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# **Consultation on the Implementation of the Market Surveillance and Enforcement Requirements of the Eco-design of Energy Using Products and Energy Labelling Framework Directives**

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# Introduction

## The Purpose of the Consultation

This Consultation consists of three parts:

1.1 **Part 1** asks for comments on three options under consideration for which should be the authority(ies) responsible for enforcing the requirements of the Energy Labelling (92/75/EC) and Ecodesign of Energy Using Products (2005/32/EC) Framework Directives. In summary, these are:

- **Option 1:** For Trading Standards Officers (TSOs) to carry out this function for all implementing measures moving forward;
- **Option 2:** For a Central Government Body or Agency already carrying out similar enforcement activities to enforce the manufacturer requirements to ensure products perform as claimed;
- **Option 3:** A combination of the above, whereby TSOs enforce the requirements for consumer products, but that the requirements for non domestic products are enforced by a different body that has expertise in this area.

1.2 The Government's preferred option in terms of value for money and effectiveness of enforcement is option 2. Comments on all options are welcome, but in particular, the Government would be keen to hear the views of organisations or individuals that disagree with the proposed option 2.

1.3 Under all of the scenarios summarised above, it is proposed that TSOs retain the responsibility to enforce the requirements of the Energy Labelling Directive imposed on retailers to display energy labels.

1.4 This part of the consultation also seeks views on the accompanying initial Impact Assessment and draft Regulations.

1.5 In addition, Part 1 of the Consultation asks for stakeholder's views on a number of cross cutting issues, and discusses a number of technical changes in the draft Regulations.

1.6 **Part 2** aims to gather stakeholder views on a proposed expansion of the enforcement options available to the market surveillance authority, in particular through the establishment of an administrative penalties regime and also on the strengthening of the current criminal sanctions already available to enforcement bodies.

1.7 **Part 3** aims to gather views on draft Government guidance documents for the first 5 implementing measures recently agreed in Europe under the EUP Directive on standby and off mode power consumption, external power supplies, simple set top boxes, tertiary lighting and general lighting. The Government will continue to work within Europe to also promote the adoption of EU level Guidance.

## Background

### **The Energy Labelling Framework Directive**

1.8 The Energy Labelling Framework Directive stems from the *Specific Actions For Vigorous Energy Efficiency Programme* which was established in October 1991 to give a new impetus to the promotion of energy efficiency in the European Union and setting down areas where this could be achieved.

1.9 Energy labels provide clear and easily recognisable information for consumers about the relative energy consumption and performance of domestic appliances. This is done via an A (most efficient) to G (least efficient) label. These labels enable consumers to choose efficient appliances which use less energy and (where applicable) water when in use. They also encourage manufacturers to compete against each other on the environmental performance of their products.

1.10 The Energy Labelling Framework Directive does not directly introduce obligations on businesses, but instead provides a legal framework for establishing labelling requirements. Mandatory EU energy labels (in the form of implementing Directives) are currently required to be displayed on household refrigerators & freezers, washing machines, electric tumble-dryers, combined washer-dryers, dishwashers, household electric ovens, air conditioning units and lamps at the points of sale. Over the last decade the A-G label has been one of the most significant drivers in transforming the market for more energy efficient products.

### **The Ecodesign of Energy Using Products Framework Directive**

1.11 The Framework Directive for the Ecodesign of Energy Using Products (EuP) came into force in 2005 and aims to reduce the environmental impact of energy using products, and therefore contributes to sustainable development while still ensuring the free movement of products. The European Commission estimates that implementing measures brought forward under the Framework Directive have the potential to reduce EU energy consumption by around 10%.

1.12 The EuP Framework Directive, is similar to the labelling framework in that it does not directly introduce obligations on businesses, but instead provides a legal framework for establishing minimum eco-design requirements for energy using products by defining conditions and criteria for setting such requirements through subsequent implementing measures. Implementing measures are targeted at individual energy using product groups such as white goods, motors, televisions, lighting equipment, or as in the case of the measure on standby, a specific function of all electrical products.

### **EuP Implementing Measures**

1.13 EuP implementing measures can take the form of EU Directives, Regulations, Commission Decisions or voluntary agreements. All of the measures agreed so far have been EU Regulations.

1.14 In order to bring forward an Implementing Measure on a particular product, the Commission first carry out a detailed study to assess the environmental impacts of the product in question, and identify potential policies to mitigate those impacts. The Commission then draws up a 'Working Document', which is discussed at a meeting of the Consultation Forum. This is a meeting of representatives from

Member State Governments, industry and the Commission. Following this discussion, the Commission takes on board the comments from the Consultation Forum, and prepares a draft Regulation to be voted on at a meeting of the Regulatory Committee. Once the text of the measure is agreed by the Regulatory Committee, it is subject to scrutiny by the European Parliament before being published in the Official Journal of the European Union. Recent discussions in the EU have considered Ecodesign and labelling measures in parallel.

1.15 Since agreement was reached on the EuP Framework Directive in 2005, the European Commission has been undertaking the evidence work necessary to bring forward regulations for over 20 priority products. In principle, implementing measures can address any environmental impact, but in practice, the main impact identified for this first group of twenty or so products to be subject to implementing measures has been the energy they consume while in use.

1.16 To date Member States have approved Regulations for ten product groups: Standby Power Consumption, Simple Set Top Boxes, External Power Supplies, General and Tertiary Lighting, motors, televisions, circulators and domestic washing machines and refrigerators. These measures will come into force around mid 2010.

