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European Ecodesign Compliance Project

Work Package 2: Overcoming Barriers and Establishing Best Practices

Best Practice Guidelines for Coordinated and Effective Ecodesign Market Surveillance

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Summary

These guidelines aim to describe *best practices for ecodesign market surveillance*. The main target group for these guidelines are Ecodesign Market Surveillance Authorities (MSAs). The guidelines have been formulated based on the experiences and analyses gained within the Ecopliant project. The recommendations laid out in these guidelines are a summary of seven separate subtask reports, which were finalised by Ecopliant subtask leaders in 2014.

The project partners believe that this paper will give a valuable input on how to monitor, verify and enforce ecodesign requirements for energy related products.

However, the recommendations in these guidelines are not meant to infringe national legislation or national prioritisations. In addition, the recommendations are in many cases to be seen as *good practices*, and not always *best practices*, since it is not possible to define best practices that suit all Member States and all MSAs.

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Note: This document has been elaborated within Ecopliant project Work Package 2 and constitutes D2.4 Best Practice Guidelines

The sole responsibility for the content of this document lies with the partners of the Ecopliant project. It does not necessarily reflect the opinion of the European Union. Neither the Executive Agency for Small and Medium-sized Enterprises (EASME) nor the European Commission are responsible for any use that may be made of the information contained therein.

1 Introduction

1.1 Scope of the Ecopliant Guidelines

The purpose of these guidelines is to describe *best practices for ecodesign market surveillance*. The main target group for these guidelines are Ecodesign MSAs. The guidelines have been formulated based on the experiences and analyses gained within the Ecopliant project¹.

The project has collected and analysed existing practices used by major international and national MSAs for ecodesign market surveillance. Project partners have shared their own experiences and the project has also collected input from other EU/EEA MSAs with an extensive survey. The project carried out a pilot action for coordinated market surveillance, including e.g. joint laboratory testing and document inspection actions, to practically assess the feasibility of the selected best practices. In addition, the findings have been discussed during a series of training seminars held in 2014 for MSA personnel, in which both consortium members, Member States representatives and other EEA countries have participated.

Based on these experiences, this *Best Practice Guidelines for Coordinated and Effective Ecodesign Market Surveillance* has been developed.

These guidelines constitute a balanced and agreed summary of findings and recommendations included in seven different subtask Reports, released by Ecopliant subtask leaders in October 2014². For a detailed description of the covered areas, including the specific best practice recommendations, it is recommended to read the subtask reports.

The recommendations in these guidelines are not meant to infringe national legislation or national prioritisations. In addition, the recommendations are in many cases to be seen as *good practices*, and not always *best practices*, since it is not possible to define best practices that suit all Member States and all MSAs.

1.2 Existing literature for MV&E of EU product legislation

Monitoring, verification and enforcement (MV&E) activities for market surveillance is a complex and multi-faceted matter. To describe *all* aspects of market surveillance, and develop an overall guidance for best practice for MSAs, is not possible within the Ecopliant project. The project focused only on the most relevant aspects of ecodesign market surveillance.

A lot of work in the area of MV&E has already been done for other EU product-related Directives, for example in the consumer product safety area. Market surveillance procedures for product safety and for product performance are not fully comparable or interchangeable, but there are similarities.

¹The Ecopliant project was granted financial support by the IEE-programme in early 2012. The project consortium consists of eleven partners; most of them market surveillance authorities (MSAs) for Ecodesign and some of them agencies and policy makers. The partners come from Denmark, Finland, Germany, Hungary, Ireland, Italy, The Netherlands, Spain, Sweden and the UK. Project coordination is led by UK DECC.

² Available at <http://www.ecopliant.eu/wp2-reports-establish-best-practice/>

PROSAFE³ has published a book on Best Practice Techniques in Market Surveillance⁴, known amongst PROSAFE members and market surveillance officers as "the Book". Although related to consumer products/product safety market surveillance, some of the best practices described in the PROSAFE reports are relevant for ecodesign market surveillance, especially in terms of the general overview on procedures.

Another publication that deals with international best practices for market surveillance is "Compliance Counts: A Practitioner's Guidebook on Best Practice Monitoring, Verification, and Enforcement for Appliance Standards & Labelling" by Mark Ellis and Ass in partnership with CLASP⁵.

References to other national, EU and international publications related to market surveillance can be found in the subtask reports, on the Ecopliant project website.

1.3 Primary goal of the Ecopliant Guidelines

The Ecopliant project limited its scope to develop and describe the best practice procedures that are specific for ecodesign market surveillance. By adopting this approach, Ecopliant avoided duplication of existing and already documented experiences that have been developed by other projects/studies and give its valuable contribution by preparing reliable material on the specific issues related to ecodesign market surveillance.

The main focus of the Ecopliant guidelines for coordinated and effective ecodesign market surveillance is:

- Organisation and strategy in national market surveillance
- How to establish inspection programmes
- How to select products for inspection
- How to identify EEA-wide product model numbers
- How to conduct document inspection
- How to conduct compliance verification laboratory tests
- Sharing of inspection results amongst MSAs
- How to enforce the provisions of the ecodesign regulations

The Ecopliant Team believes that these guidelines will give valuable input to the MSAs on how to carry out national, but also EU-coordinated, effective ecodesign market surveillance activities.

1.4 The legal base

The general objective of market surveillance is to ensure that products placed on the Community market, put into service or made available, comply with applicable product-related legislation and that the products do not endanger health, safety or any other aspect of protection of public

³ PROSAFE (Product Safety) is a non-profit professional organisation for market surveillance authorities and officers from throughout the EEA.

