



Eco Design of Energy Using Products Directive (“EUP”) Orgalime comments on the EP ENVI committee report

Brussels, 29 March 2004

A. INTRODUCTION

With the adoption of the European Parliament’s ENVI committee report on the eco design of energy using products directive (“EUP”), the Commission’s EUP proposal that was presented in August 2003 has been substantially changed both conceptually and in its structure in a way that is overall unacceptable to our industry:

1. While the Commission’s proposal aimed at providing a structured framework for encouraging improvements of the environmental performance of engineering products traded in the internal market, we feel that this report is tending towards establishing a framework which, to say the least is unusual in a liberal economic system. If we welcome the proposals of the European Parliament to provide more structure and consistency in areas such as market surveillance, we strongly object to the proposed transfer of many of the crucial decisions on the design of products from manufacturers who make the products to nebulous bureaucratic structures. It must be clear that a situation where core competences of a manufacturer in the area of the design of a product, are shifted to external planning structures that would provide technical options and finally impose design solutions, is unworkable and unacceptable.
2. The amendments to the initial report have led to adopting, at the Committee stage, a report that, in many sections, is lacking in clarity: it is composed of a patchwork of inconsistent and sometimes even contradictory amendments that would lead to regulation which at best would be unclear and unenforceable. At worst it would risk severely damaging the competitiveness and innovation capacities of European engineering companies.
3. The ENVI committee report departs from the tried and tested New Approach principles, which underpin existing Internal Market legislation, applied to most energy using products at the present time. As such it introduces a number of proposals, which due to their hasty introduction have not been well thought through and will lead to legal uncertainty and widely differing interpretations.

While Orgalime¹ fully supports the integration of environmental aspects into product design, and is committed to collaborating with regulators to facilitate the adoption of quality regulation, we are strongly concerned that an issue, which is vital to our companies, is not being discussed in depth, as it merits. We feel that this situation arises partly from the haste at which regulators seem to be progressing in order to complete work on this proposal before parliamentary elections and enlargement. If the report were adopted as legislation today, we believe that it would both be unacceptable for companies producing within the EU and unworkable.

¹ *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. The engineering industry, which manufactures both consumer products and capital goods, is clearly the industry, which will be affected by the EUP proposal.*

These comments are supported by AQUA, CECED, CECIMO, CEMA, CITEF, EFCEM, EHI, EICTA, EUMABOIS, EUROPUMP, FACOGAZ and PNEUROP.

B. KEY AREAS OF CONCERN AND THE WAY FORWARD

Competitiveness and innovation

The survival of our industries and the realisation of the Lisbon objectives depend on the international competitiveness of our industries. Too bureaucratic measures and rigid regulations hinder innovation (e.g.: AM 21). A manufacturer needs flexibility in fulfilling regulatory goals and at the same time a legal framework that provides certainty in order to have sufficient room for creativity and innovation.

We are therefore extremely concerned that references to costs and competitiveness in the criteria of article 12 (re **AM 58**) have been suppressed. This means once again that regulators are choosing to ignore the economic pillar of sustainable development.

When this is combined with the idea of a "**top runner concept**" (see **AM 21**), requirements to be established with a view to "minimising the product's environmental impact" (**AM 67.1, para 2**), and energy consumption at the level of the "best performing product available on the market" (**AM 67.1, 3**), whereas the ecological profile is to be established on the basis of "the state of the art" (see **AM 66, part 1.1, para 4**, and **AM 67, para 8 & 67.1, para 3 and 1.1**) - there are inevitably grounds for questioning how welcome our industries are in the EU.

Is it reasonable to ask companies to provide the "best performance" of e.g. energy consumption, no matter what the costs are and consequences on functionalities? A manufacturer has to balance all technical, safety, functional, economic and eco-design aspects to find the best possible mix.

Too little room for market forces as driver for innovation

Innovation and improvements in design are driven primarily by market forces, which must remain the drivers for action in the field of eco design prior to considering possible implementing measures. While the Commission's text has established this priority, which the Council has rightly further reinforced, the present report, however, clearly opts for preferring legislation. AM 22, 60 and 73 particularly shortcut the options of instruments for achieving environmental improvements by rendering the instrument of self regulation as rapid and efficient action in the field of environment, too complex and rigid, especially for product sectors with short innovation circles, e.g. ICT products.

While voluntary agreements are always subject to public scrutiny, we believe that judging the suitability of a voluntary agreement to achieve the desired outcomes would normally be part of the Commission's prerogatives (see AM 60).

Orgalime is also surprised that a voluntary agreement should be subject to the provisions for market surveillance (see AM 47). This could well lead to the, we imagine, unintended situation where manufacturers covered by a voluntary agreement could be banned from the market, while manufacturers not covered by the agreement could not.