1.17 EuP implementing measures have been shown to be a highly cost effective approach to improving the energy efficiency of products. It is estimated that the measures so far agreed combined could deliver in the UK estimated net benefits of over £900m pa between now and 2020 in terms of savings to end-users, savings from lower carbon emissions and other benefits, and save around 7 million tonnes of CO<sub>2</sub> per annum by 2020. A number of further measures are under currently discussion in Europe with some 20 further measures planned over the coming 2-3 years.

### **The Proposed Expansion of the EuP and Energy Labelling Framework Directives**

1.18 As part of the EU Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan launched in July 2008, the European Commission published plans to expand the scope of the EuP Framework Directive to allow the setting of ecodesign requirements for energy related products, such as windows, insulation materials, or some water using products. Agreement on this 'Ecodesign Directive' has recently been reached in Europe and the Commission will publish a working plan setting out an indicative list of priority product groups for adoption of implementing measures by 21 October 2011.

1.19 In parallel, the Energy Labelling Framework Directive is being updated to, *inter alia*, align its scope with the wider scope of the EuP Directive and to allow future implementing measures to be European Regulations (as now for EuP) rather than Directives as currently required. Until the recast of the Energy Labelling Framework Directive is complete, the first round of energy labelling requirements are expected to be brought forward as Directives.

### **Transposition**

1.20 The requirements of the Energy Labelling Framework Directive on individual products have been brought forward in a series of 'daughter directives', which have had to be transposed into UK legislation. The EuP Directive is transposed by the Ecodesign for Energy Using Products Regulations 2007, which implement the

requirements of the Framework Directive, and ecodesign requirements for three product groups agreed at the time the Directive was agreed: boilers, lighting ballasts and fridge freezers.

1.21 Given that all of the recently agreed EuP implementing measures are European Regulations, the ecodesign requirements of these do not need to be transposed into national legislation. However, the market surveillance and enforcement of the minimum standards (which constitute much of the framework prescribed in the Framework Directive) need to be brought into effect at a National Level, both in terms of legislative transposition of the relevant Framework Directive provisions in the 2007 Regulations and in terms of making sure that the practical arrangements which are made on the ground satisfy the Framework Directive obligation for Member States to put in place a market surveillance and enforcement regime robust enough to ensure compliance with the requirements of the various implementing measures. Specifically, the Directive requires Member States to put in place a **Market Surveillance Authority** (MSA), which has powers to carry out checks on products, request relevant information from manufacturers and request the withdrawal from the market of non compliant products. It also requires that penalties shall be 'effective, proportionate and dissuasive, taking into account the extent of non compliance and the number of units of non-complying products placed on the Community market'. The options put forward in this consultation, therefore, are intended to implement these requirements in the UK.

### **Current Enforcement Regime**

1.22 The EuP and Energy Labelling Framework Directives require manufacturers to ensure that the products they place on the market perform above the minimum standard set by EuP, and within the claimed performance declared on the energy label. The Energy Labelling Framework Directive also includes a requirement on distributors to ensure that they display an energy label at the point of sale.

1.23 Responsibility for the enforcement of all of these requirements currently rests with Trading Standards Officers (TSOs). Currently there are eight energy labelling measures in force (on domestic fridges and freezers, washing machines, electric tumble dryers, combined washer-dryers, dishwashers, lamps, air conditioners and electric ovens) as well as the three minimum energy performance Directives brought under EuP in 2005.

1.24 In addition to the formal role of TSOs, Defra's Market Transformation Programme (MTP) carries out some product testing for market surveillance purposes and, if a product is found to be performing below the claimed value, the details are passed to TSOs to consider enforcement action.

### **Current Levels of Product Compliance**

1.25 There is no hard data available, but estimates based on European wide research carried out by the European consumer standardisation group ANEC, suggest that around 15% of energy using products placed on the market are non compliant with energy labelling and minimum standards legislation. However, the Government believes that this is a very conservative estimate as initial results from the most recent MTP testing programme indicate that at least 25% of the products tested did not perform as claimed on the label. This percentage is exclusive of products falling within the tolerance level and therefore considered legally compliant.

1.26 While error allowances have been introduced by the European legislation to mainly take into consideration possible laboratory and measurement variations, evidence suggests that products are designed with those tolerances 'built in'. The UK is pushing for these tolerances to be reduced whenever appropriate and we believe that an additional benefit of a more credible enforcement regime is that manufacturers will rely less on tolerances.

### **Impacts of Non Compliance**

1.27 Products that do not comply with the requirements of the EuP or Energy Labelling Framework Directives are responsible for a number of negative impacts including:

- environmental consequences in terms of not realising the full energy and CO<sub>2</sub> savings potential of these policies;
- financial consequences in terms of highly cost effective CO<sub>2</sub> savings not realised;
- public health impacts and knock on financial consequences in terms air quality improvements not realised;
- financial consequences for consumers i.e. not saving as much on energy bills as expected;
- an uneven playing field for manufacturers placing products on the market;
- reputational damage for the UK if the Directives are not properly enforced;
- risk of infraction and significant fines from the EU if an appropriate enforcement system is not put in place.

### **Overall costs of Non Compliance**

1.28 The Impact Assessment carried out on options for the MSA and published in parallel to this consultation document, contains a detailed discussion on non compliance and, based on the opinions of a number of product experts, provides a cautious estimate of the costs of non compliance. Due to the difficulties in getting accurate data on non compliance, and in forecasting the likely impacts of different methods of enforcement, the estimates in the Impact Assessment should be used only as a broad indication of the relative cost-effectiveness of the policy options.

