



POSITION PAPER¹
Common position of the Council on a proposal for
a framework directive for the setting of eco design requirements for energy using products
(“EUP”)

Brussels, 17 December 2004

Orgalime speaks for 33 trade federations representing some 130,000 companies in the mechanical, electrical, electronic and metalworking industries of 23 European countries. These industries employ some 7 million people and account for 1175 billion euros of annual output, which is a quarter of the EU's output of manufactured products and a third of the manufactured exports of the European Union.

Executive Summary

In addressing itself to **product design**, this draft directive addresses a **manufacturer's core competence**; this is an extremely sensitive issue for our industry, and indeed is one of the most sensitive issues on which regulators in recent years have challenged us.

If considering legislation in the area of environmental product policy, it is all the more important that the Council has endorsed **article 95 of the EC Treaty** as sole legal basis of the EUP proposal. This should facilitate the adoption of a fully harmonized approach across Europe.

Orgalime believes that in a number of important areas the Council has improved and clarified the Commission's proposal in a pragmatic and balanced manner. These areas include:

- The introduction of a consultation forum open to stakeholders and a working plan
- The requirement that this forum will also have to be consulted for possible implementing measures on the first round of product groups pre-selected in the ECCP process
- The clear priority given to alternative courses, such as self-regulation
- The rejection of the “top runner” approach
- The clarifications introduced into Annex I and V
- The acknowledgement of the criteria of cost-effectiveness
- The acknowledgement of possible accompanying training and information measures for SMEs

Orgalime would like to encourage the European Parliament and the Commission to fully endorse these improvements.

In certain areas, however, Orgalime believes that further clarification and improvements would still become necessary. Amongst the most important are:

¹ **This position paper is supported by AQUA, CELMA, CITEF, EGMF, EUROPUMP, FACOGAZ and PNEUROP.**

- Free movement of products for which no implementing measure was found necessary and for products below a sales/trades volume of 200.000 units
- A clearer definition of the manufacturer to ensure that all products falling under the scope of future implementing measures meet the same legal requirements
- Uncertainties linked with article 12
- The application of New Approach principles, especially concerning the use of standards
- Conformity assessment and third party certification
- Use of national labels for presumption of conformity

We would encourage the European Parliament to provide the necessary improvements and clarifications in these areas.

Orgalime industries have been active in the past in the field of integrating environmental aspects into product design and will continue along this path.

1. WELCOME AREAS OF PROGRESS

Orgalime believes that in a number of important areas the Council has improved and clarified the proposal in a pragmatic and balanced manner.

Among the most significant areas of improvement, which we consider essential to be kept in the future legislation, are the following:

- ***Welcome sole legal base (Article 95)***

The EUP framework directive comes into an area where product related legislation is based on the "New Approach" under article 95 of the EC Treaty and thus ensures free movement of these products within the Internal Market. It is therefore vital to our industries to avoid that individual national initiatives in this area should impact common European requirements for our products; this would inevitably impede the functioning of the Internal Market, create barriers to trade and moreover further harm the competitiveness of our industries.

We therefore appeal to the Members of the European Parliament to keep article 95 as the sole legal base of the EUP proposal.

- ***The introduction of a consultation forum open to stakeholders and a working plan***

Product design is the very competence of manufacturers. In the interest of Better Regulation Principles, industry should therefore be involved from the outset in the whole process of implementing measures, both in the identification of a product to be covered by an implementing measure, and when the content of any eco-design requirement is to be defined.

We therefore support the establishment of a consultation forum in article 14 of the common position and the requirement that this forum will also have to be consulted for possible implementing measures on the first round of product groups pre-selected in the ECCP process (article 13.2). We believe that the establishment of a working plan as included in the common position will make legislation more predictable for the industry and at the same time meet the request of the European Parliament for an indication on which products the Commission intends to focus in the near future. A product list, however, would disregard the procedures for setting eco design requirements, which have just been established in the EUP proposal

- ***The clear priority given to alternative courses, such as self-regulation***

Our industry welcomes the priority accorded to alternative courses, such as self-regulation by the industry, as stated in recitals 14 and 15. During the legislative process, Orgalime has stressed that no implementing measure should be necessary whenever market forces prove to be effective in achieving environmental goals. We therefore welcome article 12.3 of the common position.

