

Summary of responses to the Consultation on the Implementation of the Market Surveillance and Enforcement Requirements of the Eco-design of Energy Using Products and Energy Labelling Framework Directives held 11 June 2009 – 4 September 2009.

September 2009

Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London SW1P 3JR
Telephone 020 7238 6000
Website: www.defra.gov.uk

© Crown copyright 2009
Copyright in the typographical arrangement and design rests with the Crown.

This publication (excluding the royal arms and departmental logos) may be re-used free of charge in any format or medium provided that it is re-used accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

Information about this publication and further copies are available from:

Defra
Sarah Nicholson
5D Ergon House
London
SW1P 2AL
Tel: 020 7238 4741

Email: product.compliance@defra.gsi.gov.uk

This document is available on the Defra website:
<http://www.defra.gov.uk/corporate/consult/eup-labelling/index.htm>

Published by the Department for Environment, Food and Rural Affairs

Contents

- 1. Background 3
- 2. Summary of Responses 4
 - a. General 4
 - b. Part 1 5
 - c. Part 2 11
 - d. Part 3 12
- Annex A 15

1. Background

This consultation sought stakeholder views on three main topics:

Part 1 asked for comments on three options under consideration for which should be the Market Surveillance Authority (MSA) 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 options were:

- **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.

Part 2 aimed to gather stakeholder views on a proposed expansion of the enforcement options available to the Market Surveillance Authority (MSA), 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.

Part 3 aimed to gather views on draft Government guidance documents for the first 5 implementing measures recently agreed in Europe under the EuP Directive. These are: Standby and off mode power consumption, external power supplies, simple set top boxes, tertiary lighting and general lighting.

Thirty responses were received in total from a wide range of stakeholders including product manufacturers, trade associations, energy companies and green groups as well as one personal respondent.

This document summarises the responses and addresses the main issues raised by respondents in relation to each question in turn. This document does not represent an answer to every single point raised but provides an overview of the main issues and a Government response. There is a list of respondents at Annex A.

Responses to Part 1 of the consultation i.e. who should be the Market Surveillance Authority (MSA) have been dealt with in detail. Responses to Part 2 (Enforcement options) have been answered more generally, as another consultation on this issue is anticipated. Responses to Part 3 (Guidance) will be taken into account when publishing a final version of the guidance and have not been discussed in detail here.

2. Summary of Responses

General Comments

The vast majority of respondents were supportive of the move to strengthen compliance and enforcement for the Energy Using Products (EuP) and Energy Labelling Framework Directives by supporting the implementation of the Government's preferred option, **Option 2**, which calls for a Central Government Body or Agency already carrying out similar enforcement activities to enforce the manufacturer requirements to ensure products perform as claimed.

One respondent was concerned that any new measures brought in should be compatible with measures already existing and considered that by combining the requirements of the Framework Directives with other measures costs could be reduced, the time it takes products to come to market shortened and confusion between measures could be minimised.

One respondent agreed that the impact assessment was a thorough analysis of lighting, but was concerned that it took no account of the effect of the 'energy saving' light bulbs on light-sensitive patients.

One respondent criticised the layout of the document and suggested an alternative format.

There were several comments raised regarding the boilers product group, in that the proposed implementation of the EuP for lot 1 (boilers) is based upon 'system' labelling and that this causes significant problems as in reality the system cannot be tested in a laboratory. One respondent thought a solution could be to set up a new surveillance body within local authority building control departments to undertake this activity.

Government Response

Government notes stakeholder support for the proposals to strengthen compliance and enforcement for EuP and Labelling by appointing a dedicated Market Surveillance Authority (MSA). Government agrees that any new measures brought in should be compatible with those already in place. To this end, Defra will work closely with other Government Departments and other relevant bodies to ensure a harmonised approach.

