

Paris-la-Défense, the 15th of May 2018

## **POSITION PAPER**

### **MODIFICATION OF MACHINERY**

#### **Purpose of this document**

This position paper sets out CISMA position about the term « substantial modification » as it is used in the **MDG**<sup>(1)</sup> and as it is defined in the German authority interpretation paper in reference to the « *Notice from the Federal Ministry of Labour and Social Affairs of 9 April 2015 – IIIb5-39607-3* ».

This CISMA document identifies the related concerns and issues with this concept and gives CISMA view on how to best deal with the term « substantial modification », taking into consideration the relevant European legal acts i.e. **MD**<sup>(2)</sup> and **UWED**<sup>(3)</sup>.

#### **Background**

The term « substantial modification » is used in several clauses of **MDG** (§82, §39, 2th para. §72, 4th para. and §.140, 6<sup>th</sup> para. ref. to §.72, 4<sup>th</sup> para).

As this term is not defined in **MDG**, there is a room for interpretation of this concept and the interpretation paper published in 2015 by the Federal Ministry of Labour and Social Affairs in Germany is intended to give the view of German authority on this matter.

According to German authority's paper, if « *sufficient risk reduction cannot be achieved by simple safeguards* », then « *it is a substantial modification* », given that such substantial modification implies the application of **MD** in force at the date of that operation.

(1) Machinery Directive Guidelines    (2) Machinery Directive    (3) Use of Work Equipment Directive

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## **CISMA concerns about the term « substantial modification » as it is used in MDG**

- This term has **no legal background** (not used in any legal act, neither in MD nor in UWED)
- There is **no harmonised European definition of this term** (neither in MDG nor in another European official document)
- It is **used to describe two different situations** in MDG (see annex 1) and sometimes as a synonymous of « transformation », but meaning in that case a « rebuilding of an used machinery » in order to provide a new machinery;

Even if the legal consequence is the same in both cases, i.e. application of the MD in force at the date of the operation (« modification » of new machinery or « rebuilding » of used machinery), the same term is used to describe two totally different situations and operations.

## **CISMA concerns about the concept of « substantial modification » as it is defined in German Authority's paper**

- The wording as proposed in German authority's paper « (if) *sufficient risk reduction cannot be achieved by simple safeguards (then it) is a substantial modification* » doesn't help to define the term. On the contrary, this proposed definition would open the door to **multiple interpretations** and lead to **confusion** without any harmonised view within Europe
- With the above wording, a lot of modifications would be considered as substantial ones and a spread of MD application to used machinery would create an **European legal issue** between legal acts i.e. **MD and UWED**
- This would result also in a **loss of credibility for CE marking**
- Some **retrofitting operations** made by manufacturers on used machinery **would be considered as substantial ones and finally would not be possible anymore**, because of their cost related to the full application of MD in force at the date of the modification
- In manufacturing plants, any modification of a machinery/assembly of machinery would be easily considered as substantial and then would have a **very huge economic consequence** for manufacturers themselves

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## **CISMA position**

From CISMA view, there are no two categories of modifications (« soft » and « substantial » ones) with their respective legislation (UWED and MD), but only a modification (whatever is its extent) or not, taking into account that any modification shall be considered in the light of UWED. Therefore, the concept of « substantial modification » is misleading.

Moreover, the application of UWED before any modification cannot decrease the safety level of a used machinery because the employer must ensure that machinery throughout its working life, is still compliant with the rules applicable at its first putting into service in EU.

In addition, the above statement coming from EU legislation is not in contradiction with :

- the application of the state of the art during a modification of an used machinery and with
- the use of a risk assesment method (for part of the machinery subject to a modification) based on the method used by manufacturers at the design stage for new machinery

From CISMA view, there is no open question regarding the legal consequence related to a re-building of an used machinery (meaning a full application of MD in force at the date of that operation). Because of the cost of this « re-building » operation and taking into account the feedback of CISMA members, this operation is either exceptionnal or considered as a theoritical case.

**In conclusion, considering our concerns related to the concept of « substantial modification » as it is proposed in the German authority's interpretation paper, especially for used machinery, CISMA is in favour to engage a terminology work at European level (terms and associated definitions) in accordance with the European legislation.**

**At least, CISMA is in favour to replace the term « substantial modification » by a more appropriate one, especially when this term identifies the willing to re-build an used machinery with the intention to manufacture a new one, and not to modify it.**

*CISMA (French Association of equipment manufacturers of construction, infrastructure, steel and handling equipment industries) gathers 200 companies that employ about 32 000 people in France. Exporting 54% of their sales amounts to ca. 8,8 billion euros. Main actions of CISMA consist in promoting the sector and providing members with economics and statistical figures. The association is also active in influencing the regulatory and technical environment at French and European level within CECE (Committee for European Construction Equipment) and FEM (European Materials handling Federation).*

## Annex 1

### About the different uses of the term « substantial modification » in MDG

On one side for a machinery already placed on EU market by an OEM, §82 of MDG aims to describe when a change made by a third party on that machinery is to be considered as a modification (named « *substantial modification* » in MDG) before its 1st putting into service in EU.

On the other side for an used machinery, §39, 2<sup>th</sup> para. §72, 4<sup>th</sup> para. and §.140, 6<sup>th</sup> para. ref. to §.72, 4<sup>th</sup> para. of MDG aim to describe the specific situation when this **used machinery will be re-designed/re-built to become a new machinery** (named also « transformation » in MDG).