This principle would also mean that sectors potentially targeted for implementing measures should be given the opportunity of developing voluntary measures prior to considering the adoption of regulation. It must also be stressed that all stakeholders have a responsibility for developing the demand for products respecting environmental considerations and for using products in an environmental friendly manner.

- ***The rejection of the “top runner” approach***

Orgalime has continuously opposed the introduction of the so-called top runner approach, which exists in Japan, into the EUP proposal. This is for several reasons: As opposed to the Japanese top runner approach designed for a homogeneous market and applied only in the field of energy efficiency, EUP would establish a *legally binding* framework for *all* environmental aspects of an EUP aiming at *immediately banning* those products that do not comply with an eco design requirement laid down in an implementing measure *from the market*. In addition, it is not in the interest of society to ask companies to provide the "best performance" of e.g. energy consumption, *no matter what the costs and consequences on functionalities are*. A manufacturer has to balance all technical, safety, functional, economic and eco-design aspects to find the best possible mix for the design of a product and by this taking into account the interest of the consumers.

We therefore fully support the Council's view of not incorporating the top runner approach into the EUP proposal and encourage the European Parliament to follow this direction. Further information on the Japanese top runner approach is provided in [Orgalime's EUP Background Paper](#) of 19 November 2004.

- ***Clarification introduced in Annex I***

Orgalime has always called for flexibility in the way that manufacturers have to meet generic eco-design requirements. However, clarity on the role of authorities and manufacturer is also indispensable for ensuring compliance with legal requirements. Orgalime welcomes that more clarity has been introduced by the Council concerning the roles of both, authorities and manufacturers, including part 3 on “Requirements for the manufacturer”.

- ***The compromise solution agreed upon for Annex V***

Conformity assessment procedures should be flexible, i.e. taking into account both the different characteristics of the EUP to be covered by implementing measures and the different types of companies to perform the assessment. This would include keeping the option of management systems (annex V of the EUP proposal) when assessing the conformity of a product.

However, two essential elements have been lacking the original Commission proposal: On the one hand, the original proposal did not allow for an integrated management systems in annex V. Secondly, there were uncertainties on whether the same level of documentation requirements would be required by both, annex IV and annex V.

In our opinion, both aspects have been properly addressed in the common position. Orgalime therefore supports the present wording of annex V and recommends keeping both annexes, IV and V, at the level of the EUP framework directive.

- ***The acknowledgement of possible accompanying training and information measures for SMEs***

Orgalime has been continuously raising its concern about the impacts on companies, in particular SMEs, that will arise from any implementing measure under this framework directive and therefore underlines the importance of developing appropriate practical tools, such as checklists, commonly accepted databases and simplified methods for integrating environmental aspects into product design as well as training and education measures and consumer information campaigns. In our opinion, member states should ensure, in particular by developing support networks, structures and programs, that they encourage SME's to adopt an environmentally sound approach at the product design stage and to adapt to future European legislation.

We therefore support recital 23 and would welcome if the European Parliament strengthened this approach by re-introducing amendment 26 and 56, part 2 of its first reading report.

2. FURTHER CLARIFICATION NEEDED

- ***Free movement guaranteed?***

Orgalime welcomes the Council's support for Article 95 as the sole legal basis for the proposal. This should facilitate the adoption of a fully harmonized approach across Europe as indicated in recitals 1,6 and 36.

We also support the Council's proposal in article 5.2, stating that free movement will also be ensured in areas where the applicable implementing measure provides that no eco design requirement will be necessary for certain eco design parameters. This should help to eliminate existing but also future barriers to trade, which might arise.

