experience, and possible solutions, to tackle free-riders, generally understood to occur when one firm benefits from the actions and efforts of another without paying or sharing the costs. More specifically, in the area of EPR, 'online free-riders' are market operators that circumvent extended producer responsibility and related obligations, such as registration and payment of fees.

This paper seeks to present the main considerations to be taken account of when developing the Guidance.

## Considerations

Online free-riding is an issue of great concern. Online (often distance) sellers not registered and not undertaking take back, or not paying for collection and reprocessing, impose an unfair cost on other producers and retailers, distort the market, make compliant companies less competitive and result in an overstatement of WEEE collection rates – the lower the placed on market figures the easier it is for Member States to reach the collection targets, so the lesser the need for stringent enforcement. Since online free-riding risks resulting in underfunded waste streams, it may undermine the sustainability of the EPR scheme.

According to the OECD<sup>1</sup>, online free-riding is not just a small-seller issue and it is not just confined to websites in Asia; even some of the largest online platforms evade their obligations. There are acute problems when there is no legal entity in a Member State. 'Marketplace' platforms legally avoid EPR obligations as they are not the seller nor the importer. Furthermore, EPR regulations are complex and confusing for online sellers, whilst enforcement activity is resource intensive and not well co-ordinated across jurisdictions. And finally, consumers do not understand the problem.

The OECD estimates online free-riding to account for 5-10% of all sales. SENS eRecycling, a PRO in Switzerland, for example, estimates that 5% of electrical and electronic equipment placed on the Swiss market is non-compliant. According to Eunomia, a UK-based consultancy, online sales in the EU have grown by over 18% from 2014 to 2015. The

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<sup>1</sup> "Extended Producer Responsibility and the Impact of Online Sales", OECD, 2018.

estimated share of online (non-store) EEE retail in the EU is estimated to exceed 30% of the market. Of online shoppers, 32% bought goods from other EU Member States, 20% non-EU in 2016.

Being WEEE compliant entails an undeniable administrative burden and the WEEE management cost is, for certain sectors, 10-20% of the total sales price – and for batteries it can be 100%, so the reward for dodging the system is extraordinary. The huge scale of free riding puts compliant companies, and 'bricks and mortar' retailers at a material commercial disadvantage. The issue is particularly acute for companies selling lighting<sup>2</sup> and light-weight products. According to recent research undertaken by UK WEEE Scheme Forum, the share of unregistered products in the total UK market varies from 8% (washing machines and dryers) to 88% (fitness watches). It is reasonable to assume that the share of unregistered products is similar in the rest of Europe.

	Tablet PC	Power tools	Fitness watches	Display screens	LED lightbulbs	Electric hair care	Washing machines and dryers
#products checked	70	70	50	25	120	113	120
#products potentially unregistered	28	38	44	3	91	57	9
% products unregistered	40%	54%	88%	12%	76%	50%	8%

In the past few years, the WEEE Forum has hosted several events<sup>3</sup> and has engaged with various stakeholders and the authors of the OECD report. More data is required to quantify the full scale of the problem. The WEEE Forum is of the view that the three areas where progress should be made are: legislation, enforcement and awareness.

## Legislation

The UK authorities, in association with market actors, are toying with the idea that, if the market operator that makes the product available on the market is not a manufacturer, nor an importer, but does facilitate the EU import or market entry, for example through offering a (multi-seller) online platform, he is deemed a 'producer'.

Failing that, and as a minimum, marketplaces (or multi-seller online platforms) need to play a bigger role in countering free-riding. They could, for example, be required to notify the seller about his EPR obligations and compliance, and to exclude those sellers that do not conform.

<sup>2</sup> UK WEEE Schemes Forum, 2018.

<sup>3</sup> On 13 September 2017, in Brussels, over 80 delegates from across twelve countries met to discuss ways to tackle the growing number of online marketplaces that fail to be WEEE compliant with the EPR regulations. The workshop contributors included the European Commission, EucoLight, WEEE Forum, WEEE Europe, Dell, Environmental Protection Agency Ireland, E-commerce Europe and European WEEE Registers Network. On 7 May 2018, in Pyrgos, Cyprus, the chief executives and operations managers of the PRO of the WEEE Forum met a delegation of the European WEEE Enforcement Network. On 19 March 2019, EXPRA, EucoLight, Eucobat, WEEE Forum and ETRMA exchanged views with Eunomia, the consultant charged with writing the report for the Commission.

The concept of Authorised Representative (AR) could potentially help to address the problem, but needs further analysis to ensure it is appropriate, and that liabilities of the AR are adequately defined.

Eighty per cent of the problem is related to transactions that take place within the European single market. In many cases the product will have originated from outside of the EU but is held in stock by fulfilment houses and other online operators inside the EU. Tackling this first will be easier and will solve a major part of the problem.

Policymakers should consider making batteries, packaging and WEEE subject to the same legislative framework as far as the definition of 'producer' is concerned and amend the Blue Guide. Many businesses are subject to all three laws, and divergence in legal definitions creates unnecessary and costly confusion.