An Equality Impact Assessment was drafted in advance of the EU Member State vote on lighting in December 2008. The impact on the health of the individuals identified by the Commission's expert scientists was raised by the UK at an EU level and is one key reason for allowing halogen lamps to remain on the market. Government has already been in close consultation with stakeholders on the specific issues mentioned here and the Department of Health is continuing to work with clinicians, patient groups and the lighting industry on this issue.

The Government notes the helpful comments made by several stakeholders on boilers and water heaters. The Ecodesign Implementing Measures on these product groups are at a draft stage and therefore subject to change. Once the measures are finalised, the Government will consider whether the approach for

other products is also appropriate for boilers and water heaters, or whether these measures will require a different approach. This will depend on a number of variables, such as which conformity assessment procedure is eventually agreed upon in Europe for these products and, if relevant, systems, and the balance of requirements on heating systems versus products.

As mentioned above, it will be important for the MSA to work closely with both other Government Departments and Industry, in order to ensure enforcement activity for heating systems is carried out in a workable and effective way.

Part 1 - The Proposed Options for the Market Surveillance Authority

Consultation Question 1.1 : Do you agree with the Government's view that Option 2 discussed in Part 1 should be taken forward?

The vast majority of respondents strongly supported the Government's preferred option (Option 2). Only one respondent thought Option 3 was preferable. Most of the respondents echoed the rationale contained in the impact assessment when clarifying the reasons for their support of Option 2.

Some held the view that the decentralised nature of Trading Standards Officers (TSO's) may lead to inconsistencies in approaches to enforcement and that a central body would remedy this problem. Some respondents acknowledged the need for an improved regime to ensure a level playing field for compliant businesses, while others thought that improvements in the regime could help ensure customer confidence, both in the claims made about products and in associated 'environmental claims' made by other companies for e.g. energy companies. Others were keen to safeguard the function of both Directives to deliver the maximum potential to reduce emissions, save consumers money and help drive environmental innovation.

Those who commented specifically on the enforcement of the Labelling Directive acknowledged that TSOs were best placed to continue to ensure the correct placement of the label in retail premises. However one respondent thought, depending on what the exact obligations on retailers were, that the responsibility for enforcement of the Labelling Directive might also be best placed with the Market Surveillance Authority.

Several respondents requested more clarity on the identity and role of the MSA, one respondent asked how it could be assured that funding for enforcement activities was used solely for this purpose (i.e. EuP and Energy Labelling).

Some respondents stressed the importance of the MSA being suitably technically competent and that it should be able to build and maintain adequate expertise to deal with both consumer and non-domestic products.

Another issue raised by respondents was the importance of positive communication and collaboration between the MSA and existing Government Departments, other testing bodies as well as across EU member states. The communication between the proposed MSA and the TSOs enforcing labelling was also thought important. The importance of enforcement activities being carried out in a spirit of cooperation between the MSA and business was also noted by some respondents.

Government Response

Because of the overwhelming support for Option 2 Government will bring the regulations into force as soon as possible, following which the Secretary of State will appoint an appropriate Market Surveillance Authority (MSA)

In brief the role of the MSA will be to:

- **provide an advisory role to businesses to encourage product compliance;**
- **monitor compliance and carry out risk based product testing;**
- **take action in cases where products are found to be non compliant. This can include requesting that products are withdrawn from the market and taking prosecutions where necessary;**
- **Communication and information sharing with other MSAs across Europe.**

More detail on the role and responsibilities of the new body will therefore be available in due course.

The Government agrees with comments on the need for the MSA to develop technical expertise and the importance of communication and collaboration, with both with other Member States and with manufacturers and retailers. To this end, Defra will work with the new MSA to ensure these important points are addressed within the scope of its activities. We will also ensure that any funding provided for market surveillance and enforcement is utilised in pursuit of the agreed role for the MSA.

Consultation Question 1.2 : Do you have any comments on the draft Regulations in Annex B and C intended to give effect to Option 2?

It was noted by some respondents that the regulations would require frequent updating as more implementing measures are agreed in order to add these products to the regulations.

Some respondents thought that the time limit for prosecution should remain at 6 months due to the short market time of many consumer products. This is discussed in more detail in question 1.7.

