Consultation on the introduction of Civil Sanctions and Cost Sharing for the Energy Using Products and Energy Labelling Regulations

23 March 2010
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Introduction

The Purpose of the Consultation

1. **Part 1** asks for comments on the Government’s preferred approach to introduce a civil sanctions regime to enforce the requirements under the Ecodesign for Energy Using Products (EuP) and Energy Labelling legislation. This part of the consultation also seeks views on the accompanying initial Impact Assessment and draft Regulations.

2. **Part 2** asks for comments on the Government’s preferred option on how costs should be shared between the Government and industry for the market surveillance activities (i.e. testing of products) under the requirements of the EuP and Energy Labelling legislation. This part of the consultation also seeks views on the accompanying draft Regulations and the Initial Impact Assessments.

3. The draft regulations attached are the Energy Using Product amending Regulations (Annex 2) and the Energy Labelling amending Regulations (Annex 3).

Background

The Energy Labelling Framework Directive

4. 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.

5. 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.

6. 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

7. 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%.

8. 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 ecodesign 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.

Product Specific Measures under the Ecodesign Framework Directive

9. 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 20 or so products to be subject to implementing measures has been the energy they consume while in use.

10. To date, Member States have approved Regulations for ten product groups: Standby and off mode power Consumption, Simple Set Top Boxes, External Power Supplies, General and Tertiary Lighting, Motors, Televisions, Circulators and Refrigerators. These measures are coming in to force throughout 2009 and 2010/11.

11. 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 per annum 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 CO2 per annum by 2020. A number of further measures are currently under discussion in
Europe with some 20 further measures covering other products planned over the coming 2-3 years.

Transposition

12. 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 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 obligation for Member States to put in place a robust market surveillance and enforcement regime is satisfied.

13. 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'.

Previous Consultation


15. This consultation examined the rationale and options for putting in place a Market Surveillance Authority (MSA) as required by the Ecodesign of Energy using Products (EuP) and Energy Labelling Framework Directives. As a result of the feedback received, the preferred option to give this function to a dedicated team in a different Government Agency was chosen. The role of MSA was subsequently given to the National Measurement Office (NMO) on 2 November 2009.

16. The consultation also included preliminary proposals on a proposed civil sanctions regime and on a system of sharing compliance testing costs. This consultation looks at these proposals in detail.
Appointment of the National Measurement Office as the Market Surveillance Authority for Energy Using Products and Energy Labelling

17. In November 2009, the National Measurement Office (NMO) began work as the MSA for the EuP and Energy Labelling Directives. The NMO is an Executive Agency of the Department for Business, Innovation and Skills (BIS) and, amongst other things, has responsibility for ensuring that trade measurements used by both industry and consumers are fair, accurate and legal.

18. The NMO also acts as the MSA under the Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations (RoHS) and the Batteries and Accumulators (Placing on the Market) Regulations.

19. One of the reasons that the NMO were awarded the role of MSA is their commitment to a collaborative approach to market surveillance and enforcement. The NMO are dedicated to working closely with industry, including manufacturers, retailers and importers, to raise awareness of and improve understanding of the obligations of the EuP and Labelling Directives and to encourage and assist companies in their compliance.

20. NMO will carry out consistent enforcement of the EuP and Labelling Directives across England, Scotland, Wales and Northern Ireland adopting a risk-based, proportionate and targeted approach to inspection and enforcement. NMO will carry out a programme of risk based compliance testing, in accredited testing laboratories, in order to identify non compliant products.

21. In accordance with the general approach, the MSA will judge each breach in compliance on its individual merits and focus on bringing products into compliance, rather than moving straight to issuing penalties or prosecution. This approach fits well with the proposals put forward in this paper for a flexible and proportionate system of civil sanctions.

Hampton Principles

22. It is a requirement of better regulation principles that anybody with the responsibility for enforcing civil sanctions does so in line with Hampton Principles (see Box 1). One of the reasons Defra gave the responsibility for the enforcement of this legislation to the NMO is their positive approach to the Hampton compliance process.