Credit card companies must be involved in discussions around sharing responsibility, the principle being, for example, that a consumer cannot use his/her credit card to purchase goods from EPR non-registered companies on marketplaces. Alternatively, the credit card company could be required to verify that the company from whom goods are purchased with its cards has EPR registered.

EPR and VAT registration must be linked with each other.

The important thing to note is that no EU law disallows Member States to take the above measures. Many measures do not necessarily require EU legislation to make progress, yet an adjustment of legal responsibilities, for example at Member State level, is certainly desirable.

## **Enforcement**

There is a need for enhanced, structured co-operation between producer responsibility organisations, on the one hand, and enforcement agencies, customs and other authorities, home delivery companies and marketplaces, on the other, to pro-actively identify free-riders and counter free-riding.

Enforcement of legislation across Member States borders is typically challenging but not impossible, as the example of Belgium vis-à-vis Germany and the Netherlands shows. Enforcement of EU laws in China is hard, but the topic of online free-riding could be subject to negotiations in EU-China trade deals. Or China could be encouraged to set up PRO to allow for better control.

In any case, enforcement agencies must be tougher when it comes to the verification of conformity with existing legislation. A few high-profile and well-publicised court cases, possibly commented on by thought leaders on social media, would alert some of the free-riders into action.

The enforcement agencies of all Member States must be represented in the European WEEE Enforcement Network in order to optimise seamless co-operation across Europe.

Evidence of wrong-doing or unregistered activities must be reported to the enforcement agencies and throughout the network.

## Awareness

There is some need for education of online operators, who may not all be aware of the need to comply.

Certification of online operators that do verify the compliance of the product they sell could help consumers to exercise an informed choice.

Authorities or PRO should consider running awareness campaigns in the rest of the world, especially in those jurisdictions where non-compliant marketplaces originate from.

## Specific questions

The background paper that Eunomia shared with delegates in the workshop on 13 March 2019, hosted by the European Commission, discusses issues related to the study it is preparing, and raises three questions. The following paragraphs seek to present a response.

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### **Is there any systematic effort (and by whom) to establish the extent to which free-riding occurs? If so, what does this involve?**

The free-riding issue has given rise to the formation of working groups in several Member States. In Portugal, for example, a working group composed of producer responsibility organisations and their associates, producer associations, controlling authorities and enforcement authorities, discuss solutions for every type of free-riding.

### **Free-riding is identified, are adjustments in reporting what is placed on the market made (to inform reported recycling performance)? If so, is such an adjustment a legal requirement? If so, is this subject to independent verification, and by whom?**

Free-riding is usually identified in the form of sub-declaration through the audit process to producers, which is a legal responsibility of the PRO to their producers. In Portugal, retroactive adjustments in reporting are allowed under PRO contract until the two previous years and the responsibility transfer will only be effective if the payment is regularized.

## **What measures are in place to detect and tackle SME free-riders/large companies which may be under-reporting quantities placed on the market including distance (usually online) sales?**

Some of the proposed measures include the development and widened sharing of EPR education material, delegation of the responsibility of auditing to an independent entity, creation of a centralized platform to denounce free-riding and definition of rules for the simplification and yet security of the activity of Authorized Representative. The customs authorities also require the presentation of a contract with a PRO whenever they detect the importation of a product covered by EPR legislation.

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### About the WEEE Forum a.i.s.b.l.

The WEEE Forum, set up in 2002, is a Brussels-based European not-for-profit association speaking for thirty-six not-for-profit electrical and electronic equipment waste (WEEE) producer compliance schemes – alternatively referred to as 'producer responsibility organisations' (PRO). The 36 PROs are based in Australia, Austria, Belgium, Canada, Czechia, Cyprus, Denmark, Estonia, Italy, France, Greece, Iceland, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. It is the biggest organisation of its kind in the world. In 2018, its member organisations reported collection and proper de-pollution and recycling of 2,200,000 tonnes of WEEE. Members in 2018: Amb3E, ANAKYΚΛΩΣΗ ΣΥΣΚΕΥΩΝ, ASEKOL, Australia New Zealand Recycling Platform, Ecodom, Ecologic, Eco-systèmes ESR, Ecotic, ECOTIC, Ecotrel, EES-Ringlus, EGIO, Electrocyclosis Cyprus, Electronic Products Recycling Association, ElektroEko, Elektrowin, El-Kretsen, elretur, Environ, ΦΩΤΟΚ'ΥΚΛΩΣΗΣ, Norsirk, Recipo, Recupel, Remedia, RENAS, Repic, RoRec, SENS eRecycling, SWICO, UFH, Úrvinnslusjóður, Wecycle, WEEE Ireland, WEEE Malta, WEEE Recycle and Zeos. Contact: [info@weee-forum.org](mailto:info@weee-forum.org). Website: [www.weee-forum.org](http://www.weee-forum.org). See also [15 Years On](#).