1.29 Projections for the total benefits from recent eco-design and labelling measures (which assumes full compliance) suggest a Present Value benefit of £11.3bn. Non compliance of products means that some of these benefits will not be achieved, as energy consumption will be higher than projected. From the non compliance estimates used in the Impact Assessment, the cost of non compliance (i.e. the benefits not achieved) is estimated at around £700m. We believe this is a significant underestimation and does not include some costs, such as:

- an uneven playing field for manufacturers placing products on the market;
- reputational damage for the UK if the Directives are not properly enforced;
- risk of infraction and significant fines from the EU if an appropriate enforcement system is not put in place.

1.30 However, there are also some economic *benefits* from non compliance, because (i) less energy saving results in a lower impact of the Heat Replacement Effect, which is responsible for heating costs to consumers and non-traded CO<sub>2</sub> emissions; and (ii) it is possible that some non-compliant products will be offered to

consumers at a lower price than projected, because the manufacturers haven't incurred the full costs of improving their products.

1.31 These benefits from non compliance are, however, small in comparison with the costs of non compliance. The projections for total costs from recent eco-design and labelling measures suggest a total Present Value cost of £2.7bn, of which around £336m will be avoided due to non compliance. Therefore, this is treated as a benefit of non compliance.

1.32 In summary, the costs of non compliance from recent eco-design and labelling measures are estimated at £700m and the benefits of non compliance at £336m. Therefore, the Net Present Value foregone due to non compliance is £364m, although as noted above we believe this is a significant underestimate.

### **Future enforcement regime**

1.33 Given the number of implementing measures recently agreed or planned for agreement over the coming 2-3 years, it is important to put in place an appropriate Market Surveillance Authority with adequate resources and powers to safeguard the significant benefits outlined above.

1.34 Because legislative changes need to be made to implement the enforcement requirements of the new EuP implementing measures, the Government believes that now is a good time to review the current arrangements to assess whether TSOs are still best placed to carry out the enforcement function for this legislation, or whether this may, at least partly, be better placed with a central Government Body or Agency.

1.35 In putting forward the options discussed below, the Government is also keen to ensure compliance with the requirements of the EU Regulation on Accreditation and Market Surveillance (RAMS), which from January 2010 will require that Market Surveillance Authorities for various pieces of New Approach legislation have appropriate powers to carry out their roles effectively.

## **Part 1 - The Proposed Options for the Market Surveillance Authority**

2.1 As noted above, the responsibility for the enforcement of the current EuP and labelling implementing measures currently falls to local authority trading standard departments (referred to in the Regulations as Local Weights and Measures Authorities and jointly referred to as Trading Standards Officers or TSOs for the purposes of this document only) in England, Wales and Scotland, and to the Department of Enterprise, Trade and Investment in Northern Ireland (DETI).

2.2 TSOs also carry out the enforcement of the various energy information regulations relating to the energy labelling of household products such as the retailer requirements to display an energy label on certain products at the point of sale.

### **Who should carry out Market Surveillance and Enforcement Activities Moving Forward?**

2.3 As part of the work leading up to this consultation, the Government has considered three options with the aim of identifying a cost effective regime to improve the level of product compliance, bearing in mind the expansion of the EuP and Energy Labelling Framework Directives.

2.4 The options considered are as follows:

Option 1: to increase the remit of TSOs to be the MSA for all products subject to EUP and Labelling measures moving forward;

Option 2: to transfer the responsibility for the enforcement of the requirements on manufacturers to ensure that their products perform as claimed to a dedicated team in an existing central Government Body or Agency;

Option 3: a hybrid approach, where TSOs would have responsibility for the enforcement of the requirements on domestic products and a separate Body would enforce the requirements for non domestic products.

2.5 Regardless of which option is decided upon, the Government considers that the enforcement of the requirements on retailers to display an energy label at the point of sale should remain with TSOs, at least for the domestic products, as there are economies of scale and this fits well with their current activities of regular inspections in retail premises.

2.6 To do nothing is not an option, as a MSA must be identified to enforce the requirements of the recently agreed implementing measures.

2.7 The three options, and advantages and disadvantages of each, are expanded on below and the costs and benefits associated with the options are assessed in the Impact Assessment which accompanies this document.

## **Option 1**

### **Description**

2.8 The remit of TSOs is extended to become the MSA for all new products subject to EuP and Energy Labelling implementing measures moving forward.

### **Advantages**

#### **Recognition**

2.9 TSOs are widely recognised by manufacturers and consumers as an enforcement authority.

#### **Expertise**

2.10 TSOs have been responsible for enforcement of the existing ecodesign and energy labelling legislation for some time now. They have the necessary experience and expertise to take prosecutions against manufacturers of non compliant products.

#### **Coverage**

2.11 TSO coverage is national so they can potentially identify non compliant products in all parts of the country. There is also the possibility that the checking of the energy labelling of products in retail premises could be combined with existing visits already carried out for other legislation (e.g. packaging). However checking the energy label is displayed correctly is a small part of the compliance picture, it is the systematic testing of products to uncover non-complaint models that can have a real impact on non-compliant products.

### **Disadvantages**

#### **Value for Money**

2.12 Any additional new funding made available by the Government to Local Authorities (as required under the new burdens principle) is not ring fenced, and therefore, there is no guarantee that it will actually be spent on the enforcement of the energy labelling and eco design legislation. Given that funding would be spread across all Local Authorities, when compared to the high cost of testing it is not likely to increase product testing.