Government Response

The Government is aware that a significant number of measures are due to be agreed over the coming years, which will need to be added to the Regulations. However, in order to minimise disruption, the intention is to add these newly agreed products to the Regulations in batches where timing allows.

While some products may have a reasonably short market time, the Government does not believe this is a reason not to increase the time limit for prosecutions available to the MSA. The current time limit is one of the key barriers to taking action against non compliant products, as it is virtually impossible to carry out the necessary tests to demonstrate a product is non compliant in the time available.

Consultation Question 1.3 : If relevant, please give details of any alternative options that have not been examined here.

There were relatively few suggestions for alternative routes of enforcement, those that were suggested were specific to heating systems. Respondents suggested a new surveillance body should be considered within local authority building control departments to undertake this activity, given the installer's obligation to ensure that boilers are installed as described in the manufacturer's instructions and that they comply with building regulations.

Government Response

Please see the answer above in the General comments section with regard to heating systems.

Consultation Question 1.4: Do you agree with the information contained in the Impact Assessment? Is there any further information you would like to include.

There was broad agreement with the information contained in the impact assessment. Some thought it was important that the factors set out in the Impact Assessment which support the cost benefits of Option 2 should be taken into account when the MSA is set up.

One respondent thought the issue of public confidence in the impact assessment was underplayed and that a loss of public confidence in the energy efficiency claims of products could undermine confidence in other areas such as in energy saving schemes offered by energy companies

One respondent questioned the treatment of tolerances in the impact assessment and asserted that a sensible level of plus and minus tolerance should be both accepted and understood.

One respondent had several queries regarding the Impact Assessment. They thought that the total cost estimates for each of the suggested regimes needed to be more clearly explained. They also queried how the suggested additional policy areas could be covered (such as Energy Star) by the MSA.

Government Response

The impact assessment received overall support. It should be noted that, as with any impact assessment, the figures were intended to provide an evaluation of the options under consideration and that, as stated upfront in the assessment, it is essential to make a number of assumptions in order to consider a range of costs and benefits.

Government recognises the use of fair tolerances in the EuP Implementing measures. However, previous testing has shown that some products can perform consistently below the required level, but within the tolerance. This strongly implies that some manufacturers use the tolerance as an extra allowance. The impact assessment reflects that with increased surveillance, manufacturers might be less likely to use the tolerance and therefore product efficiencies in general should improve.

Consultation Question 1.5 : 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.

Again the vast majority of respondents agreed with the proposed amount of funding. Those that disagreed had doubts that the level of funding proposed would be sufficient to test a full representative sample of products. Respondents were keen that funding should be ringfenced to ensure targeted spending, that there should be regular reviews of progress and several organisations expressed a desire to work with Defra and the MSA in sharing both test results and enforcement best practice.

One respondent raised a concern that the estimated cost of testing was too high and questioned why the cost of retesting was included when a cost sharing approach was put forward in the document.

Some respondents, mainly from the lighting industry, thought that the testing regime could be more intensive based mainly on the fact that the volume of lighting products on the market is higher than that of other products.

One respondent thought that the approach was one of 'test first, ask questions later' and felt this was not proportionate or risk-based. They were also concerned about the effect of possible differences between test labs, in that manufacturers who have been tested in 'Lab A' in one way may be penalised because 'Lab B' tests products based upon a different interpretation of the standard.

Some respondents suggested that risk based testing should be used and that the funding should be targeted on products with the highest risk of environmental impact.

Government Response

The cost of testing was estimated based on the experience Defra has in carrying out its own product testing programme. The cost of retesting was included as the policy on cost sharing has not yet been finalised at this stage (see response to question 1.6 on cost sharing).