23. The NMO has recently been subject to a Hampton Implementation review by the Better Regulation Executive (BRE). The review concluded that overall the NMO:
• is an open and accessible regulator with a good level of engagement with its stakeholders;
• has technical expertise that is widely recognised, well respected and trusted; and
• engages well with its stakeholders, with a good approach to consultation and use of feedback.

24. Hampton Compliance is an ongoing process and the NMO continue to work with the Better Regulation Executive to ensure that civil sanctions will be used in accordance with the principles of Better Regulation.


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<td>The Government accepted in full the Hampton report’s vision for enforcement being primarily light-touch and comprehensively risk based. At the same time, it recognised that the available sanctions were not always a deterrent to serious non compliance and needed to be toughened. This led to a review of regulatory sanctions, carried out for the Government, by Professor Richard Macrory.</td>
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<td><strong>Macrory Review (2006)</strong></td>
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<td>The Macrory report recommended that regulators should have a more flexible set of enforcement measures to use in ways proportionate to the extent and seriousness of non compliance, and any harm that had been caused. Also, that guidelines on criminal sentencing in regulatory cases would assist the courts in imposing proportionate sanctions on offenders. The Government accepted the Macrory recommendations in full.</td>
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**Current Levels of Product Compliance**

26. Our initial estimates on the rate of non compliance were based in part on the European wide research carried out by the European consumer standardisation group ANEC, which suggested that around 15% of energy using products placed on the market are non compliant with energy labelling and minimum standards legislation.

27. For the purposes of the impact assessment carried out on options for better market surveillance arrangements, the estimated overall rate of non compliance was set at 6.2%. This estimated non compliance rate was considered to be a very conservative estimate and this has been borne out by the recent Market Picture Testing carried out by Defra where a large percentage (in some cases 100%) of products did not meet the claims on their labels. We therefore estimate the rate of non compliance could be as high as, if not higher than, 25%.
Impacts of Non Compliance

28. 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 CO2 savings potential of these policies;
- financial consequences in terms of highly cost effective CO2 savings not realised;
- public health impacts and knock on financial consequences in terms of 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.

29. The Impact Assessment carried out on options for better market surveillance arrangements contained 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.

30. 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 for the period 2010-2020. The Government believes this is a significant underestimate 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.

31. The impact assessment estimates the benefits of non compliance, which are formed mainly from the costs of compliance not being met by business, at £336m for the period 2010-2020. Therefore, the Net Present Value foregone over the period 2010-2020 due to non compliance is £364m, although as noted above, we believe this is a significant underestimate.

32. The appointment of the MSA and the introduction of a risk based system of product testing is the first step to bringing down the rate of non compliance. It is expected that the implementation of this system has a positive effect on non compliance, as
the NMO carries out compliance awareness activities and business will be adverse to the publication of negative testing results. However, awareness raising and testing can only go so far to bring about the level of compliance we hope to achieve. A flexible and proportionate system of penalties is also needed to ensure that penalties are 'effective, proportionate and dissuasive', as required by the Directive.
Part 1 - Introducing Civil Sanctions

Background

33. The consultation responses received last year indicated that there is broad agreement amongst stakeholders on the principles behind the introduction of civil sanctions to enforce compliance with the EuP and Energy Labelling implementing measures.

34. The vast majority of stakeholders agreed with the need for a proportionate and effective enforcement regime. Respondents were keen that in regard to incidences of non compliance, the punishment should fit the crime and that the level of penalty applied should reflect costs to consumers and to society and should also reflect the scale of environmental damage caused by the compliance breach.

35. The consultation responses revealed that many businesses placed a high importance on maintaining a level playing field and they wanted to ensure non compliant companies incurred higher costs (not the same costs) as compliant companies. Respondents were also in favour of keeping criminal sanctions in order to punish the worst offenders.

36. Although in broad support of a new regime, many acknowledged the need for further clarification on the details. This document sets out in detail the proposals for a new civil sanctions regime.

The Current Situation

37. Currently, only criminal sanctions are available to the MSA in cases where products are found to be non compliant. Cases brought against non compliant manufacturers can be tried at a Magistrate court or Crown court. It is likely that around 95% of cases would be tried at the Magistrates court where the maximum fine for non compliance is £5000. Fines are unlimited in the Crown court.