⁴ See: http://www.prosafe.org/read_write/file/EMARS_Best_Practice_Book.pdf

⁵ Available at http://www.clasponline.org/~media/Files/SLDocuments/2006-2011/2010-09_MVEGuidebookSingle.pdf

interests, e.g. energy efficiency. Market surveillance is carried out in a number of different areas, by different authorities and with backgrounds in different legislation.

Market surveillance is essential for the functioning of the Single Market, in order to protect European consumers against risks presented by non-compliant products. In addition, market surveillance helps to protect responsible businesses from unfair competition by unscrupulous economic operators who ignore the rules.

There are a number of Directives and Regulations that form the legal base for market surveillance:

1.4.1 Regulation (EC) No 765/2008

General requirements for market surveillance on products available on the EU market are stated in the EU Regulation 765/2008 on accreditation and market surveillance⁶.

1.4.2 The Ecodesign Directive for Energy-Related Products 2009/125/EC, the implementing measures and the national legislations transposing the Directive

The legal base for ecodesign market surveillance is also to be found in the sectorial legislation, i.e. the ecodesign framework Directive⁷ 2009/125/EC and in the national legislation of Member States transposing the Directive. In addition, specific criteria that are essential for market surveillance can also be found in the implementing measures (regulations)⁸.

Market surveillance according to the Ecodesign Directive is the responsibility of all Member States. Member States are requested to appoint national market surveillance authorities, as stated in Article 3(2):

2. Member States shall designate the authorities responsible for market surveillance. They shall arrange for such authorities to have and use the necessary powers to take the appropriate measures incumbent upon them under this Directive. Member States shall define the tasks, powers and organisational arrangements of the competent authorities which shall be entitled to:

- (a) organise appropriate checks on product compliance, on an adequate scale, and oblige the manufacturer or its authorised representative to recall non-compliant products from the market in accordance with Article 7;
- (b) require the parties concerned to provide all necessary information, as specified in the implementing measures;
- (c) take samples of products and subject them to compliance checks.

3. Member States shall keep the Commission informed about the results of the market surveillance, and where appropriate, the Commission shall pass on such information to the other Member States.

4. Member States shall ensure that consumers and other interested parties are given an opportunity to submit observations on product compliance to the competent authorities.

⁶ [Regulation \(EC\) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products](#)

⁷ [Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products](#)

⁸ http://ec.europa.eu/growth/industry/sustainability/ecodesign/index_en.htm

1.4.3 Commission proposal COM (2013) 75 for a regulation on market surveillance of products

In February 2013, the European Commission proposed a new package of legislative and non-legislative measures to improve consumer product safety and to strengthen market surveillance of products in the EU⁹. The package includes a proposal for a “Regulation on market surveillance”. One reason for this proposal was that EU rules on market surveillance are fragmented and scattered over several different pieces of legislation, thus creating gaps and overlaps. The legislative proposals by the Commission aim to enable improved coordination of the way authorities check products and enforce product directives across the European Union.

The package is still being discussed in the European Parliament and in the Council. At the time of writing (March 2015), it is not known when the new legislation will come into force.

1.4.4 The Ecodesign ADCO

Ecodesign Market Surveillance Administrative Cooperation (Ecodesign ADCO) is an EU forum for cooperation between national MSAs responsible for the market surveillance of products covered by Directive 2009/125/EC and its implementing measures. It meets twice a year to discuss experiences in market surveillance practices and possible open issues for products covered by ecodesign regulations. All national market surveillance authorities for ecodesign of the EEA countries are asked to participate in the ADCO Ecodesign Group and to share the outcomes of the meetings.

⁹ <http://ec.europa.eu/consumers/safety/psmsp/>

2 Best Practice Guidelines

The main outcome of the experiences and analyses gained within the Ecopliant project are described in the below paragraphs. The Ecopliant Team recommends reading the seven developed subtask reports in order to have a complete picture of all findings and recommendations¹⁰. In some cases, the seven subtask reports present the views and recommendations by each responsible subtask leader. The recommendations you find in the Best Practice Guidelines, as described below, are the agreed recommendations from the whole Ecopliant Team.

The recommendations in these guidelines are not meant to infringe national legislation or national prioritisations. In addition, the recommendations are in many cases to be seen as *good practices*, and not always *best practices*, since it is not possible to define best practices that suit all Member States and all MSAs. In some chapters, you will find examples that illustrate how various issues are dealt with in various Member States.

2.1 Organisation and strategy in national market surveillance

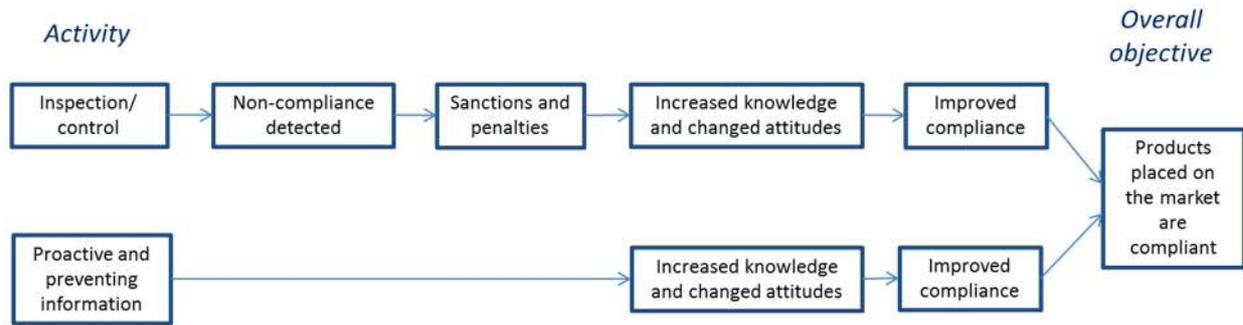
Member States are responsible for surveillance activities on their own territory. It is up to each Member State how to organise its market surveillance within the framework of the legislation. In this respect the adopted solutions vary among Member States:

- Some have delegated market surveillance responsibilities for a number of product related Directives and Regulations at one or a few national market surveillance authorities.
- Some on the other hand, have chosen the same Authority to be in charge of both ecodesign market surveillance and ecodesign and energy policy development.
- Others have organised the ecodesign market surveillance at regional level, with one common national coordinator.
- And in others, the responsibility for ecodesign market surveillance is divided between two different MSAs, typically one for consumer products and one for industrial products.

