

***Online platforms and WEEE responsibilities under
Directive 2012/19/EU***

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1 Objective

Online sales are increasing every year.¹ Today more and more consumers purchase all kind of products online, very often via so called online platforms.² Online platforms sell various goods as a one-stop shop. This is convenient for consumers and therefore online platforms flourish.

Producers selling electrical and electronic equipment (*EEE*) via online platforms must fulfil the same environmental, financial and legal standards, no matter if they are established in or outside the European Union (*EU*). Fact is, that non-compliant producers selling via online platforms, especially those established outside the EU, are steadily increasing.³

Online platforms are generally not producers under the Directive 2012/19/EU (WEEE2) unless they fulfil a producer definition, e.g. when they place EEE on a national market themselves.

Because of a lack of jurisdiction, all WEEE2 obligations - for example registration, reporting and financial responsibilities for WEEE take-back and recycling - of producers established outside the EU are not enforceable. This results in non-compliant producers established outside the EU who generate WEEE orphans⁴ in the Member States where they place EEE on the national market via the online platforms. These WEEE orphans are additionally financed and taken care of by the (already) registered and compliant producers and/or their Producer Responsibility Organisations (PROs) in each Member State.

Online platforms facilitate the sales of producers established outside the EU. The services of such online platforms vary from providing the online platform and its offers to enable and assist the closing of contracts, to storing EEE, packing and shipping EEE, billing, invoicing and even to assist in terms of warranty issues or complaints.

Online platforms are fully aware that most of their customers abroad are non-compliant. Over the last two years they were informed about many individual cases of non-compliant producers that were neither registered nor financed their WEEE take-back. In few cases the online platforms reacted and expelled non-compliant producers from their platforms.

¹ For example <https://www.smartinsights.com/digital-marketing-strategy/online-retail-sales-growth/> (last visited 25.05.2020)

² For example Amazon, ebay, Alibaba, Wish etc.

³ For example <https://resource.co/article/new-study-highlights-truly-shocking-extent-weee-non-compliance> (last visited 25.05.2020)

⁴ WEEE orphans are WEEE that is not financed in terms of take-back and recycling by the obliged producers.

The profits of online platforms with online sales of non-compliant producers, that they enable with their services, are enormous. This explains why there is no real attempt of online platforms to stop or ease the problem described.

Instead they now falsely allege that the European WEEE2 requirements like registration, reporting and financing the WEEE collection or appointing an authorised representative are too complicated for small and medium-sized companies (*SMEs*).

As a matter of fact, round about 70-80% of the registered producers today, that are compliant in terms of WEEE, are *SMEs* and established in the EU.

2 A solution proposed by online platforms

In November 2019 a bigger online platform proposed a solution for the business problem, the so called “Flat Fee model”. This solution should also be suitable for all online platforms. Its key elements are:

- Online platforms shall act as an “intermediate” (not as a compliance scheme, a producer or authorised representative) for their customers towards producer responsibility organisations and national registers.
- Neither the online platforms nor their customers (the obligated producers abroad) are required to register or appoint an authorised representative in the Member States where the EEE is placed on market.
- Online platforms shall only inform the national registers that they are acting as intermediate for their customers.
- Online platforms shall only annually submit reports on behalf of all their customers per category⁵ and as “bulk”.⁶ Reporting shall be done in units or weight. Weight is based on estimates from historical data.⁷

Justification of the The Flat Fee model:

- The producer definition requires no changes.
- The authorized representative mechanism is already implemented for WEEE (delegation principle for producers).
- Registration of individual sellers is not needed for all the volumes channelled through the marketplace as being reported as “bulk”.
- Many *SMEs* will benefit from the Flat Fee model and will become compliant. Being compliant in all European Member States is considered too much bureaucracy for most of customers of online platforms. The Flat Fee model eases the level of bureaucracy.

⁵ Reporting according to the relevant sub-categories in the specific Member States seems not to be possible with the Flat Fee model. But such detailed reporting is required in order to finance the different billing models of the *EPR-/PRO-Systems*.

⁶ That means reports of all producers per category are summed up in one total figure.

⁷ That raises the question why there is no accurate data in terms of weight available?

3 Scrutinizing the proposal

Cui bono? The Flat Fee model facilitates online platforms' business model and secures it. Without any doubt, the Flat Fee model is a **Lex-online platforms**. Although, legally the proposal is neither possible nor justifiable under the current or a future WEEE2.