Introducing Civil Sanctions

38. In 2006, the Macrory Review\(^1\) 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.

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39. Macrory found that the regulatory system placed too heavy a reliance on prosecution. There were also too many cases where offenders are left with financial benefit from non compliance, undermining compliant businesses. Too often there was no requirement on offenders to restore damage caused by their non compliance.

40. In some cases prosecution was not proportionate but some sanction would still be justified. The lack of available intermediate sanctions for this purpose left a “compliance gap”. Civil sanctions are an effective alternative to prosecution in suitable cases, providing a more proportionate approach and filling the compliance gap.

41. The report identified six principles that should underpin any regulatory sanctioning regime:

- Aim to change the behaviour of the offender;
- Aim to eliminate any financial gain or benefit from non compliance;
- Be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- Be proportionate to the nature of the offence and the harm caused;
- Aim to restore the harm caused by the regulatory non compliance, where appropriate; and
- Aim to deter future non compliance.

42. 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, proportionate penalties are essential to ensure a level playing field for business by ensuring that non compliant companies incur the same or higher costs than compliant companies.

43. Introducing a system of civil sanctions has the potential to be the most effective method for resolving many instances of non compliance, as well as providing a sufficient deterrent in the first place to discourage non compliance.

44. Such penalties would enable the MSA to choose the ‘best fit’ of enforcement options for each individual case. Proportionate and effective sanctions will do more to level the playing field for compliant businesses and remove economic advantage from those who fail to comply. Civil sanctions also fit with the better regulation ‘less is more’ agenda and are in keeping with established Hampton Principles.

45. The EuP and Energy Labelling Directives currently cover over 10 different product groups and will eventually cover many more (30+). Products covered are from both the domestic and commercial sectors and range from Fridges and Washing Machines to TVs to Electric Motors and Lighting. Because of the differences between
these product groups a one size fits all, rigid sanctions regime would offer significantly less flexibility for Regulators.

46. The NMO aims to work collaboratively with business. Civil sanctions allow a better graduated response to instances of non compliance. Non compliant companies would be able to work with the MSA and volunteer 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.

Proposed Civil Sanctions Framework

47. It is proposed the following Civil Sanctions are available to MSAs are in-keeping with the findings of Hampton and Macrory as well as mirroring, as closely as possible, the proposals set out by the “Fairer and Better Environmental Enforcement” (see Box 2) consultation recently run by Defra in order to maintain consistency in environmental regulation.

Box 2. The Fairer and Better Environmental Enforcement Project

There are several similarities between this work and the ongoing Fairer and Better Environmental Enforcement project which looks at the penalty regime for a broad range of environmental legislation, building on the Regulatory Enforcement and Sanctions (RES) Act.

These proposals have been produced in order to mirror, where appropriate, the FBEE proposals, in order to ensure a consistent approach to sanctions across Government. Even though Ecodesign and Energy Labelling are not subject to the requirements of the RES Act, Defra is keen to follow the principles set down in the RES Act to ensure consistency with other regimes.

48. To enforce compliance with the Energy Using Products Framework Directive Implementing Measures, it is proposed the MSA are able to use the following enforcement actions:

- Compliance Notice
- Stop Notice
- Enforcement Undertakings
- Variable Monetary Penalty

49. For Energy Using Products – the MSA will be able to enforce compliance by issuing, for retailers and manufacturers – either a Compliance notice (CN), a Stop Notice (SN) and by agreeing to Enforcement Undertakings (EU). Additionally, for manufacturers the MSA will be able issue a Variable Monetary Penalty (VMP)

50. For Energy Labelling, the MSA will be able to issue a Compliance notice (CN) and a Stop Notice (SN), agree Enforcement Undertakings (EU) and a Variable Monetary Penalty (VMP) to manufacturers. Details for each of the Civil Sanctions are set out below.

51. As proposed in the previous consultation, Trading Standards retain the responsibility for checking the requirements of retailers to display the energy label correctly.