#### **Priority**

2.13 TSOs enforce hundreds of different pieces of legislation and therefore have to prioritise their enforcement activities within their resources. This inevitably means they tend to focus on areas where product compliance is critical such as product safety and expensive and technically demanding product testing such as that required for testing energy efficiency is afforded a lower priority.

#### **Technical Expertise**

2.14 The tests required to determine the energy efficiency of energy using products are often technically demanding and require a detailed understanding of testing standards in order to interpret the results correctly. While some individual TSOs may have the required expertise, this is by no means the case across the board, and building the required expertise across several hundred local authorities would be a costly exercise, and would seem to be wasteful given the likely proportion of their time which they would spend on this activity.

## **Coordination**

2.15 The number of local authorities can result in a fragmented testing programme, which can make it difficult to administer a testing programme in a coordinated way resulting in potential duplication of effort, therefore impacting on the positive benefits to be gained from a high level of product compliance.

## **Non Domestic Products**

2.16 The expertise that TSOs have built up in the market surveillance of products for EuP and Labelling has been exclusively for domestic products. However, many of the products that will shortly be subject to implementing measures are exclusively non domestic, such as motors, machine tools, transformers and furnaces, meaning that TSOs would need to build up the necessary expertise in these areas in order to enforce the requirements adequately. As noted above, building up expertise amongst many authorities is challenging and resource intensive.

## **Summary**

2.17 Although this option may ensure a degree of continuity with the current regime, past experience has shown that it is not likely to afford a high priority to product testing given the costs of testing and the technical expertise required. In the fifteen or so years that energy labelling requirements have been in force, the Government is not aware of any significant product testing having been carried out to check products meet the claims on energy labels.

2.18 Without a widespread, coordinated programme of testing there is unlikely to be significant deterrent for non-compliant manufacturers to improve. The Government considers, therefore, that this option is not likely to result in increased levels of compliance and that given the number of new products coming under implementing measures over the coming years, there is a high risk that levels of non compliance could increase further resulting in higher than expected energy costs for consumers, negative environmental impacts and an uneven playing field for business.

## **Option 2**

### **Description**

2.19 Move the enforcement function away from TSOs to a dedicated team in an existing Government Body or Executive Agency (for example, the National Measurement Office or the Vehicle Certification Agency, who both already carry out a degree of product testing). Draft regulations giving effect to this option by placing responsibility for enforcement on the Secretary of State who would then contract an appropriate agency, are attached at Annex B and C.

### **Advantages**

### **Priority**

2.20 The enforcement of this legislation would be the *raison d'être* of a dedicated team in a central body, which would be able to afford the enforcement of this legislation the highest priority.

### **Value for Money**

2.21 The Government considers that this option is likely to provide optimum value for money, in that the total budget allocated by Government can be ringfenced and directly spent on enforcement of the energy labelling and EuP Directive requirements. The funding made available to this body will need to be sufficient to cope with the high cost of carrying out testing.

### **Technical Expertise**

2.22 A central body would be able to quickly build the product testing expertise necessary to understand and interpret test results.

### **Non Domestic Products**

2.23 Some of the bodies under consideration to fulfil the role of the MSA already have experience in dealing with both consumer and non domestic products, and as noted above, have the potential to quickly build expertise.

### **Strategic Approach**

2.24 A central body could carry out coordinated action nationwide thus avoiding the risk of duplicated tests while building more capacity for testing. There would also be more scope to coordinate at European level and participate in any future Administrative Cooperative meetings of European enforcement bodies.

### **Disadvantages**

2.25 There is a risk that some of the product testing expertise built up by TSOs might be lost and there will be some work required to ensure that the transition to the new regime is smooth and cost effective.

### **Summary**

2.26 This is the Government's preferred option, as it is cost effective and a similar approach has proven to work well for the enforcement of similar legislation such as the Restriction of Hazardous Substances (RoHS) Regulations. This option would enable a nationwide strategy for product testing to be implemented and whichever MSA that is ultimately chosen will be experienced in working with business to raise awareness and ensure product compliance. This option is most likely to result in an equitable market for businesses and provide assurance for consumers expecting the stated level of energy performance from their products.

## **Option 3**

### **Description**

2.27 A hybrid of options one and two, where TSOs retain responsibility for the enforcement of the requirements on domestic products and a separate Body or Agency would enforce the legal requirements for non domestic products.

### **Advantages**

2.28 While TSOs can in principle take on an enforcement role for non domestic products, their expertise, certainly for energy efficiency testing, is exclusive to domestic products. Other bodies traditionally enforce requirements for non domestic products.

2.29 This option is more likely to provide continuity to business while ensuring that specialist knowledge is developed in commercial products testing.

### **Disadvantages**

2.30 This option would seem to be the most difficult to implement practically. Managing a split between products could prove challenging, and could result in inequalities between the enforcement of domestic and non-domestic product requirements. It could also lead to confusion for regulated businesses.

### **Summary**

2.31 This option is likely to prove difficult to implement in practice, and would require more resource to manage, it could result in confusion for manufacturers and consumers and does not seem to offer the value for money benefits of the other options.

### **Consultation Questions**

Consultation Question: Do you agree with the Government's view that Option 2 discussed in Part 1 should be taken forward?

Consultation Question: Do you have any comments on the draft Regulations in Annex B and C intended to give effect to Option 2?

Consultation Question: If relevant, please give details of any alternative options that have not been examined here.