Article 95 of the EC Treaty to be sole legal base

The European Parliament's JURI and ITRE Committees as well as the Council have supported keeping a sole legal base of article 95 of the EC Treaty.

EUP is a product related directive. Product legislation regulating our products is exclusively based on art. 95 EC Treaty. A twofold legal base of articles 95 and 175 (see AMs 1, 2, 3, 4, 61) will only create unnecessary problems for manufacturers, including market distortion, a further fragmentation of the internal market and barriers to trade. All of these will negatively impact the competitiveness of companies.

Orgalime strongly rejects any other legal base than article 95 on the EUP proposal.

Market Surveillance

Orgalime welcomes that MEPs focus on clear requirements for market surveillance (AM 24, 25, 47 and 64). Efficient market surveillance is a must to ensure a level playing field for manufacturers.

- **Clear rules setting a common framework are positive - but alignment according to practice needed**

However, there are some misunderstandings, leading to an inappropriate mix of roles: e.g. AMs 52 and 55, 1.b concerning the use of "notified bodies".

Under New Approach Directives (which apply to nearly all of the products that will be targeted by future implementing directives) notified bodies have another role, i.e. to certify conformity in cooperation with manufacturers. Making the same bodies also responsible for post market control by institutionalising them as a part of market surveillance authorities, would consequently lead to a conflict of interests.

Furthermore, amendment 58.3 introduces a concept of "random third party pre-distribution verification". Any such concept would either result in a public pre-market-registration in order to identify future products to be launched or simply be unworkable in practice. This is not acceptable for industry.

As stated under the issue of "market forces", amendment 47 incorrectly suggests using voluntary agreements as a basis for market surveillance.

Selection of product groups and establishment of requirements

- **Don't start by disregarding the procedures established by the EUP proposal**

Article 12 of the EUP proposal provides a structured framework for selecting products for implementing measures. It is vital to us that such a structured and balanced approach should become the norm in order to remove the increasing uncertainty, which manufacturers are facing with the regulatory process today. Establishing pre-determined product lists would immediately contradict the established framework. Therefore, Orgalime cannot support AMs 19, 59 (and also AM 32 of the ITRE opinion), which deal with priority areas and product groups to be targeted "without prejudice to the integrated approach promoted in the directive".

- **Don't shortcut well established procedures by creating new structures**

As any legislation in the extremely sensitive field of product design will directly affect the core competence of the manufacturer, his innovation capacities and competitiveness as well as the ability of companies to meet differing needs of their customers both, private and professional, we have continuously stressed the importance of relevant stakeholder involvement from the very start of the process of establishing implementing measures, thus, from the scrutiny of areas to be targeted to the final decision on requirements.

MEPs have supported the importance of establishing legal certainty for the involvement of stakeholders, which we welcome. However, as the report is composed of a patchwork of amendments reflecting different possible solutions, it results in the confusing establishment of too many different "players" and "independent expert bodies" that would all depend on input and data from manufacturers: an "independent entity" (AM 20), a "product eco design expert body drawing partially on the resources of the Executive Agency for Intelligent Energy for Europe" (AM 20), a "pre-Comitology Advisory Committee" (AM 28), an "independent body of experts" (AM62), a "group of analysts chosen for their competence" (AM66 and 67), an "energy efficiency advocacy network" (AM 55.2.a) and an "Eco-Design Board" (AM 63). There is no clear definition of responsibilities, rights and duties for these different actors.

The report gives the impression that regulators aim to interfere at the heart of what is the manufacturer' core competence, the design of a product, depriving the manufacturer of his core competence by institutionalising a centrally planned process led by "expert groups independent from economic interests". This is a bureaucratic vision of how the economy can be run which is unacceptable for us.

Orgalime believes that proper stakeholder consultation should aim at carrying out an **extended impact assessment prior to considering legislation through implementing measures, in accordance with Better Regulation principles** and an inclusive and transparent process of setting requirements by **creating a pre-Comitology advisory committee in the context of the regulatory committee** (as referred to in AM 28). However, this advisory committee should not only be cited in the recitals of the proposal, but be established in the legal text of the proposal (article 12 or 14). This

advisory committee would also feed into the impact assessment. Any other solution would only create unnecessary bureaucratic structures that would lack efficiency and added value.

- **“Body of experts” risks to put standardisation process into question**

When analysing the use of so-called independent body of experts (re AM 62) and analysts, Orgalime does not consider it appropriate to establish new bureaucratic procedures and structures outside the existing legal framework. This would not create transparency, and would only lead to unclear decision processes and therefore legal uncertainty. We would like to refer once again to the Better Regulation Package, which enshrines rules and principles for impact assessment, the result of which should, we believe, be taken into account by all the EU Institutions.

According to the revised concept suggested for Annex II (see AM 67.1) the technical and economic analysis, which aims at identifying *technical options* would now be made by the body of experts.

