



Commission proposal for a Directive on Environmental Liability – Com (2002) 17 of 23 January 2002

Orgalime Position Paper

11 June 2003

Introduction

Orgalime is the liaison group representing the interests of the European mechanical, electrical, electronic and metalworking industries at the level of the EU. Orgalime's members include, at the present time, 32 national trade federations representing some 130,000 companies in 21 European countries. These industries, which include mainly small and medium sized companies, employ some 7.3 million people and account for around 1,200 billion Euro in the GNP and one third of the industrial exports of the EU.

A number of issues contained in the proposed EU directive on environmental liability after the first reading in the European Parliament are causing strong concerns within our industry. As this proposal will be discussed at the EU Council of 13 June 2003, Orgalime wishes to draw the attention of Council ministers to the following key points :

Mandatory Insurance

Orgalime wishes to point out that the introduction of mandatory insurance will not solve the problem that the risks resulting from the proposal will not be insurable. Orgalime therefore insists on the need for prior analysis of the possibility to insure certain risks and on the cost of cover, which may not always be affordable. Such an analysis must be carried out immediately, especially in the field of damage caused to biodiversity. The possibility of insurance and the costs of coverage imply, *inter alia*, that the development risk and the "permit defence" should be maintained as a defence for the enterprises. There is also need for a financial ceiling and the removal of individual liability in cases where damage has been caused by several parties.

Exoneration of liability

- *The "Permit defence"*

Orgalime is of the opinion that the possibility of exoneration of liability on the basis of the "permit defence" must be maintained. The delivery of a permit, linked to very strict conditions, must be considered as an instrument for prevention and control by the authorities, which thereby guarantees a high level of protection. Moreover, the "permit defence" is accepted in the USA (cf. CERCLA's 'Permit shield' for Natural Resource Damages). The removal of this exoneration ground will seriously affect the competitiveness of European industry vis-à-vis its American competitors.

- The Development risk defence

Orgalime strongly opposes the extension of industry liability to development risk. Industry must be able to invoke these risks as a defence, as provided for in the initial proposal of the Commission. As it concerns risks that cannot be known on the basis of the scientific and technical knowledge at the moment of the facts, these are by definition risks that are unknown. The question then arises if these risks can be insured and if so, at what price. In the opinion of the European Parliament, the 'permit defence' and the 'development risks' may only be invoked as extenuating circumstances before the courts. However, this is not acceptable, as it would cause legal insecurity and divergent interpretations in Member States.

Financial ceiling of liability

The European Parliament was not sympathetic towards the request from industry for the introduction of a financial ceiling to liability. The European Parliament left this to the Member States. This solution is far from satisfactory and is in contradiction with the aim of harmonisation. A liability regime independent of negligence introduced by the proposed directive is especially constraining for industry. Therefore, Orgalime requests that this liability be limited to a specific amount. Orgalime proposes a financial ceiling of 70 million euro, as stated in the "Product Liability" directive. The fixing of a ceiling is crucial in order to insure the risks. Without such a ceiling, insurance and financial guarantees would not be available on the market.

Conclusions

Orgalime, in line with most other trade federations, is truly concerned about the outcome of the vote in the European Parliament. We hope that, during their negotiations, representatives from Member States will be aware of the significance of this Directive and will finally agree on a liability regime which is fair, manageable and insurable.