However, there is still uncertainty as the proposal only ensures free movement of EUP subject to an implementing measure. This becomes especially evident for EUP where no implementing measure is necessary, as the criteria in article 12 would not be fulfilled or because of the existence of voluntary measures. For these products, the Commission after having consulted stakeholders would have identified that there would be no need for regulation. Consequently, in such areas there should not be any regulation at European or national level and this should be clearly spelled out. Also for products with a volume of sales and trade under 200 000 units uncertainty exists on whether free movement would be guaranteed by the EUP directive (such products would in most cases already move freely according to other EU-directives than EUP). There is a need to eliminate such loopholes and further clarify that all EUP are ensured free movement within the internal market.

In the interest of ensuring that this proposal does not undermine the integrity of the internal market while at the same time guaranteeing a level playing field for companies manufacturing in the EU, we would urge regulators to ensure that the proposal does not undermine the benefits provided by harmonizing legislation under Article 95 of the Treaty, which we see as the main added value of the EUP proposal.

In this context, we also feel that recital 20, when considered in conjunction with article 1.4 of the proposal, could risk undermining such a harmonised approach.

- **Article 12 “implementing measures”**

The common position clarifies that if an implementing measure is considered, all the criteria of article 12 have to be met. Orgalime welcomes this. We also welcome that the reference to “without entailing excessive cost” has been kept in both, article 12.2.c and recital 2 since the deletion of this criteria would have seriously undermined the third pillar of sustainable development.

We do however feel that some uncertainties in article 12 remain:

- **“200.000 units”?**

While Orgalime acknowledges the aim to provide further clarification on article 12.2.a of the directive through the introduction of a boundary defining what is considered as a significant level of sales of EUP, we are concerned that this may introduce a certain level of legal uncertainty, given that the term “unit” has not been defined in the proposal. This inevitably gives rise to the question of what constitutes a “unit”, and how and whether it differs from “an energy-using product” defined in article 2.1. Furthermore, consideration must be given to the criteria to be used for the definition of what constitutes 200.000 units and how this figure would be derived. Any evaluation of “most recently available figures” should ensure that like-for-like product figures are used. This will enable sensible differentiation between products with a similarly described role but vastly different construction and specification because, as a group, they are manufactured to suit specific uses and customer requirements.

- **“Wide disparity”?**

To our mind, the term “wide disparity of environmental performance” is unclear. We especially believe that article 12.2.c should not be interpreted in a way that would result in acknowledging priority to one specific technology, which would be in contradiction with article 12.5 which we support.

- **EUP to be in accordance with principles of the “New Approach”**

Recital 27 states that this directive would be in accordance with the principles for the implementation of the New Approach. We welcome this. As for the issue of using the reference to harmonised European standards, we support articles 7 and 8, and the intention of using harmonised standards for presumption of conformity as it is successfully done in traditional New Approach directives.

However, the present wording is in some parts confusing, as it is not in line with fundamental New Approach principles: For example, one of the main principles concerning the use of standards for presumption of conformity is that they constitute a voluntary tool. If the manufacturer does not want to use the standard, (e.g.: for the reason that he applies different technologies than the one the standard is based upon) it will be his responsibility to demonstrate conformity with his own tests or other documentation, which would of course be subject to scrutiny of market surveillance authorities.

Though recital 24, article 2.26 as well as annexes IV and V clearly endorse that the use of standards is voluntary, annex VII, indent 5 concerning the use of such (voluntary) harmonised standards states that “when available, ...*harmonised standards*... will be used”. This gives the impression as if all standards were mandatory.

To our understanding, however, Annex VII, indent 5, does not address such voluntary harmonised standards in general, but measurement standards. In this area, a mandatory standard seems justified.

In order to avoid misunderstandings between harmonised standards and measurement standards for the use of such harmonised standards, we suggest clarifying that annex VII, indent 5 refers to measurement standards only.