MSAs can use in-house personnel for all market surveillance activities. Some MSAs do however also use the expertise of other public bodies, such as energy Agencies and/or private sector subcontractors, for example when it comes to communication, technical expertise, document inspections and, of course, external test laboratories.

In addition to inspection and control activities, many MSAs arrange proactive and preventative activities to inform manufacturers and their representatives or importers about the ecodesign requirements that are in force or coming into force. This can also be a way to improve compliance, especially when it comes to newly adopted regulations.

¹⁰ Seven Ecopliant subtask reports available at <http://www.ecopliant.eu/wp2-reports-establish-best-practice/>



The role of proactive and preventative information activities in market surveillance

Examples of proactive and preventative information activities:

- Most commonly, MSAs hold information meetings, send out newsletters and publish guidelines on how to comply with the specific legislative provisions.
- Some MSAs issue brochures, guides and leaflets.
- Some MSAs work in cooperation with other public bodies such as Chambers of Commerce and national Agencies to disseminate information about the ecodesign requirements of products.
- MSAs can make public announcement beforehand to inform manufacturers and their representatives or importers about planned market surveillance action(s), by e.g. publishing their yearly market surveillance programme on their website.

Example of current practice:

Spanish MSA cooperates with industry in order to achieve higher level of compliance

The Spanish Ministry of Industry, in collaboration with the Foundation for the Promotion of Industrial Innovation (FFII), develops and updates a public access information point about industrial legislation:

<http://www.f2i2.net/legislacionseguridadindustrial/default.aspx>

Besides, the FFII teaches courses about the application of EU and national legislation to manufacturers and other stakeholders. These courses are co-financed by the Spanish Ministry of Industry. The courses include the information and figures of the most recent market surveillance activities in the Directive concerned and the general inspection plans of the year. This information include only generic reference to the products inspected but not any specific data about the products inspected (brands, model numbers, importers, etc.).

Some manufacturer associations collaborates with the Spanish Ministry by the signature of an agreement where the association pays for the samples and tests in an independent and accredited laboratory and transfers the test results as a complaint to the Ministry that follows the administrative procedure regarding complaints.

Some MSAs publish the results of market surveillance activities on their website or in other public forum. This can be a way of discouraging possible improper behaviour by market actors and can be seen as an extra sanction in case of non-compliance. Publication can be in the form of case-by-case-publications, sectorial reports or annual reports, all depending on national legislation and strategies.

Example of current practice:

Publishing results of market surveillance activities in the UK

The National Measurement Office (NMO) takes a considered view when deciding whether or not to publish results from market surveillance projects. When used correctly, the publication of results from market surveillance projects can be a meaningful sanction and so the decision to publish or not, must be based on a case by case basis and be proportionate to the offence, or level of non-compliance.

Results can be published via many formats e.g. news stories, press releases, reports etc; where appropriate, press releases are developed with the economic operator in question. Regardless of the format the NMO has found that the most effective platform to use when publishing is the NMO website. This allows greater control of content and of distribution. Content can be passive (published online with no announcement) or it can be active (an e-alert sent to those which subscribe to the NMOs Ecodesign pages). There are currently 3289 subscribers which comprise of consumer organisations, trade associations, manufacturers and media organisations. When used actively, subscribers can use content as they wish on their own 'third party' media platforms which, in turn enhances the impact of publishing results from market surveillance projects.

Since manufacturing, in many cases, is based outside of Europe, cooperation with customs authorities can be an effective way to prevent non-compliant products from entering the EU-market. However, customs have often other priorities and activities, which prevent them from questioning the compliance of imported products to the ecodesign legislation and to take the necessary action against products that might infringe these requirements. It might however be useful to actively inform national customs authorities about the Ecodesign regulations and relevant product requirements in force.

Harmonised standards play a very important role in market surveillance. Some MSAs take part in the national/EU or even international standardisation committees when standards are developed. The presence of MSAs among experts that define EU or international standards can be useful to ensure that the testing conditions and measurement methods set in the agreed standards are effectively applicable by MSAs when ecodesign requirements are challenged.

Some MSAs take part in the national processes when new Ecodesign regulations are developed and national positions are established, other MSA representatives participate in the meetings where ecodesign requirements are discussed and agreed among EU co-legislators. MSAs can have important input to the regulatory process, e.g. to ensure clear, consistent and enforceable new regulations and also regarding mandates for standardisation.