**Types of Civil Sanctions Available to the MSA**

52. Detailed procedures for issuing each of the following notices will be included in the guidance which will be produced in due course by the NMO, however in summary the notices will be applied as follows.

**Compliance Notice (CN)**

53. A CN is a written notice issued by the MSA which requires a business to take actions to bring products into compliance with the law and/or return to compliance within a specified period. For example, a business could be required to take steps to re-label appliances or make minor adjustments to its design, manufacturing or product testing processes. It will be an offence to ignore a compliance notice.

**Stop Notice (SN)**

54. A SN is a written notice which requires the business to remove a non compliant product from the market. It can be used either to stop the placing of the product onto the market until the operator has taken the steps specified in the notice, or it may be imposed where the MSA thinks the operator may be likely to put a non compliant product into the market.

55. The SN is designed to encourage the operator back into compliance by prohibiting the business from carrying on with the activity until the steps needed to secure compliance with the law have been taken. For example, the notice could specify that a business improves the product in order to bring it into compliance. It will be an offence to ignore a stop notice.

**Enforcement Undertakings (EU)**
56. An EU is a voluntary agreement by a business to undertake specific actions that would make amends for non compliance and its effects within a specified timeframe. Although in practice it may be the business that brings the non compliance to the MSA’s attention, it is for the MSA to decide whether or not to accept the EU.

57. The enforcement undertakings that are agreed between the MSA and the business will be unique for each incidence of non compliance. However, for illustrative purposes only, the following is a list of actions which COULD be considered appropriate by the MSA:

- A manufacturer could agree to advertise the breach in the models compliance to consumers and retailers and agree to undertake specific action in order to ensure compliance in the future;
- A manufacturer or retailer could offer to consumers a reimbursement of costs for the product or offer a replacement model;
- A manufacturer or retailer could reimburse customers’ electricity costs based on the difference between the expected and the actual performance of the model;
- A manufacturer could agree to either change the labelling of further products, upgrade the models energy efficiency, and/or improve quality assurance procedures or in-house testing procedures and provide evidence of this to the MSA.

58. The onus here is on business to put forward practical and workable solutions to the MSA. The MSA will not be expected to enter into protracted negotiations over Enforcement Undertakings and will be able to refuse to accept any unreasonable proposals put forward and use other more suitable methods to enforce compliance.

Variable Monetary Penalties (VMPs)

59. A VMP is a monetary penalty which the MSA may impose for moderate to serious offences where the MSA decides that prosecution is not in the public interest. A VMP can be issued in conjunction with a CN or an SN. Where notices are combined for the same offence, then they should be imposed by the MSA at the same time.

60. A VMP will enable the MSA to set a monetary penalty at a level that removes any financial benefit from committing the offence. We are aware that the equivalent VMP’s being made available by the FBEE project will have an upper limit of £250,000, however we believe that the gains to be made from selling non compliant products could be far higher than this level of cap. In order to deter future non compliance and protect the level playing field for compliant business, VMPs for selling non compliant products should remain for the MSA to determine depending on the scale of the compliance breach that has occurred. Therefore we do not propose a cap for VMPs in this area.
Q1. Consultation Question: Do you believe that VMPs should be capped? If so, why and at what level?

61. Guidance produced by the MSA is required to set out the process for determining a VMP, however in summary a VMP should:

- Remove any financial benefit from non compliance;
- Apply penalties for behaviour that has aggravated non compliance but is still not sufficiently serious in the MSA’s view to deserve prosecution; and
- Reflect the environmental damaged caused by the breach in compliance.

62. Each instance of non compliance will be treated individually by the MSA, however an example of some of the factors which MAY be taken into account in determining a VMP include:

- The severity of the breach in compliance i.e. the difference between the efficiency claimed and the actual efficiency;
- The number of models on the market;
- The number of sales of the model;
- The additional CO2 emitted as a result of non compliant products being placed on the market.

63. As the overriding aim is to bring companies into compliance, the costs incurred by a company for making a product compliant could be deducted from the VMP. This will be for the MSA to decide.