## **Cross Cutting Issues**

### **Impact Assessment**

2.32 An Impact Assessment has been produced and published together with this consultation document in order to inform the decision making process which looks at both the options for the MSA and the options surrounding the resources or funding dedicated to product testing.

**Consultation Question:** Do you agree with the information contained in the Impact Assessment? Is there any further information you would like to include.

### **The proposed resources dedicated to testing**

2.33 While this consultation document, in the main, discusses who is best placed to carry out compliance and enforcement activities, the accompanying Impact Assessment examines how different testing regimes (and different levels of funding) will affect the value for money of each of the MSA options. In brief, the Government anticipates that a testing regime which tests products from each EuP group over a two year rotation would lead to a substantial improvement in product compliance. Such a regime is estimated to cost in the region of £1m per annum including overheads. The detailed options for the resources or funding dedicated to testing are outlined in detail in the accompanying Impact Assessment.

**Consultation Question:** Do you agree with the proposed resources or funding dedicated to product testing? If you do not agree, please include if possible details of why not.

### **Cost Sharing**

2.34 In addition to expensive product testing, the EuP implementing measures and energy labelling legislation requires that if an appliance fails the first test then retests should be performed on (usually) three further samples in order to demonstrate that the first test sample was not simply on a 'rogue' model. Therefore, the total costs of testing a single model to demonstrate that it is under performing can easily reach £10-15k or more.

2.35 While the Government accepts there is a cost to product testing, it is the Government's view that the onus to demonstrate that a product which fails the first test is a rogue product should be on the manufacturers or legal importers. The draft Regulations, therefore, allow the MSA to charge manufacturers for the costs of the further (normally 3) tests necessary to determine whether a product is compliant

**Consultation Question:** Do you agree with the Government's proposed approach to cost sharing as outlined above?

### **Time limit for prosecutions**

2.36 Magistrate Court proceedings are subject to a 6 month time limit to take a prosecution from the date an offence is discovered. Given that most products need four rounds of complicated testing before an MSA can take a prosecution, this time limit is very tight. The 6 month rule applies in the absence of any contrary provision in legislation. The draft Regulations provide the MSA with 12 months to bring a prosecution from the date that it considers it has sufficient evidence to bring proceedings.

Consultation Question: Do you agree with the Government's proposed approach to the 6 month rule outlined above?

## **Technical changes to the Regulations**

### **Responsibility for Enforcement**

2.37 In order to give effect to the Government's preferred option, option 2, the draft Regulations place the responsibility for enforcement of the requirements of EuP and Energy Labelling Directives on the Secretary of State. The Secretary of State will then give the responsibility for the enforcement to an appropriate Government Body or Agency. This is similar to the approach that has been successfully used for other product legislation such as the RoHS Regulations.

### **Appeals**

2.38 The EuP Regulations currently leave open the possibility for businesses to appeal against an enforcement notice to the Secretary of State. However, given that under the Government's preferred approach, the responsibility for enforcement will be with the Secretary of State, it would not be appropriate for appeals to also go to the Secretary of State. The draft Regulations, therefore, remove the appeals process from the Regulations, on the understanding that whichever body is eventually chosen to be the MSA will have in place an appropriate internal mechanism for dealing with appeals.

### **Regulation on Accreditation and Market Surveillance**

2.39 The European Regulation on Accreditation and Market Surveillance (RAMS) will come into force in January 2010, and aims to harmonise the powers available to Market Surveillance Authorities that enforce New Approach legislation (which includes the EuP Directive). The draft Regulations have been prepared with RAMS compliance in mind, but the Government would particularly welcome views from Stakeholders on whether they consider the products covered by implementing measures could constitute a 'serious risk' arising from non compliance with the [harmonised requirements], in which case, the MSA will require further powers of recall and destruction.

2.40 Government is also concerned to ensure that the Market Surveillance Authority has the appropriate powers available to it to ensure that non-compliant products are not made available to consumers at retail outlets. The draft Regulations have been prepared to provide the Market Surveillance Authority with powers to serve enforcement notices on retailers.

### **Structure of Regulations**

2.45 The EuP implementing measures are European Regulations and are, as such, directly applicable in UK law. However, there is a need to ensure that their requirements can be enforced and so the EuP Regulations relate to products listed in the schedules ('listed products'). In order for these Regulations to apply to a product subject to an implementing measure, that product will need to be added as a listed product in the schedules. The current draft regulations include as listed products those products that were already subject to an Implementing Measure when the Framework Directive was agreed in 2005 and those for which an implementing measure has recently been published in the official journal.

2.46 Moving forward, as implementing measures are agreed, these schedules will be updated periodically.

**Updating references to standards**

2.47 The Statutory Instruments on Labelling refer to harmonised testing standards, which are from time to time updated. The draft Regulations update the references to the standards in the Regulations on *household electric refrigerators, freezers and their combinations* and *air conditioners*.

Consultation Question: Do you have any further comments on the draft Regulations?

## **Part 2 - Improving and expanding the Sanctions Toolkit Available to the Market Surveillance Authority**

### **Background**

3.1 The options described in Part 1 discuss WHO is the best placed to carry out market surveillance and enforcement work for the EuP and Energy Labelling Framework Directives. This section deals with HOW the MSA can best enforce compliance with the Directives.

3.2 To ensure a high level of compliance the MSA will need to draw on flexible and proportionate enforcement options to both penalise instances of non compliance and prevent future breaches. Effective penalties are essential to ensure a level playing field for business by ensuring that non-compliant companies incur same or higher costs than compliant companies.