2.1.1.1 Recommendations for Ecodesign MSAs

- *Each Member State should consider how to organise its market surveillance in order to make it most appropriate for the specific national conditions.*
- *MSAs should consider whether in-house personnel should be used for all market surveillance activities or if external expertise should be used.*
- *MSAs can consider whether proactive and preventative activities should be carried out, in order to inform manufacturers, their representatives and importers about the ecodesign requirements that are in force or will come into force.*
- *MSAs should consider if the results of market surveillance activities should be published or made publicly available in other forms.*
- *Ecodesign MSAs should consider how to cooperate with national customs authorities in market surveillance.*
- *MSAs should consider being involved in national (and EU or even international) standardisation committees for the development of standards for harmonisation.*
- *MSAs should consider taking part in the formulation of a national position on proposed new legislation, especially regarding enforceability and mandates for standardisation.*

2.2 How to establish Inspection Programmes

Within these Guidelines, the expression “national inspection programme” is used to indicate a number of actions that go beyond product testing. An Inspection Programme can in fact include product laboratory testing, document(s) inspection, visual product checks and also other surveillance activities.

There are a number of different aspects to consider for MSAs when establishing national inspection programmes, e.g. resources available, consumer behaviour, national priorities, but also aspects like coordination of inspection programmes within and outside their own country, use of test laboratories, sharing of inspection results and the possibilities for third party funding.

The recommendations laid out in this section can be studied in detail in subtask report “*Subtask 1.4 Testing programmes and Full Compliance Testing Activities*”.

2.2.1 Development of national inspection programmes

When developing a national inspection programme, detecting non-compliant products is the main objective. However, each individual MSA might also see additional desired outputs of such programmes.

Article 3 (2) of the Ecodesign Directive states that:

Member States shall designate the authorities responsible for market surveillance. They shall arrange for such authorities to have and use the necessary powers to take the appropriate measures incumbent upon them under this Directive. Member States shall define the tasks, powers and organisational arrangements of the competent authorities which shall be entitled to:

- (a) Organise appropriate checks on product compliance, on an adequate scale, and oblige the manufacturer or its authorised representative to recall non-compliant products from the market in accordance with Article 7;
- (c) Take samples of products and subject them to compliance checks.

Therefore, national inspection programmes should be designed and developed to detect non-compliant products that have been or are being placed on the market. Factors such as national legislation, priorities and available resources then lead to the specific approach and procedures defined in each country by the national MSA(s).

When developing national inspection programmes, MSAs should focus attention both on the desired *outcome* (result) of the programme and *content* of the programme.

There are several outcomes that can be considered and expected from a national inspection programme:

1. To detect non-compliant products
2. To ensure that detected non-compliance is dealt with by appropriate enforcement actions
3. To gauge levels of compliance in order to get an overview of the market or for any other kind of data collection
4. To use non-compliance (suspected or confirmed) as a means to start a dialogue in order to engage industry or business.

There are different compliance verification methodologies that can be applied to achieve the expected outcome. The compliance verification methodologies that should be considered and described in the national inspection programme are:

- Compliance testing according to the relevant EU legislation procedure
- Checks of other requirements (e.g. document inspection or information requirements)
- Visual product checks (in situ/in laboratory)
- Screen testing¹¹.

This decision may be based on resource and national considerations.

Once the intended outcome and associated methodology have been established, there are several factors that may help to focus and finally determine the content of the inspection programme, i.e. what should actually be inspected, when, by whom and on what grounds. For example, product category (-ies) with a history of non-compliance can be targeted, or products covered by new legislation, or products with high energy consumption. Additional information on this issue can be found in chapter 2.3.

It is important to highlight that any inspection programme should include a strategy for disposal of products after the verification has been conducted. Considerations should not only be based on national legislation and/or policy but also where possible in keeping with the spirit of the Ecodesign Directive and other EU legislation on (electric and electronic) waste disposal, addressing environmental concerns by using reliable disposal routes.

2.2.1.1 Recommendations for Ecodesign MSAs

- *National inspection programmes should be designed and developed to effectively detect non-compliant products that have been or are being placed on the market*
- *When developing a national inspection programme:*
 - *Ensure that there is a clearly defined desired outcome (what would you like to achieve)*
 - *Ensure that there is a clearly defined desired content (which product categories and specific products to select)*
 - *Ensure that there is methodology to develop content (what methods should be used: testing, document inspections, visual inspections)*
 - *Ensure that there is a suitable disposal strategy in place.*

2.2.2 Coordination of inspection programmes

Coordination of inspection programmes between MSAs is an important way to use the available resources in the most efficient way. Coordination can be done between national MSAs, e.g. MSAs responsible for different product directives (energy labelling, RoHS and/or LVD-directives) and/or among regional MSA, or EU-wide, e.g. between Ecodesign MSAs. Sharing details of planned inspection programmes is not a legislative provision of the Directive. Although sharing results on non-compliant products is mandatory, many MSAs however currently share additional information in

¹¹ The definition of screen testing is given in chapter 2.3.

order to meet mutual objectives. Coordination opportunities might for example occur via the Ecodesign ADCO or on a regional level or even on an international level (i.e. coordination of market surveillance among major worldwide markets).

Sharing information, programme coordination and collaboration amongst MSAs provide numerous benefits, e.g. increased capacity and cost savings and increased access to laboratory facilities. In order to reduce administrative and regulatory burdens, manufacturers and importers often ask for greater coordination of market surveillance activities, between national authorities, when MSAs are assessing products that are subject to several product related directives. This can also improve the efficiency of MSAs.

There are some practical opportunities and tools for sharing of information between MSAs. A number of support systems are in place for MSAs at EU level, such as the Ecodesign ADCO (Administrative Cooperation), Circabc and ICSMS. More information regarding platforms where Ecodesign data can be shared see chapter 2.7.