The Government fully supports the principles of risk based product testing. The proposed resources dedicated to the MSA can only cover a small proportion of the overall market for Energy using Products covered or soon to be covered by EuP implementing measures. It is acknowledged that some products (e.g. lighting) are more numerous on the market than others, and it is envisaged that the MSA will take market share into account as a factor when devising a testing programme. Government agrees it is important to ensure a meaningful sample of products can be tested from each product group. In this instance some respondents were in favour of cost sharing which would go some way to help ensure an adequate sample of products are tested.

The Government is keen to use only accredited laboratories for product testing in order to minimise any differences between laboratories. A key task of the European ADCO group is likely to be to consider how best Member States will be able to accept test results from Market Surveillance Authorities in other Member States, and accredited laboratories are likely to play a key role here. As a first step, in its

role as Chair of the ADCO next year, the UK is coordinating the production of a list of accredited laboratories throughout Europe that Market Surveillance Authorities can use for product testing.

Consultation Question 1.6 : Do you agree with the Government's proposed approach to cost sharing as outlined above?

Although the majority supported some form of cost sharing, there were differences of opinion in the way this should be implemented. Some felt the manufacturer should bear the cost in the first instance and others thought the MSA should bear the cost. Most suggested reimbursement of the costs (to either party) depending on the test result.

Some of the respondents felt strongly that, as the onus is on manufacturers to ensure products are compliant, they should be responsible for the subsequent testing after one failure i.e. that the onus should be on the manufacturer to demonstrate the product was a 'rogue' model. One respondent added that because testing costs were already high, the financial burden of the cost of four tests on the MSA could undermine the effectiveness of the testing programme. One respondent felt that this approach could reduce the reliance of manufacturers on tolerances and therefore maximise the environmental benefits of the directives.

Other respondents agreed with some form of cost sharing but thought that the cost of the tests in the first instance should be borne by the MSA. One considered it the MSA's responsibility to prove beyond all reasonable doubt that the organisation placing a product on the market has contravened the Regulations and that an upfront sharing of testing costs was not in keeping with the principles established in the 2005 Hampton review that regulators should aim to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection. They felt a more appropriate way of cost sharing would be to incorporate any testing costs into a fine if a product is proved non compliant.

One respondent considered it the UK Government responsibility to ensure compliance with the regulations and that the private sector should not be asked to fund the government to comply with European legislation. They also considered that some instances of non compliance may not be the fault of the manufacturer. One respondent thought this approach was not allowed by the directive.

One respondent suggested a way of reducing costs could be to allow the manufacturer to 'agree' to the breach in compliance after one test, remove the product from the market and work with the MSA to improve future compliance. In this case any enforcement action taken could be more lenient. Other respondents were also keen to ensure an open dialogue between MSA and manufacturers during the enforcement process to increase understanding and minimise further testing.

Government Response

The Government has decided that further discussion, both with stakeholders and the new MSA is needed before implementing a system of cost sharing. The Government believes that there is a place for cost sharing in the market surveillance regime in order to stretch limited resources, and once the MSA is in

place the Government will initiate discussions with the MSA and stakeholders about how best to implement a system of cost sharing.

Consultation Question 1.7: Do you agree with the Government's proposed approach to the 6 month rule outlined above?

Most respondents agreed that the time limit for prosecutions should be extended to 12 months. Some disagreed due to the short market lifespan of consumer electronic products. The concern is that in a 12 month period 2 or more generations of products could be developed, sold and replaced and that this would give little opportunity for manufacturers to apply corrective actions for products in the supply chain, and thus limit any environmental gains from enforcement.

Government Response

As noted in the response to question 1.2, the Government understands that some products have shorter market time than others. It is envisaged that the MSA will take this into account along with other factors when planning product testing and enforcement action.

Consultation Question 1.8 : Do you have any further comments on the draft Regulations?

One respondent stressed that the appeals procedure should be a third party independent one. Another considered the proposed penalty system too weak and suggested that regular testing and publication of the test results could be an effective deterrent.

Government Response

It is agreed that there should be a sufficient appeals process in place. This issue is currently under consideration and will be addressed in further detail in the second administrative penalties consultation. The appeals procedure has been strengthened in order to include a requirement for the Secretary of State to appoint an appeals body.