64. An Impact Assessment (Annex 5) aimed at setting out the cost and benefits of introducing civil sanctions is based upon the Impact Assessment initially produced for the consultation on who should be the MSA. There are no new costs and benefits contained in this impact assessment as the proposed measures safeguard the cost and benefits already claimed.

Q2. Consultation Question: Do you agree with the range of Civil Sanctions proposed? If not, why not and how would you change the proposed regime?

Q3. Consultation Question: Do you agree with the information contained in the Impact Assessment?

Procedure for Imposing Civil Sanctions
65. Before imposing either a VMP or a CN, the MSA must first serve the business with a ‘notice of intent’ telling it what is proposed. The notice must include certain information:

- the grounds for proposing to impose the notice;
- the amount to be paid;
- the right to make representations and objections and the period within which they may be made – the period will be 28 days beginning with the day the notice is received; and
- the circumstances in which the MSA is not allowed to impose the notice: where a business has a defence, as set out in the legislation that created the offence.

66. The business will then have the right to make written representations and objections to the MSA about the proposal to impose a CN or VMP.

67. Because Stop Notices are intended for the most serious of breaches in compliance, the MSA is not required to serve a notice of intent. Where Stop Notices are served, there is a very high risk of a large amount of severely non compliant products being introduced to the market.

68. For VMPs and CNs, if, after the time period for representations has passed, the MSA decides to impose a notice, it must serve a ‘final notice’, which contains the following information:

i. the grounds for imposing the notice;
ii. the amount to be paid;
iii. if a variable monetary penalty is imposed, how payment may be made and the period within which it must be made;
iv. rights of appeal; and
v. the consequences of failing to comply with the notice.

Q4. Consultation Question: Do you agree with the proposed procedure for issuing a notice of intent? If not, why not and what would you change?

When will the MSA use civil sanctions?

69. Business will wish to have a general understanding of what factors would point towards prosecution instead of the alternative civil sanctions.

70. The MSA is required by law to produce guidance which outlines the way in which they typically reach enforcement decisions at present and which illustrates how they
71. The MSA will continue to have regard to the Code for Crown Prosecutors when deciding whether or not to prosecute.

**Monitoring and Review**

72. The introduction of civil sanctions will be reviewed two years after the implementation of the policy. Defra will work with the MSA to ensure that suitable information is gathered from the first operational use of civil sanctions onwards, so that the use and impact of the new sanctions can be assessed.

73. Defra is working with the MSA to agree suitable indicators of performance and will be required to produce performance reports against the agreed milestones, as well as publish an annual report to Defra. Defra and the NMO have agreed to meet on a quarterly basis to monitor performance and discuss relevant issues.

**Q5. Consultation Question:** Do you agree with the proposed review period?

74. In line with the requirements of the FBEE project the MSA will be required to publish the details of enforcement action taken on a regular basis.

**Guidance**

75. Guidance will be published by the NMO in due course following the result of this consultation. Any MSA who carries out this function in the future will be required by regulation to produce guidance. The guidance will set out clear procedures for carrying out each type of enforcement action as well as outline the appeals procedures.

**Q6. Consultation Question:** Is there anything further you think should be taken into account when the NMO produces guidance?

**Appeals**

76. It is anticipated that the MSAs collaborative approach to compliance will enable issues to be addressed in many cases without the need for appeals. However, it is still important that there is a robust system in place to deal with appeals against civil sanctions. It is proposed that, in line with Defra’s FBEE proposals, appeals are heard by the First Tier Tribunal.
How would a business go about making an appeal?

77. In the first instance, representations can be made against the notice of intent which must be served by the MSA before enforcement action is carried out. Appeals can also be made against VMPs, CNs and SNs. The mechanism for appeals will be clearly set out in the guidance produced by the NMO.

Appeals to the First-tier Tribunal

78. Appeals will be made to the General Regulatory Chamber of the First-tier Tribunal. The tribunal is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure cases are dealt with in the interest of justice and minimising parties’ costs. The composition of a tribunal is a matter for the Senior President of Tribunals to decide, and may include non legal members with suitable expertise or experience in the issues in an appeal in addition to Tribunal Judiciary.