There might however be barriers to an effective coordination of inspection programmes. Barriers to sharing details of planned inspection programmes can be typically explained by the following factors, which should be properly addressed if coordinated inspection programmes are to be successfully put in place:

- **Defined objectives:** the purpose of sharing information about planned inspection programmes should be set and agreed among participants. The task is to arrive at a coordination (or at a coordinated planning) of the inspection programmes.
- **Detail:** the level of detail (e.g. product category or model specific) to be shared, as this may impact on resources requested from each participant of a coordinated inspection programme.
- **Confidentiality:** ownership and access to data should be established and agreed in advance.
- **Communication:** contact points should be appointed to ensure proper communication and data flow and that any changes to inspection programmes are rapidly shared.
- **Time constraint:** careful time consideration and appropriate process planning is needed for establishing national inspection programmes
- **Flexibility:** the capability of each partner to positively manage changes in the initial process planning should be considered, since it varies between countries.

Example of current practice:

Sharing inspection programmes and data among the Nordic countries

The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have a close cooperation in Ecodesign and Energy labelling market surveillance since 2011. Since the Nordic markets for products are quite homogenous, often with the same manufacturers, importers and products, the conditions for market surveillance cooperation are good. All market surveillance officers in all five countries are more or less involved in the cooperation. As a part of this cooperation, the countries exchange their yearly market surveillance plans. So far, the plans have been shared by e-mails, but recently a webservice has been set up for sharing information.

By sharing market surveillance programmes, common inspection areas are identified at an early stage. If two or more countries have decided to test the same product category, reconciliations are done in order not to select the same product models. When inspections are done, the results are also shared. Because of the Nordic market being fairly homogenous, there have been cases where a non-compliant product have been withdrawn in several Nordic countries based on a test result from one country.

Example of current practice:

National-wide UK coordination

The National Measurement Office (NMO) is an Executive Agency for the Department of Business Innovation and Skills. However, the NMO are responsible for enforcing six EU Directives within the UK and therefore report to four Government Departments. Responsibility for some Directives within the UK is also 'split' between different authorities. For example, the Energy Labelling Directive is split between three UK authorities. Coordination (whether formal or informal) is therefore vital.

A key component of this is via the UK Market Surveillance Co-ordination Committee (MSCC). Membership of the MSCC is open to relevant government departments and agencies, public authorities, co-ordinating and professional bodies engaged in or with a policy interest in the market surveillance of products or border controls in the UK. Through the MSCC, best practice is shared and developed through the participation of joint actions and projects. The aim of this group is to take a co-ordinated and strategic approach to Market Surveillance policies and practices for products that are marketed in the UK and subject to Community harmonisation legislation or the General Product Safety Directive. The group therefore fulfils the function of a communication and co-ordination mechanism as envisaged by Article 18(1) of Regulation (EC) No 765/2008 (setting out the requirements for accreditation and market surveillance relating to the marketing of products - RAMS).

2.2.2.1 Recommendations for Ecodesign MSAs

- *When coordinating inspection programmes, ensure that existing opportunities – EU-wide and regional - are identified and taken advantage of*
- *When inspection programmes are written in national languages, ensure that there is a comprehensive summary in a widely shared language, for example English.*
- *Ensure also that barriers are identified and properly managed before coordinated inspection programmes are planned and developed*

2.3 How to select products for inspection

Ecodesign MSAs deal with a vast amount of product categories, brands and models. Therefore, it is necessary for the MSAs to carefully select products to be inspected. There are different targeting techniques and methods to use when selecting products for inspection. The different targeting methods have different benefits and effectiveness, depending also on the specific objective of the inspections (see the discussion in the previous chapter).

Targeting techniques can be used to select first the product categories and then the relevant brands and models. The product targeting should be justifiable on a number of grounds. In order to avoid criticism or bias, “guidelines” detailing the criteria used for targeting products for verification tests should be developed and published by the MSAs.

Product selection criteria can be divided into two main groups. Both give a different outcome:

1. “random or statistical based approach”
2. “targeted approach” (mostly risk-based sampling).

Risk-based sampling is a selection approach for products, brands and/or models based on a set of factors related to an increased risk of failing the compliance tests. “Risk” needs to be interpreted widely, to include risks posed by poor product coverage or non-responsiveness to stakeholder complaints. In general, it is more common to select products according to a set of criteria rather than choose a random sample for testing. Examples do exist on the combination of the random and the targeted approach for products selection.

Among the possible criteria, some appear to be most frequently used by MSAs. When selecting product categories, e.g. for national inspection programmes (see chapter 2.2 How to establish Inspection Programmes), the following selection criteria are more often used by Ecodesign MSAs:

- New legislation has come into force
- Products with high energy consumption
- Product category with a history of relative high levels of non-compliance
- Product category involved in international complaints.

For brand selection, Ecodesign MSAs more often use the following criteria:

- Brand with a history of non-compliance
- Brand involved in international complaints
- Brand with a high market share
- Brand in low price segment of the market.

When it comes to model selection, Ecodesign MSAs consider the following criteria of outmost importance:

- Model highlighted by other Member State complaints
- Model highlighted by intelligence or complaints from consumer groups and/or individuals
- Model for which the technical documentation indicates possible risks for technical non-compliance

- Model highlighted from complaints or findings of other organisations (i.e. environmental NGOs, EU projects, etc.).

In addition, some MSAs also have sampling strategies for the selection of the individual samples of the models that are to be inspected. The individual samples of the product to be verified should preferably be randomly chosen and picked-up by the MSAs to make sure that they are not "special" or "premium" units.

The so called *screening techniques* are one of a number of tools for the selection of products with a higher probability of being non-compliant. According to the working definition for the Ecopliant project, screening tests are: *“preliminary low cost screening test, used to assess the likelihood that a model will fail full compliance testing, before deciding whether to proceed with the full compliance testing in accredited laboratories. Screening tests can be carried out in the field or by MSA personnel, rather than by a sub-contracted accredited laboratory where all relevant parameters can be controlled”*.