Today every producer and authorised representative is required to register and report individually (Article 16 (2.) (a), (b) and (c) and Annex X WEEE2). The idea of a "bulk" reporting per category is absolutely not justified under the WEEE2. Nevertheless, also an "intermediate" with different prerequisites as the authorised representative is not existing under the WEEE2 regulations.

Customers of online platforms – that are not established in the relevant Member State - can appoint the online platform they use or a third party (for example a service provider) as an authorised representative with all the legal rights and obligations. The authorised representative is the mechanism developed in the WEEE2 for producers not established in the Member State where they place EEE on the market. The authorised representative was introduced under the WEEE2, especially to cope with the problems under the WEEE1 of non-compliant producers that were not established in a Member State. The authorised representative is established in the Member State where the producer has to be compliant and therefore will have all the national regulations explained by his authorised representative.

Online platforms deny the authorised representative solution as defined in the WEEE2 because they do not want to register and report according to the WEEE2 like any other compliant producer and authorised representative in the EU today has to.

The notion that an individual registration of the producers or online platforms as an authorised representative is not necessary because all producer data shall be reported as bulk by online platforms is misleading. Registration establishes the legal basis to the obliged producer with all relevant information for national registers and enforcement authorities. This is important in case obligations are infringed and need to be enforced. Reporting is one obligation that derives out of the registration. The Flat fee model tries to blur the legal picture. Reporting of quantities is important to determine the WEEE take-back obligation of a producer. But without a registration of a legal person, the producer or his appointed authorised representative, obligations could not be enforced by the national registers or enforcement authorities. It is the national registers that are in charge for registration of each individual producer and authorised representative and also for receiving their reports according to the WEEE2. A public list of registered producers and authorised representatives is also impossible if online platforms are allowed to manage their customers themselves and are entitled to decide what and whom to report to. Without an approved registration any market surveillance of non-compliant producers, either by authorities or compliant competitors, would no longer be possible. Cui bono?

Under the current WEEE2 the Flat Fee model is impossible. Therefore, a bigger online platform drafted a bill to revise national WEEE transpositions, for example in Germany. The draft bill

proposes to create the legal framework to establish the Flat Fee model as described above. It is most likely that (bigger) online platforms will try to introduce the Flat Fee model on the European level, too.

All arguments above against the Flat Fee model are also valid if scrutinized under a (possible) future WEEE Directive (WEEE3).

Nevertheless, the Flat Fee model would always create a double standard that is not justifiable. An advantage for all online platform customers from abroad if they are non-compliant so far and a disadvantage for all producers that fulfil their WEEE obligations and are compliant already today. All (ordinary) producers are required to comply with all WEEE obligations (registration, reporting and WEEE financing). According to the Flat Fee model all producers behind an online platform would only need to comply with WEEE light obligations (for example no registration shall be required, no individual reports, no reports subject to sub-categories which are relevant for the financing of the PRO-Systems). Although, if the Flat Fee model obligations would apply to everyone it would lead to the problems of non-producer registration as described above and enforcement would be impossible.

The Flat Fee model also lacks transparency, it leads to a loss of individual identification of obliged producers and their compliance and it hinders enforcement completely.

Especially the SME argumentation is misleading and may help to distract from the real intention behind the Flat Fee model. SMEs are 70-80 % of the companies already registered with the national registers today. These companies are compliant because obeying laws still is a necessity in Europe. With the Flat Fee model online platforms want to protect their businesses and profits and avoid any WEEE obligations. The Flat Fee model would guarantee the online platforms the continuous profits from their online platform services. Beyond that it will establish new business fields and profits for online platforms by acting as the one possible “intermediate” for their customers. The Flat Fee model may change market conditions and maximize or concentrate powers of certain actors in the market. Additionally, this would require that the European Commission thoroughly scrutinizes the Flat Fee model in terms of competition and antitrust law, too.

The level-playing field and the principle of producer responsibility is at stake in case the Flat Fee model should be introduced.

4 About

EWRN is an independent network of national registers at the heart of the national implementation of Directive 2012/19/EU (“WEEE2”) in the respective EU Member States. Those responsible for managing the national registers are working together at EWRN as experts regarding electrical and electronic equipment (“EEE”) and its proper treatment. EWRN’s primary objectives include promoting a harmonised approach to registration, reporting and scoping issues across the Member States.