79. The General Regulatory Chamber operates under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases. Rule 2 of the draft General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the tribunal judge wide case management powers in order to achieve these objectives.

Onward appeal from the tribunal

80. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Q7. Consultation Question: Are you satisfied with the proposed procedures for appeals? If not, why not?

Q8. Consultation Question: Do you consider that the General Regulatory Chamber Rules will suit the handling of appeals against civil penalties imposed for offences by the regulator? If not, why not?

The General Regulatory Chamber Rules may be found at: http://www.opsi.gov.uk/si/si2009/uksi_20091976_en_1
Part 2 – Introducing a System for Cost Sharing

Background

81. The verification of requirements under the Ecodesign and Energy Labelling Regulations involve a long and costly testing programme where in order to demonstrate (non)compliance with the Regulations, a product often requires a total of 4 tests (depending on the product group) which can cost in total between £10,000 and £20,000 to prove that a product is non compliant. (See Box 3 for more information on testing costs.)

Box 3. Costs of Compliance Testing
Most of the EuP implementing measures (i.e. Regulations) set down detailed criteria for product testing. In particular, they require that most products need to be tested a total of 4 times to prove that they are not a ‘rogue’ model and are therefore not compliant with the Regulations (a different regime applies to some products such as industrial motors and lamps).

Broadly speaking, an appliance must be tested once, and if the performance of the product is outside the range permitted (within a tolerance, usually 15%), a further three models must be tested, and the average result of these tests (usually within a tolerance of 10%) determines whether the product is compliant.

Testing costs can vary hugely (e.g. the cost of testing a lamp is a fraction of the cost of testing an item of commercial refrigeration) but our recent experience of testing white goods showed the average cost per product to be around £3000. Thus, the costs of testing 4 models can easily reach £10,000 - £20,000. These testing costs involve not only the laboratory test costs, but also the costs incurred when purchasing the test models from the retailer, staffing costs, and laboratory costs amongst others.

82. In June 2009, the Consultation on the Implementation of the Market Surveillance and Enforcement Requirements included a proposal for sharing the extremely high costs incurred during product testing between Government and industry, in order to maximise the budget allocated to market surveillance activities. The consultation proposed a system whereby Government would pay for the initial test and if the product were to fail outside the accepted tolerance level, industry would have to fund the cost of the following three tests, regardless of the end result. Although the proposal was not outlined in detail, the consultation responses indicated that while stakeholders were not opposed to a system of cost sharing in principle, there were conflicting opinions as to how the policy should be carried out.
83. A share of respondents felt strongly that responsibility lies with the manufacturer to ensure their products are compliant and that they should therefore take on a share of the testing costs. In particular, stakeholders highlighted that the benefits of the Government’s market surveillance activities could be undermined if the financial burden of the tests remained solely with Government. However, some stakeholders 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 the Hampton principles that regulators should aim to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

84. The consultation responses revealed that stakeholders appreciate the need for maintaining a level playing field for businesses and for differentiating clearly between responsible and rogue businesses. In general, respondents welcomed an open dialogue between the enforcement authority and manufacturers throughout the monitoring and enforcement process, in order to increase understanding and minimise testing.

85. Although stakeholders showed broad support for cost sharing, Government has acknowledged the need for further clarification of the policy. This document sets out in detail the Government’s revised preferred option for the cost sharing of product testing.

The Current Situation

86. There are millions of products covered by existing and similar forthcoming Regulations, so any cost effective testing regime will only ever be able to cover a small fraction of products on the market. It is essential that a meaningful range of products and models on the market are subject to testing, in order to have an impact on the current non compliance rate.

87. The Government needs to maximise the number of risk based products tested for a given budget, in order to ensure there is sufficient pressure for business to comply with Ecodesign and Energy Labelling requirements, and to secure a level playing field amongst competitors. Additionally, if industry shares the responsibility of market surveillance costs with Government, they will have greater incentive to ensure their products are compliant.