Orgalime underlines the importance of not interfering in the structures of standardisation. Under the New Approach technical options and solutions, which fulfil the essential requirements of directives at the level of the product are developed through mandated standards, which are adopted in a democratic and transparent process involving all stakeholders. It is not acceptable to establish a new, parallel system.

- **All environmental aspects are to be considered**

It is important to note that the proposal is meant as a tool under Integrated Product Policy. It therefore aims to cover *all* environmental aspects; it is *not only* an energy efficiency directive (as misleadingly stated in AM 31). A proper analysis according to the criteria of article 12, will show if energy efficiency can be improved, and it will then be part of the requirements of any implementing measure. Setting up implementing measures dealing only with energy requirements due to the apparent urgency of the need for savings (see AM 67, para 5), independently from other environmental aspects, would establish a hierarchy of criteria, thereby undermining the whole idea of this framework directive and its function as an IPP model.

It is essential to follow the structured approach of article 12 to arrive at the proper choice of establishing generic and/or specific requirements for a product group. This choice would depend on the product group and its specificities and characteristics. At the level of a framework directive, both options should be kept as equally important possibilities. Also, any setting of a requirement, either generic or specific, would have to follow the procedure established in articles 12. Therefore, **AM 66, 2.3a**, where manufacturers would only be allowed to place on the market products, which can be re-used and re-cycled, is far too specific for the level of a framework directive and undermines the guiding concept specified in article 12.

- **Companies need a framework that provides legal certainty**

Prioritising certain aspects such as energy may well lead to the establishment of multiple implementing measures for the same product group. This creates unstable legal framework and put unreasonably high burdens on companies. Changing the design and construction of a product will typically lead to the need for establishing new supply channels, new manufacturing processes, new instructions, new documentation etc. This is not done within a few months and at no cost.

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| Conformity assessment to be in proportion to the risk involved |
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In the area of conformity assessment, industry has continuously been stressing the importance of not introducing a system of mandatory third party certification/verification. While AM 51 generally accepts module A, which to our mind, is appropriate given the level of risk involved, it introduces an erroneous mix of module B and other modules. When referring to module B, the amendment misleadingly speaks about verification. Module B, however, constitutes a type approval certification with mandatory third party involvement, which is applied with other modules. The wording of AM 51 is unclear and confusing.

Orgalime clearly rejects AM 51 and proposes to change the Commission proposal to the effect that only module A can be used as relevant conformity assessment procedure.

While for some products mandatory third party certification exists (e.g.: safety risk of heating products under directive 90/396 or energy efficiency of heating products under directive 92/42), industry does not support making it an option in the field of environment at the level of the EUP framework directive for *all* energy using products. Also, for the products cited above, twelve years of experience have not only shown diverging verification results for one and the same product depending on the notified body involved, but have particularly noted that many third countries outside the EU have abolished third party certification in this context. Thus, in terms of ensuring fair competition, module A would be the appropriate and adequate conformity assessment procedure.

In addition, in its Resolution (Council Resolution of 10 November 2003 on the Communication of the European Commission "Enhancing the Implementation of the New Approach Directives"), the Council has established such a priority for the use module A. Consequently, Orgalime does not support AM 55.1b.

With reference to AM 68, Orgalime wishes to stress that industry shares the view that the framework directive should lead to as high a level of compliance as possible and that the Commission must pay sufficient attention to this; however, we believe that the wording of AM 68 would not be an effective way to address this issue adequately.

Same requirements for EU and Non-EU manufacturers

Orgalime welcomes that the ENVI committee supports in AM 36, 48.1.a and 50 (partly) that EU and Non EU manufacturers shall be subject to the same requirements in order to ensure a fair level playing field.

Support for SMEs

Industry supports the general objective of introducing accompanying support measures for SMEs to promote the understanding of eco-design and to facilitate the fulfilling of requirements. Orgalime therefore welcomes amendments 26, 55.1.a and 56.

C. CONCLUSIONS

The EUP proposal will set, for decades to come, the standards for better product design, which will have to be integrated by companies both large and small.

It is therefore all the more important to ensure the quality of this major piece of legislation for European engineering industries. While Orgalime fully supports the objective of integrating environmental thinking into product design, and welcomes the support of the European Parliament in areas such as market surveillance and support measures for SMEs, we feel that the general approach of the report is clearly tending in the wrong direction and many of the amendments proposed by the Parliament are unclear, unenforceable and in some cases unacceptable.

It is to our mind clear that, in view of this and in view of the gap between the report and the proposals currently under discussion in the Council, much more time needs to be spent discussing this proposal and its implications, within the institutions and with stakeholders including industry, in order to come to a result, which will promote environmental improvement without damaging the competitiveness of manufacturing industries in Europe and ensuring fair competition in the marketplace.