Examples of screening techniques that have been applied, by some MSA, are:

- in situ/in shop measurements of “standby” power consumption of specific electrical household and office equipment in order to select products for further compliance verification
- using a simple test equipment for the measurement of the power consumption of electric power supplies, standby regulation products, simple set-top boxes and TVs
- use of simplified versions of the harmonised standards .

It is important to point out that a screening test is not the same as Step 1 of the EU verification procedure¹². MSA actions against economic operators cannot start based on a screening test result, but instead only on the basis of a suspected or verified non-compliance following the two Step procedure described in the EU ecodesign legislation. Screening tests can however be used to initiate an informal dialogue with the manufacturer for further clarification. Screening tests can initiate a closer inspection of the individual model’s official documents. Likewise, the documental inspection can lead to a screening test that in turn may highlight a higher risk of non-compliance and suggest a compliance verification procedure be taken forward.

The recommendations laid out in this section are described in detail in subtask report *“Subtask 1.3 Techniques for Selecting Products for Testing”*.

¹² The EU ecodesign implementing measures establish the procedure to be followed by MSA when verifying the compliance of products placed on the market or put into service. For the vast majority of products, a two Step procedure is foreseen: in Step 1, one unit of the model under investigation is purchased from the market and is tested in a laboratory according to the relevant (harmonised) standard. If the value(s) of the measured parameters are within the permitted tolerance with the declared value(s), the model passes the test and is consider compliant with the pertinent legislation. Otherwise, 3 additional units are again selected from the market and tested and the average of the measured parameters is again considered against the permitted tolerance. An exception is light sources, where a one-step only approach is defined.

2.3.1.1 Recommendations for Ecodesign MSAs

- *Effective product targeting is especially important when legislation (e.g. Ecodesign of ErP) deals with a large number of product categories, which not all may be subject to recurrent market surveillance activities.*
- *Well-thought-out targeting techniques should be applied when selecting product categories as well as brands and models for compliance inspection.*
- *Specific criteria ('risk factor') to select product categories, brands and specific models for compliance inspection can be applied. Important selection criteria for Ecodesign MSA are:*
 - *High energy consumption and new legislation covering a product.*
 - *High market share and history of non-compliance for brands.*
 - *Other Member State or international complaints*
 - *Ambiguities in the technical documentation for a model.*
- *The product targeting must be justifiable on a range of grounds. In order to avoid criticism or bias, "guidelines" detailing the criteria used for targeting products for verification tests should be published by the MSAs.*
- *Random and targeted product selection can be successfully combined with a market share approach.*
- *Product documentation inspection can be used as a product targeting technique prior to laboratory test. See chapter 2.5.*
- *Complaints or reports about possible non-compliant products from external parties can be an important targeting method.*
- *Screening tests can be a targeting tool for the selection of products with a higher probability of being non-compliant. Screening tests should however not be used to start any action against economic operators.*
- *The specific samples selected for testing need to be randomly chosen and picked-up by MSAs. They should be representative of what is being supplied to the market. If samples are obtained directly from the producer, MSA must ensure that the samples chosen are indeed randomly selected and not "premium" units.*

2.4 How to identify EEA-wide product model numbers

Under current EU market conditions a specific product model (appliance) is sometimes sold under different product model numbers and different trademarks, even if they are in technical terms the same product.

In line with the legislation, two or more products can be stated as “equivalent” by the manufacturer/importer if they have only aesthetic differences, different trademarks or different model references or commercial code numbers, but are equal regarding the technical characteristics (volume, size, load, energy & water consumption, efficiency, functional performance, etc.) and the applicable requirements of the Ecodesign directive and relevant implementing Regulation. In this case, this equivalence has to be stated in the technical documentation issued by the manufacturer/importer.

The documentation compiled by the manufacturer can also refer to a “basic model” of the product. The “basic model” in this respect means the model that has actually been tested and from which test reports, calculations and information of other models derive.

The different trademarks and different model identification for equivalent products are often a problem for MSAs controlling the national markets, and this is especially a barrier for increased coordination of market surveillance activities across the EU.

However, information that clarifies the situation for a certain product can be required by the MSAs, according to Annex VI of Ecodesign Directive 2009/125/EC. It states that the EC declaration of conformity must contain the following elements:

- the name and address of the manufacturer or of its authorised representative;
- a description of the model sufficient for its unambiguous identification

Some implementing measures (ecodesign Regulations) include additional requirements on how the manufacturer should address the issue of equivalent models.

MSAs can request the relevant information of equivalent models and basic models. This information needs to be provided by the manufacturer or importer to comply with the requirement of an unambiguous identification. The information should be included in the technical file as an “identity declaration”. This declaration should identify:

1. all equivalent models under the same or different trademarks placed on the Community market that are covered by the same technical file.
2. different models that are derived from the same “basic model” (when applicable): the way the specific information for a model is derived (e.g. via engineering calculations) from the test report of another model of the same product (the basic model) shall be described by the manufacturer/importer and be included in the documentation.

The identity declaration can be a part of the technical file or a separate document. If the technical file clarifies which models are actually equivalent or are derived from a basic one, and for which reasons, there is no need for a specific document.

The recommendations laid out in this section are described in detail in subtask report “*Subtask 1.1 Identifying EU wide product model numbers*”.