3.3 In 2006, the Macrory Review<sup>1</sup> looked at the main reasons businesses were not compliant, and what could be done to address the situation. Macrory's final report was published in November 2006 and made several recommendations. These aimed to ensure regulators had a set of modern and flexible sanctions to use that were proportionate and appropriate to the environmental risks faced.

3.4 Therefore, in line with Macrory principles, the Government proposes to make a set of Civil Sanctions available to the MSA as well as strengthen the existing Criminal Sanctions available to punish the worst cases.

3.5 The proposals are included in this consultation at this stage for discussion purposes only. There will be a further consultation produced on the proposed penalty regime in due course.

**Consultation Question: Do you agree with the generic proposal to strengthen the criminal and civil sanctions available to the enforcement body?**

### **Current Regime**

3.6 In this area of environmental legislation, namely the Eco-design for Energy Using Products and Energy Labelling Framework Directives, the only sanctions currently available to the MSA are criminal. The maximum fine (£5000 in the Magistrates Court) appears to be disproportionate in two ways; first it is unlikely to be a sufficient monetary deterrent against non compliance, particularly for large companies with a high turnover. Second, pursuing a criminal conviction in minor instances of non compliance, for example the late provision of documentation, seems to be disproportionate in relation to the offence.

### **Mirroring the Regulatory Enforcement and Sanctions Act 2008**

3.7 A Fairer and Better Environmental Enforcement (FBEE) project is currently underway within Defra, which aims to address the outcomes of both the Macrory Review and the Defra review of environmental enforcement<sup>2</sup>, which concluded that

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<sup>1</sup> Regulatory Justice: Making Sanctions Effective. <http://www.berr.gov.uk/files/file44593.pdf>

<sup>2</sup> <http://www.defra.gov.uk/environment/enforcement/report.htm>

the current sanctioning framework for dealing with environmental offences was inadequate.

3.8 The project is developing proposals to provide various environmental regulators with a range of civil sanctions utilising the general enabling power conferred by Part 3 of the RES Act 2008 (RES Act) to introduce civil sanctions and to set out ideas for structured sentencing to assist courts in responding proportionately and effectively to environmental offences in the area of environmental legislation

3.9 Although Energy Labelling and Ecodesign legislation are not covered by the Regulatory Enforcement and Sanctions Act, it is the intention, along with other policy areas within Defra, to mirror the enforcement regimes proposed by the Act where appropriate. Mirroring the RES Act in this way ensures a consistent approach to environmental offences across Government.

3.10 The FBEE will be publishing a full consultation on the new measures this year.

### **Why Administrative Penalties?**

3.11 The EuP and Energy Labelling Framework Directives require Member States to put in place 'an effective, proportionate and dissuasive' penalty regime, which takes into account the extent of non compliance and the number of units of non-compliant products placed on the Community Market.

3.12 Administrative Penalties combined with strengthened criminal sanctions can achieve this aim. They offer a flexible and transparent method of penalising non compliance. Administrative penalties also fit with the better regulation 'less is more' agenda. If enforced by an existing body, as proposed in Part 1 of this Consultation Document, they are in keeping with Hampton Principles<sup>3</sup> (better regulation, more streamlined inspection and enforcement).

3.13 According to the Macrory review any Administrative Penalties introduced should meet a certain set of criteria. Broadly, the sanctions regime aims to:

- a. provide a sufficient deterrent against non compliance;
- b. in instances of non compliance any penalty imposed should eliminate financial gains or benefits of non-compliant behaviour as well as changing the behaviour of offenders; and
- c. a penalty regime should deter future offenders from committing similar offences.

3.14 The Government expects that the civil and improved criminal sanctions will be fairer to business for several reasons. Sanctions that more closely reflect the seriousness of the compliance breach, proportionate and effective sanctions will do more to level the playing field for compliant businesses and removing economic advantage from those who fail to comply.

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<sup>3</sup> <http://www.berr.gov.uk/whatwedo/bre/inspection-enforcement/assessing-regulatory-system/page44042.html>

3.16 Administrative penalties represent a more pragmatic approach to instances of non compliance. Non-compliant companies would be able to work with the MSA volunteering measures to address non compliance – these would be set down in an Enforcement Undertaking agreed between the MSA and non-compliant body. Enforcement Undertakings have the potential to make sanctions unnecessary in many cases.

3.17 The Government considers that a new system of criminal and civil sanctions ideally complements the governments preferred option of moving the enforcement function to a Central Body and the Impact Assessment which has been produced as part of this package, assumes that an effective penalties regime will be in place to safeguard the benefits achieved by the changed enforcement body.

### **An Illustrative Administrative Penalties Framework**

3.18 It is impossible to map out the details of the penalties framework at this stage, this will be discussed in further detail, both in conjunction with whoever becomes the MSA going forward, and through a formal consultation. However, there are certain broad details that can be set out here to provide background and inform the discussion on the regime.

3.19 It is envisaged that, for the EuP and Energy Labelling Framework Directives, compliance offences are broadly as listed below. Introducing administrative penalties reflects the fact that each compliance breach is a unique situation and it is envisaged the MSA would judge each instance of non compliance against a transparent framework of criteria to ensure an equitable system of penalties is applied.

### **Types of non compliance with EuP and Energy Labelling**

3.20

- Provision of inadequate or incomplete documentation
- Late provision of documentation
- Incorrect model label applied to product
- Product does not meet claim on the label
- Product does not meet the Minimum Energy Efficiency Standards as set out by the EuP Implementing Measure.