It is agreed the publication of testing results can be an effective information tool, and Defra is currently finalising testing reports from a recent programme of market picture product testing, which are soon to be published. The Government will consider together with the MSA whether there is a role for similar testing programmes once the MSA begins work in addition to the market surveillance testing the MSA will be carrying out.

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

The vast majority of stakeholders agreed with the plans put forward and were keen to see proportionate and effective enforcement i.e. that the punishment should fit the crime and that the level of penalty reflect the cost both to consumers, to society and reflect the scale of environmental damage.

There were queries regarding what the details of these proposals would be, and one recipient pointed out that this consultation is taking place at the same time as the Fairer and Better Environmental Enforcement (FBEE) consultation on the powers under the RES act.

Government response

The comments received in relation to these proposals will be taken into consideration at the next stage of the process. As stated in the consultation document, these are preliminary proposals only and are included as an indication of Governments current thinking on this issue. It is acknowledged in the document that the FBEE consultation is taking place and that there will be a further consultation on the detail of our proposals following the outcome of this consultation.

Consultation Question 2.1 : Do you agree with the generic proposal to strengthen the criminal and civil sanctions available to the enforcement body?

The vast majority of respondents agreed that strengthening of the criminal regime was needed in order to enable the MSA to punish non-compliance in a proportionate manner. One respondent pointed out that the criminal sanctions should remain and that criminal rather than civil sanctions should continue to be used to punish the very worst offenders.

One respondent stressed the importance of ensuring that non-compliant companies incurred higher costs (not the same costs) as compliant companies.

Government Response

Government agrees that criminal sanctions will still be needed in order to deal with the worst cases, but that the objectives of market surveillance and the aims of the new MSA would be better served if the MSA had at its disposal an array of possible actions which include both criminal sanctions and administrative measures.

The Government agrees that co-ordination between member states is of paramount importance, and to this end has been playing a leading role in discussions in the Ecodesign Administrative Cooperative meetings, which are meetings of Member State Market Surveillance Authorities. In particular, the UK has taken the Chair of the ADCO group for the year 2010-2011, and will focus first and foremost on how best to share information on product testing between Member State Authorities, and how to coordinate product testing across Europe such that different Member States can test different products and share the results.

Consultation Question 2.2 Are there any additional non-compliant activities you think should be on this list?

There were some activities that respondents thought were not on the list of non-compliant activities or that required clarification. The main points (in no particular order) were:

- That the decision of a surveillance authority as to whether to initiate civil or criminal proceedings must be open to question by judicial review.
- That the mechanism by which the MSA carried out surveillance should be protected i.e there should be clarification of what documentation manufacturers and/or legal importers would be required to provide and at which stage.
- That failure to comply with an instruction from the MSA, obstruction of an authorised officer, failure to make payments or undertake restitution as directed or the failure to comply with a business undertaking should be considered.
- What would happen if the manufacturer/ legal importer did not carry out required additional testing for non-compliant products (as per cost sharing provision) or failed to do so within the timeframe required
- No label applied to product

One respondent remarked that there was little benefit in attempting to categorise non-compliances in a purely legislative way. They considered that the severity of any offence can only be measured by considering a number of variables, including; impact on the environment, number, previous advice, impact on consumers, impact on other businesses, impact on the market of undertaking one particular sanction over another, etc.

Government Response

Government agrees that there may be little benefit in attempting to categorise non-compliances, and that a framework approach might work best in this case with each instance of non-compliance being dealt with individually. This would also facilitate a more collaborative approach between the MSA and manufacturers. This issue will be explored further in the next consultation.

Consultation Question 2.3 – 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.

There was broad agreement with the penalties proposed but, as expected at this early stage in the consultation several questions were raised on the detail of the proposals.

Some respondents were keen to see a fixed penalty system in place alongside the criminal sanctions, while others were more supportive of a system of variable monetary penalties and thought that each instance of non-compliance should be treated individually and a tailored solution found.