2.4.1.1 Recommendations for Ecodesign MSAs

- *MSAs should request information of equivalent models from the manufacturer or importer.*
- *MSAs should request information of products whose technical documentation is derived from the same “basic model” from the manufacturer or importer (when relevant).*
- *In order to identify the equivalent models and models whose technical documentation is derived from the same “basic model”, the following documents can be requested:*
 - *Identity declaration. To establish the appliances covered by the same technical file (equivalent models) and/or those derived by calculation from the same “basic model”.*
 - *Test reports. To identify the basic model.*
 - *Calculations. To justify the changes, if any, in the nominal values of some models with respect to the test report of the basic model.*

2.5 How to conduct document inspection

Products regulated under the Ecodesign Directive 2009/125/EC need to have a technical documentation file, consisting of documents relating to the conformity assessment that has been carried out by the manufacturer, making it possible for an assessment of the conformity of the product with the requirements of the directive and the relevant product specific regulation.

The technical documentation file consists of a number of documents, depending on the type of product. Requirements on the content of the technical documentation can be found both in the Ecodesign Directive and in the product specific implementing regulations. Typically, the technical documentation should include: test reports, technical information, calculations, a list of equivalent models (asked for by some implementing regulations) and of the appliances covered by the same technical file (identity declaration). In addition, the product should also always have an EU-declaration of conformity issued where the manufacturer or its authorised representative ensures and declares that the product complies with all relevant provisions of the applicable regulation(s).

The technical documentation file needs to fulfil the applicable requirements; otherwise the product does not meet the requirements of its corresponding ecodesign regulation. Therefore, document inspection is a methodology for market surveillance, often relatively inexpensive, and should be considered when establishing national inspection programmes (see chapter 2.2 How to establish Inspection Programmes). However, it is worth nothing that compliant documentation does not necessarily mean a technically compliant product and that an incomplete documentation does not necessarily mean a technically non-compliant product.

Example of current practice:

Checking of CE marking and DoC in Finland

Tukes: Finnish Safety and Chemicals Agency (Tukes) has very limited funds for ecodesign market surveillance, thus we often prefer document control instead of expensive tests, especially when dealing with bigger products. The easiest form of document inspection is to check the markings of the product (if there is access to the physical product) and to ask for the EU Declaration of Conformity (DoC). We think that if the product does not have CE marking and/or DoC, the economic operator is clearly not aware of the requirements of EU regulations, and the products need to be banned without any other proof of non-conformity. However, if there is some kind of effort put on the matter, but things are not exactly right (e.g. C and E are too close together, DoC doesn't have all the required information) then we just notify the economic operator about the flaws and ask them to fix them.

One important part of our job is to educate the Finnish manufacturers, importers and retailers. As part of this we have made different type of guides and even examples of DoCs. These can be found from our web page:

<http://www.tukes.fi/en/Branches/Electricity-and-lifts/Electrical-equipment/EC---Declaration-of-Conformity/>

Example of current practice:

Denmark uses document inspection as means to select models for lab testing

Laboratory testing of products according to Ecodesign-regulations can be an economic burden for MSAs. Thus, it can be a good idea to target the laboratory tests in order to reserve laboratory tests to models, with a well-founded suspicion of non-compliance. The Danish Market Authority usually begins inspection of a product series by conducting document inspections of several models. In cases where the documentation is clearly non-compliant, the product does not comply with the applicable regulation and actions can be taken directly. However, in many cases, the formal non-compliance cannot be established, but the MSA has a well-founded suspicion to base the further enforcement activities on.

On the basis of the information obtained from the document inspection, a subset of the inspected models is chosen for lab tests. When selecting models for lab tests on this basis, the following factors are inter alia taken into account:

- Models, which according to the results from the document inspections are clearly non-compliant, are excluded from laboratory tests.
- The brand's performance in previous inspections
- Overall impression of the presented documents (credibility, transparency, issuer of documents)

Example of current practice:

Document inspections in Spain

The procedure to conduct document inspection of one of the regional authorities in Spain is the following:

An inspector visits some shops and he selects some appliances. In the shop, he takes some pictures of the appliance, the energy label and requests to the seller the available documentation for the consumer.

Alternatively, when there is a specific complaint against a product that is sent to the Authority, the inspectors look for this product in the market and proceed as above. In some cases when the complaints come from other manufacturer, the inspector selects a similar product from the manufacturer that issued the complaint to be checked in the same way.

Later, the authority sends a written communication to the manufacturer that specifies the minimum content of the documentation requested (test report, declaration of conformity, etc.) and the measured technical parameters values that must be found in that documentation.

The documentation sent by the manufacturer is analyzed by the MSA and particularly it is checked that the rated values are suitably justified by the measured values of the test reports. In parallel, the manufacturer is officially asked about all the models covered by the same documentation in the Spanish market in order to ask for solutions for all of them when necessary.

Within the Ecopliant project, the minimum content of a technical documentation for a number of products have been identified. Based on this analysis, protocols for document inspections have been developed.

The recommendations laid out in this section, as well as the developed protocols, can be studied in detail in subtask report "*Subtask 1.2 Document Inspection Requirements*".