Market Surveillance Activities: Product Testing

88. Under the current legislation, the Government is responsible for the full costs of product testing. Only a limited number of products can be tested, at a high cost, due
to the burden of paying for the first test as well as the three further tests for each product that fails the initial test. The amount of different products tested is further limited if the number of products failing the first test is high.

89. The shortcomings of the current system are:

- Industry has less incentive to improve product compliance as they are not responsible for the cost of carrying out tests for the purpose of market surveillance;
- Due to budget constraints and expensive testing costs, fewer products can be tested. This risks the substantial benefits of appointing a dedicated MSA and risks increasing the rates of non compliance as new product requirements are implemented under the Ecodesign and Energy Labelling regulations;
- As the MSA, in this case the NMO, adheres to the Hampton principle of focussing on bringing products into compliance rather than prosecuting manufacturers, we expect the number of prosecutions and (therefore recovery of cost) to be minimal;

Government’s Preferred Option

90. The preferred option is to adopt a system of cost sharing between Government and business which is fair and incentivises compliance. The preferred option is for the Government to fund all tests carried out on a product in the first instance, but following proof of non compliance (usually after 4 tests), the business would have to reimburse all testing costs back to Government. These costs include the product purchase from the retailer, the laboratory costs, staffing costs, storage and disposal of the tested product. The enforcement authority would have to produce advisory guidance explaining the different costs along with an estimate of what these costs will amount to.

91. Introducing a system for cost sharing will provide an additional incentive for businesses to comply with the monitoring and enforcement regime under the Ecodesign and Energy Labelling Regulations. If businesses are placing non compliant products on the market, the knowledge they will have to pay for testing costs, as well as face additional civil sanctions, may render them more likely to cooperate with the market surveillance authority before they are faced with additional sanctions.

92. The preferred cost sharing regime introduces an effective deterrent to non compliance, as it creates a clearer distinction between responsible and rogue businesses. Compliant and non compliant businesses will be distinguished from one another, as only the non compliant businesses will bear the impacts of this policy: if a rogue business is placing a large amount of non compliant products on the market,
they become an easier target for product testing. The more tests that are carried out on a business’ products, the more costs the business will have to reimburse. There will be no negative impacts on compliant and responsible businesses. This will help maintain a level playing field for industry and help close the compliance gap. The benefits estimated in the previous impact assessment on compliance and enforcement will therefore be safeguarded and could even increase with the implementation of the preferred option (see Impact Assessment on Cost Sharing in Annex 6).

Draft regulations intended to give effect to this cost sharing regime are attached at Annex 2 and 3.

Q9. Consultation Question: Do you agree with the preferred cost sharing option? If not, why not?

Q10. Consultation Questions: Do you have any comments on the accompanying Impact Assessment?

How would this Cost Sharing regime work?

93. The MSA carries out tests on behalf of the Secretary of State on a risk based approach, in line with Hampton principles and according to the requirements of Schedule 4 of the EuP Regulations 2007\(^3\). Once the MSA has selected which product to test, it will purchase the chosen product from a retailer. The Government funds all costs incurred for the first test on the selected product.

94. If the product passes the first test, with the results falling within the relevant tolerance level, the product is considered as conforming to the Regulations. Government does not propose to share any testing costs with industry under these circumstances.

95. If the product fails the first test by falling outside the relevant tolerance level, the MSA must then conduct a further three tests (for most product groups). The three tests can determine if a product was either (a) a rogue model or if there was a laboratory fault, or (b) non compliant:

96. If the average of the further three products fall within the permitted tolerance level, the product can be considered as conforming to the Regulations. Government will fund all the costs of these tests.

\(^3\) Ecodesign for Energy Using Products Regulations 2007, SI 2037
97. If the average of three further test results falls outside the permitted tolerance level, the product is considered to be non compliant with the Regulations. The Government can ask the business to reimburse all costs incurred throughout the first and three subsequent tests (laboratory, product, staffing costs etc), as well as proceed with any appropriate administrative penalties or civil sanctions. Government must then inform the business that it intends to recover the costs of the tests by issuing the non compliant business with a notice of intent. The MSA will then send the business an invoice, on behalf of the Secretary of State, for all the costs incurred throughout the testing process, which must be paid within 28 days.