**Consultation Question: Are there any additional non-compliant activities you think should be on this list?**

3.21 In judging the severity of an offence it is proposed the MSA would take into account several factors including the nature and scale of the offence and its impact on consumers and the environment. Following this process there are likely to be three main types of enforcement action undertaken, in all cases the MSA would issue a notice of intent to impose a penalty and would consider representations from the manufacturer/retailer before undertaking one or more of the following:

1. Enforcement Undertakings – would enable a business, which a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking. Examples of enforcement actions which companies could undertake are:

- i. advertise the breach in the models compliance to consumers and retailers;
  - ii. offer to consumers of a re-imbusement of costs for the product or offering a replacement model;
  - iii. reimburse customers electricity costs based on the difference between the expected and the actual performance of the model;
  - iv. agree to either to change the labelling of further products or to upgrade the models energy efficiency and provide testing evidence to the MSA
2. Fixed Monetary Penalty – where the MSA will be able to impose a monetary penalty of a fixed amount, as set out for a particular offence. The Government sees fixed monetary penalties as enabling regulators, in appropriate cases, to enforce less serious offences in a more proportionate way than a criminal prosecution.
  3. Discretionary Requirements - which would enable the MSA to impose one or more of the following:
    - i. Compliance Notice - requirement to take specified steps within a stated period to secure that an offence does not continue or happen again;
    - ii. Restoration Notice - requirement to take specified steps within a stated period to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed;
    - iii. Variable Monetary Penalty - determined by the MSA, which could be calculated on the basis of several factors, for instance: the number and price of the models sold on the UK market – so the severity of the breach is therefore reflected by the value of the models sold. Other factors could include cost to society of the CO<sub>2</sub> not saved, based on the EU ETS carbon price, cost to society in terms of the air quality gains not made and the administrative costs of the models testing. Variable Monetary Penalties aim to both remove the financial benefits of non-compliance and create a sufficient deterrent.

Consultation Question – Do you agree with the range and type of administrative penalties proposed?

If you would like to see any further actions please give details. If you would like to see a smaller range of actions available please specify which actions you would not include and why.

### **Procedure for imposing Administrative Penalties**

3.22 There would be a clear and transparent set of procedures before the MSA can impose administrative penalties, for example under the RES Act, the regulator must first serve the business with a 'notice of intent' giving notification that it proposes to impose the penalty. The notice must include certain information including the grounds for proposing to impose the penalty and time periods for appeals, payments etc.

3.23 The business would then have the right to make written representations and objections to the MSA about the proposal to impose the penalty or pay a discharge payment. The business may also raise any defences to the proposed sanction.

3.24 The business must have a right of appeal to a tribunal against the final notice. Appeals could be heard by an independent ad-hoc tribunal or by an independent and impartial organisation such as the First Tier Tribunal.

3.25 These arrangements will be discussed in more detail in the further consultation.

### **Improving the current criminal sanctions regime**

3.26 Although it is envisaged that administrative penalties would be used to penalise some cases of non compliance, there is still a need to keep the criminal sanctions regime in order to punish the very worst offences and underpin the administrative regime.

3.27 The latest advice to magistrates from The Sentencing Guidelines Council, (*Magistrates Court Sentencing Guidelines* (effective from August 2008)) emphasises the fact that fines for corporate offenders should be substantial enough to have a “real economic impact”.

3.28 As the maximum fine (£5000 in the Magistrates Court) is unlikely to provide this ‘economic impact’, particularly for large companies with a high turnover, there is a need to strengthen the criminal sanctions available.

3.29 Currently a number of environmental offences carry exceptional statutory maxima (ESM), which allow for heavier fines than the standard scale of fines, we would aim to mirror similar environmental offences and increase the monetary levels of penalty to a higher amount.

Consultation Questions: Do you agree with the proposals to improve the criminal sanctions framework?

Consultation Question: Do you have any further suggestions for improving the enforcement options available to the MSA.

## Part 3 - Draft Guidance Documentation EuP Implementing Measures agreed up to end 2008

### Introduction

4.1 Draft Guidance on EuP implementing measures agreed up to the end of 2008 is set out in Annex E for your comments. This is intended to assist those placing energy using products on the UK market to understand the application of EU Regulations establishing implementing measures under the Eco-design for Energy Using Products Framework Directive (EuP)

4.2 It aims to explain the EU Regulations although interpretation of the law is for the courts. Although reference is made to existing legislation, following this guidance is not in itself obligatory. However, if you do follow it you will normally be doing enough to help your organisation meet its legal obligations in respect of the legislation covered in this guidance.

4.3 The EU Regulations themselves should always be read and understood, as they constitute the law. This guidance is informative and has no legal authority. You should refer to the EU Regulations themselves for a full statement of the legal requirements and in the case of any doubt take independent advice, including your own legal advice. The Government will also continue to work within Europe to advocate for European level guidance to be developed. This should help consistency of implementation across Member States.

4.4 The guidance document sets out common requirements across regulations and provides product specific guidance in individual annexes. At present the guidance covers Regulations relating to the Standby and off mode power consumption of energy using products, simple set top boxes, external power supplies, tertiary lighting and domestic lighting. It is the intention that new annexes will be added as new Regulations are agreed.

Consultation Question: Does the guidance provide sufficient generic guidance to enable you to understand what you need to do before placing your products on the EU Market?

Consultation Question: Do you have any suggestions for improving the guidance? Any suggestions should take into account the fact that the Government cannot provide definitive legal interpretations or legislation and that it is not the intention that this guidance should cover all possible scenarios.