Respondents were in principle broadly in favour of introducing the enforcement undertakings and discretionary requirements. However, some respondents were concerned about the implications of requiring advertisement of the breach of compliance to producers and retailers and considered that any recourse to this form of action would need to consider the damage to the reputation of the company concerned.

Some questioned how variable monetary penalties would be calculated and disagreed with some of the factors that were suggested.

Government Response

There were several points raised which will not be discussed in detail here but will be incorporated into the further consultation on administrative penalties.

Consultation Question 2.4 Do you agree with the proposals to improve the criminal sanctions framework?

Most respondents agreed with the proposals with one agreeing that the dual system of both criminal and civil sanctions provides more flexibility helping to ensure that the penalty fits the crime.

One respondent requested more clarity on which current environmental offences such a system would mirror. For example, what will the minimum ESM fine be?

Government Response

Government agrees that criminal and civil sanctions can combine to create a proportionate and flexible system of penalties. More details on how the proposals can mirror those covered under the RES act will be incorporated in the penalties consultation, following the results of the FBEE consultation.

Consultation Question 2.5 : Do you have any further suggestions for improving the enforcement options available to the MSA.

There were few responses to this question. Those that did respond were keen to ensure that prosecution in one country would not automatically lead to prosecution in another for the same offence.

Another thought that the MSA should consider competitor surveillance as supplementary to its own internal testing regime. One reiterated that criminal conviction should be a last resort and that there should be a spirit of cooperation between manufacturers and the MSA.

Government Response

As enforcement of this legislation is a devolved matter, it does not follow that a prosecution in one Member State will result in a prosecution in another. Member States must inform the Commission and other Member States of action they take on non-compliant products. As noted elsewhere, it is likely that the ADCO group will have some function of sharing information on product testing throughout the EU.

The Government agrees with the sentiment that prosecution should be a last resort, and will encourage the MSA to develop productive relationships with manufacturers and use all means at its disposal to promote product compliance, not just prosecution.

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

Consultation Question 3.1 : 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?

One company thought that due to the complexity and diversity of Consumer Electronic products, clear guidance would not always be possible.

One company had some product specific technical questions on the guidance which will not be addressed here but will be incorporated, if appropriate, in further drafts.

Consultation Question 3.2 : 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.

There were some specific suggestions for improvement which will be taken into account in the drafting of the final guidance documents. Other more general points were that a flow chart or decision tree might be useful, that the guidance should be considered as a 'live' document and updated as experience and expertise build up; that there should be cooperation between member states and that references to Commission guidance should be included where appropriate.

Government Response

The Government would like to thank stakeholders for their considered responses to the draft guidance. The points raised will be taken into account when producing the final guidance documents. It is expected that the final documents will be published towards the end of the year, together with draft guidance for the more recently agreed implementing measures.

Annex A

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

List of Respondents

- Association of Manufacturers of Domestic Appliances (AMDEA)
- Association of Signals, Lighting and other Highway Electrical Contractors - Highway Electrical Manufacturers and Suppliers Association (ASLEC-HEMSA)
- Bosch
- British Gas
- Ceres Power
- EBM PAPST
- EchoStar
- EDF Energy (EDF)
- Energy Saving Trust (EST)
- Department of Business, Innovation and Skills (BIS)
- Federation of Environmental Trade Associations (FETA)
- Green Alliance
- Heating and Hot Water Industry Council (HHIC)
- Intellect
- Kohler Mira
- Lighting Association
- Lighting Quality Assurance
- Lighting Industry Federation (LIF)
- Local Authorities Coordinators of Regulatory Services (LACORS)
- Micro Power Council
- National Measurement Office (NMO)
- Oil Firing Technical Association (OFTEC)
- Pace
- Professional Lighting Designers' Association (PLDA)
- Scottish and Southern Energy (SSE)
- SONY
- SPECTRUM
- Steffen Taschner
- Waste Watch
- Which?