98. In instances where the testing requirements are different, e.g. for lamps (where 20 samples are tested), a similar principle will be applied, i.e. that if the product fails the tests, the manufacturer will need to reimburse all the costs incurred throughout the 20 tests.

99. The MSA must be satisfied beyond reasonable doubt that the product tested has proven non compliant before requesting the costs be shared with the non compliant business.

100. A non compliant business must pay the costs of the failed tests, unless it has reason to appeal the recovery notice issued by the MSA.

101. The MSA will also publish and maintain guidance on the general level of costs. These costs will include ‘inter alia’: indicative costs for laboratory testing, product purchasing, staffing costs. Actual testing costs may vary depending on the product tested. This guidance will be updated regularly to keep the cost information up to date as far as possible and shall be made publically available to ensure the transparency and accountability of the enforcement authority’s activities and costs.

Q11. Consultation Question: Do you agree with the proposed procedure? If not, why not and what alternatives would you propose?

Review

102. The cost sharing option will be reviewed two years after the implementation of the policy. Defra and the MSA will collaborate with other Member State market surveillance authorities to bring into line EU Member State approaches on cost sharing, in order to maintain a consistent approach for industry throughout the internal market.

Q12. Consultation Question: Do you have any further comments on the rest of the consultation documents?
**Useful Links**

Annex 1 – Full List of Consultation Questions

Q1. Consultation Question: Do you believe that VMPs should be capped? If so, why and at what level?

Q2. Consultation Question: Do you agree with the range of Civil Sanctions proposed? If not, why not and how would you change the proposed regime?

Q3. Consultation Question: Do you agree with the information contained in the Impact Assessment?

Q4. Consultation Question: Do you agree with the proposed procedure for issuing a notice of intent? If not, why not and what would you change?

Q5. Consultation Question: Do you agree with the proposed review period?

Q6. Consultation Question: Is there anything further you think should be taken into account when the NMO produces guidance?

Q7. Consultation Question: Are you satisfied with the proposed procedures for appeals? If not, why not?

Q8. Consultation Question: Do you consider that the General Regulatory Chamber Rules will suit the handling of appeals against civil penalties imposed for offences by the regulator? If not, why not?

Q9. Consultation Question: Do you agree with the preferred cost sharing option? If not, why not?

Q10. Consultation Questions: Do you have any comments on the accompanying Impact Assessment?

Q11. Consultation Question: Do you agree with the proposed procedure? If not, why not and what alternatives would you propose?

Q12. Consultation Question: Do you have any further comments on the rest of the consultation documents?

Attached as a separate document

Annex 3 – Draft Energy Information (Amendment) (Civil Sanctions) Regulations 2010

Attached as a separate document

Annex 4 – Draft Impact Assessment on Civil Sanctions

Attached as a separate document

Annex 5 – Draft Impact Assessment on Cost Sharing

Attached as a separate document
Annex 6 – Glossary

BIS – Department for Business Innovation and Skills

BRE – Better Regulation Executive

CN – Compliance Notice


EU – Enforcement Undertaking


FBEE – Fairer and Better Environmental Enforcement

MSA – Market Surveillance Authority

NMO – National Measurement Office

NPb – Net Present Benefit

NPc – Net Present Cost

NPV – Net Present Value

RAMS – Regulation of Accreditation and Market Surveillance (765/2008/EC)

RES Act – Regulatory Enforcement and Sanctions Act 2008

RoHs – Restriction of Hazardous Substances Directive

SN - Stop Notice

VMP – Variable Monetary Penalty
How to Respond

All responses should be submitted (preferably by e-mail) by close on Tuesday 15th June 2010. Please either complete the attached Consultation Response form or send your comments directly, stating ‘Compliance and Enforcement Consultation’ clearly in the subject line to: product.compliance@defra.gsi.gov.uk

Or by post to:
Maria Grace
Compliance and Enforcement Consultation
Department for Environment, Food and Rural Affairs
Area 5D, Ergon House
Horseferry Road
London
SW1P 2AL

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

Scotland
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Energy Efficiency & Microgeneration Team
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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.