## **Annex A – Full List of Consultation Questions**

### **Part 1 - The Proposed Options for the Compliance and Enforcement Market Surveillance Authority**

Consultation Question: Do you agree with the Government's view that Option 2 discussed in Part 1 should be taken forward?

Consultation Question: Do you have any comments on the draft Regulations in Annex B and C intended to give effect to Option 2?

Consultation Question: If relevant, please give details of any alternative options that have not been examined here.

Consultation Question: Do you agree with the information contained in the Impact Assessment? Is there any further information you would like to include.

Consultation Question: Do you agree with the proposed resources or funding dedicated to product testing? If you do not agree, please include if possible details of why not.

Consultation Question: Do you agree with the Government's proposed approach to cost sharing as outlined above?

Consultation Question: Do you agree with the Government's proposed approach to the 6 month rule outlined above?

Consultation Question: Do you have any further comments on the draft Regulations?

### **Part 2 - Improving and expanding the Penalties Toolkit Available to the Market Surveillance Authority**

Consultation Question: Do you agree with the generic proposal to strengthen the criminal and civil sanctions available to the enforcement body?

Consultation Question – Do you agree with the range and type of administrative penalties proposed?

If you would like to see any further actions please give details. If you would like to see a smaller range of actions available please specify which actions you would not include and why.

Consultation Questions: Do you agree with the proposals to improve the criminal sanctions framework?

Consultation Question: Do you have any further suggestions for improving the enforcement options available to the MSA.

### **Part 3 - Draft Guidance Documentation EuP Implementing Measures agreed to end 2008**

Consultation Question: Does the guidance provide sufficient generic guidance to enable you to understand what you need to do before placing your products on the EU Market?

Consultation Question: Do you have any suggestions for improving the guidance? Any suggestions should take into account the fact that the Government cannot provide definitive legal interpretations or legislation and that it is not the intention that this guidance should cover all possible scenarios.

## **Annex B – Draft Amending Regulations – EuP**

Attached as separate documents

## **Annex C – Draft Amending Regulations – Labelling**

Attached as separate documents

## **Annex D – Initial Impact Assessment for the Market Surveillance Authority**

Attached as a separate document

## **Annex E – Draft Guidance notes**

Attached as a separate document

## **Annex F – Glossary**

DETI	Department of Enterprise, Trade and Investment
EC	European Commission
ETS	Emissions Trading System
ESM	Exceptional statutory maxima
EuP	Eco-design of Energy Using Products
FBEE	Fairer and Better Environmental Enforcement
LA	Local Authority
MSA	Market Surveillance Authority
MTP	Market Transformation Programme
NPV	Net Present Value
PVb	Present Value benefit
PVc	Present Value cost
RAMS	EU Regulation of Accreditation and Market Surveillance
RES Act	Regulatory Enforcement and Sanctions Act 2008
RoHs	Restriction of Hazardous Substances Directive
TSOs	Trading Standards Officers

## Annex G – Timetable for the Energy Using Products (EuP) and Energy Labelling Implementing Measures.

Product Group	Current Status	First Requirements
Off Mode and Stand-by	Regulation in force	Jan 2010
Simple Set Top Boxes	Regulation in force	Feb 2010
External Power Supplies	Regulation in force	April 2010
Domestic Lighting	Regulation in force	September 2009
Tertiary Lighting	Regulation in force	April 2010
Motors	Expected entry into force Autumn 2009	c. Autumn 2010
Domestic Cold Appliances	Expected entry into force Autumn 2009	c. Autumn 2010
Televisions	Expected entry into force Autumn 2009	c. Autumn 2010
Dishwashers	Vote in Summer, expected entry into force Autumn/Winter 2009	c. Autumn 2010
Washing machines	Expected entry into force Autumn 2009	c. Autumn 2010
Circulators	Expected entry into force Autumn 2009	c. Autumn 2010
Water Heaters	Vote in Autumn, expected entry into force Autumn/Winter 2009	c. Autumn 2010
Boilers	Vote expected Autumn/Winter 2009	Early 2011
Pumps	Vote expected Autumn/Winter 2009	Early 2011
Imaging Equipment (printers etc)	Initial discussions Autumn 2009	Mid 2011
Personal Computers	Initial discussions Autumn 2009	Mid 2011
Room Air Conditioners	Initial discussions Autumn 2009	Mid 2011
Complex Set Top Boxes	Initial discussions Autumn 2009	Mid 2011
Solid Fuel Boilers	Initial discussions Autumn 2009	Mid 2011
Commercial Refrigeration	Initial discussions Winter 2009	Late 2011
Non Domestic ventilation	Initial discussions Winter 2009	Late 2011
Vacuum Cleaners	Initial discussions Winter 2009	Late 2011
Laundry Driers	Initial discussions Winter 2009	Late 2011
Domestic lighting Phase II	Initial discussions Winter 2009	Late 2011

## How to Respond

**All responses should be submitted (preferably by e-mail) by close on Friday 4<sup>th</sup> September 2009.** Please state 'Compliance and Enforcement Consultation' clearly in the subject line and send to: [product.compliance@defra.gsi.gov.uk](mailto:product.compliance@defra.gsi.gov.uk)

Or by post to:

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Respondents in Scotland, Wales and Northern Ireland are asked to **copy** their responses to the relevant Devolved Administration (contacts are listed below):

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Please note that information contained in your responses may be published in a summary of responses. If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in email response will not be treated as such a request. You should also be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.