3. AREAS FOR FURTHER IMPROVEMENT

- ***A clearer definition of the manufacturer to ensure that all products falling under the scope of future implementing measures meet the same legal requirements***

The European Parliament has in its report tabled amendments that emphasized the importance of ensuring that EUP manufactured in the EU and EUP imported through trading companies are dealt with in the same way. To our mind, the political agreement in Council has not solved all the outstanding issues, which our industry believes would help to guarantee fair competition (as stated in recital 6).

We feel, in particular, that this definition may be incomplete and misleading since any physical product will of course have “a manufacturer”. The manufacturer, however, or its authorized representative, and the importer have different roles: the former has a direct responsibility for the design of the product, while the latter has a trading role.

Transferring the responsibilities of manufacturers located outside the EU to the importer, as proposed in the definition, does in our opinion not provide a satisfactory solution. There are some obligations of the manufacturer, which cannot be transferred to the importer. For example, it is impossible to transfer some of the obligations listed in annexes IV and V to the importer: e.g. an importer cannot choose alternative design solutions.

The importer should be bound by explicit obligations which ensure that the same level of requirements are met by both, goods imported through trading companies and goods manufactured in the EU. Making explicit certain obligations, such as requiring that trading companies placing EUP on the Community market should have access to the technical documentation at the moment the product is imported, would help to enable market surveillance authorities to assess if EUP manufactured outside the EU are eligible or not to bear the CE mark.

We would therefore request the European Parliament to take up this issue in its further proceedings starting from amendments 36, 48.1a, 50(partly) and 70 of the first reading report of the European Parliament.

- ***Third party certification***

Orgalime believes that the Council has missed the opportunity to opt for appropriate rules on conformity assessment. We cannot see what risk would justify the use of modules other than A in the area of the environmental legislation regulating EUP.

Even for product categories where other modules have been selected in the past (e.g. directive 92/42/EEC on energy efficiency requirements for hot water boilers), manufacturers would welcome the replacement of third party certification by a manufacturers’ declaration.

Where other modules have already been chosen for certain aspects such as the area of safety (for example in certain categories of pressure equipment), we do not see the advantage of introducing additional obligations, bureaucracy and therefore further costs for manufacturers operating in the EU.

We believe that this runs counter to the increasing trend at an international level towards the use of the manufacturer's declaration and will only undermine the EU's own policy of encouraging third countries to apply proportionate regulation, inspired by the EU's model of regulation based on the New Approach.

Orgalime would therefore welcome the exclusive installation of module A as conformity assessment procedure and propose that the possible use of a module different from module A should be deleted (article 7.2 and annex VII.6).

- ***National labels***

Article 8.4 gives a mandate to the Commission to decide whether or not "other eco-labels than the Community Eco-label pursuant to Regulation (EC) No 1980/2000" fulfil equivalent conditions for the purpose of presumption of conformity.

If labels other than the Community Eco-label are accepted for the purposes of presumption of conformity, as foreseen in article 8.4, Orgalime recommends that that it would pass through the consultative forum and later on be published either in the Official Journal of the EU or by being specifically mentioned in the implementing measure. This would help to guarantee an open and transparent process.

4. CONCLUSIONS

In conclusion, Orgalime believes that in many areas of importance, the Council has shaped the proposal in an acceptable manner, which will help to increase clarity and legal certainty of the EUP proposal for companies.

However, areas of concern, which would need further clarification, still exist. These include the issue of same requirements to apply for goods manufactured within the EU and products imported by trading companies in the context of ensuring effective market surveillance, the issue of free movement of products for which no implementing measure was found necessary or below a sales volume of 200.000 units, the use of harmonised standards in accordance with New Approach principles, no mandatory third party conformity assessment or the use of national labels for conformity assessment.

We request the European Parliament to take up these remaining issues and find proper solutions in the interest of the three pillars of sustainable development, environmental, social and economic.

Orgalime industries have been active in the past in the field of integrating environmental aspects into product design and will continue along this path.