2.5.1.1 Recommendations for Ecodesign MSAs

- *Document inspection is an important part of market surveillance and should be considered when establishing national inspection programmes.*
- *Document inspection is a stand-alone activity: if the documentation of a product does not meet the requirements of its corresponding ecodesign regulation, the product does not comply with the relevant implementing measure under the Ecodesign Directive.*
- *It can also be used as a very useful method to select products for further compliance verification through laboratory testing.*
- *It is essential to define harmonised rules for inspections, including document inspections, for all the Member States. Otherwise, with different rules and procedures, the same manufacturer/importer could send the same documentation to different national MSAs in the same or different countries and find it was only accepted in some of them.*
- *Before starting a document inspection, the minimum content of the documentation and the rated and measured values to be provided according to the relevant implementing regulation(s) need to be clarified.*
- *The technical documentation file should include a list of all equivalent models of all products covered by the same technical file (identity declaration) and of the products where the same basic model is used to derive compliance by calculation or interpolation.*

- *It is necessary to check that the manufacturer has not used measurement tolerances prescribed in the legislation for MSA to achieve a more favourable score or classification than the test reported in the documentation.*

2.6 How to conduct compliance verification laboratory tests

The technical product compliance is determined through measurements done in test laboratories following harmonized standards or transitional method(s) published by the European Commission.

There are a number of different issues to consider for MSAs when conducting compliance tests, for example the use of qualified test laboratories, sharing of test results and possibilities for third party funding.

The recommendations laid out in this section are described in detail in subtask reports “*Subtask 1.4 Testing programmes and Full Compliance Testing Activities*” and “*Subtask 1.6 Sharing Data between Member States*”.

2.6.1 Compliance verification through laboratory testing activities

The purpose of this section is to describe how qualified (and possibly accredited) laboratories in the EEA should be used by MSAs for testing according to the verification procedure defined in the EU Ecodesign legislation.

The importance and use of accurate measurements in relation to the Ecodesign Directive is stressed throughout the product specific implementing measures, which state that:

“Measurements of the relevant product parameters should be performed using reliable, accurate and reproducible measurement methods, which take into account the recognised state-of-the-art measurement methods including, where available, harmonised standards adopted by the European standardisation bodies...”

The verification of product compliance through laboratory testing and the function that laboratories play in delivering reliable and accurate results is therefore central to the effective enforcement and success of the Ecodesign Directive. When selecting laboratories for testing, many MSAs base their choice on criteria as expertise, reliability of result, accreditation, available budget and services offered.

Accreditation itself guarantees a degree of reliability and expertise of the accredited laboratory and is viewed by many MSAs as an essential component in the process of laboratory selection.

When conducting verification testing, the usability of results should always be a consideration. Mutual recognition, which means the increased use and acceptance of results from qualified (and accredited) laboratories, including results from laboratories in other countries, is one way of achieving this. In this way, the International Laboratory Accreditation Cooperation ILAC vision of a 'product tested once and accepted everywhere'¹³ can be realised.

2.6.1.1 Recommendations for Ecodesign MSAs

- *When selecting laboratories, consider accreditation, competence and reliability of test results.*
- *When selecting laboratories, the following practical considerations should also be made:*
 - *Clear objectives, including the applicable verification procedure/harmonised standard to be used*

¹³ Source – ILAC www.ilac.org

- *Legal considerations, e.g. handling of evidence in line with national processes*
- *Financial planning*
- *Contingency planning, e.g. in the event of unforeseen circumstances*
- *Commercial incentives, e.g. when some laboratories require guarantees of work to ensure that acquiring accreditation is commercially viable*
- *Mutual recognition of the test results by other MSAs in other Member States*

2.6.2 Third Party Funding

The monitoring, verification and enforcement of the Ecodesign Directive requires resources (human, financial, time). In some cases, such resources can be beyond the national reach possibilities, making market surveillance almost impossible and as consequence putting at risk the Directive's intended economic and environmental benefits. Some MSAs consider funding by third parties as a way to enlarge the available economic resources for laboratory testing.

A third party can be described as any private or public subject not directly involved in market surveillance e.g. trades association, industry or grants, and other funding initiatives including European Commission's co-funded projects. There are several opportunities for third party funding which include but are not limited to the following:

- **Regulatory:** Some MSAs have for example powers which allow for the recovery of testing and other costs. This regulatory process can be considered as a reactive form of third party funding.
- **Industry Cooperation:** Some MSAs strive to build successful and proactive relationships with industry in order to develop and progress market surveillance projects which are mutually beneficial to both parties. Cooperation can come in many guises: direct funding (subsidies), indirect funding (access to human or laboratory resources) and shared work. This form of funding is considered as a mutually proactive form of third party funding.
- **EU Programmes:** Third party funding can also come via programme initiatives such as the Intelligent Energy Europe (IEE) programme that has co-funded the Ecopliant project. This form of funding is considered as a proactive form of third party funding.

2.6.2.1 Recommendations for Ecodesign MSAs

- *Different third party funding models can exist and can be used by MSAs as part of a balanced approach to raise financial resources in the context of national market surveillance actions.*
- *However, regardless of the model or models used, it is essential that a MSA retain the following characteristics as these factors help to support the operational effectiveness and efficiency of market surveillance:*
 - *Independence*
 - *Transparency*
 - *Impartiality*
 - *Objectivity.*

2.7 Sharing of inspection results amongst MSAs

It has been recognised that market surveillance, both at national and cross border level, can only be truly successful when public authorities cooperate and share information such as, but not limited to, test or documental inspection results. Therefore, results from national inspections should be shared between MSAs. This relates to document inspections and compliance verification laboratory test results. Although preliminary screening test results can also be shared. However, the intrinsic unknown reproducibility and lower reliability of such results (not achieved fully following a recognised measurement method and test conditions) makes them less usable at least for some MSAs. The results of product targeting can also be shared, in order to coordinate the efforts of different MSAs towards more risky products.

The recommendations laid out in this section are described in detail in subtask report “*Subtask 1.4 Testing programmes and Full Compliance Testing Activities*” and “*Subtask 1.6 Sharing Data between Member States*”.

The concept of exchanging information is not only mandatory under Article 12 of the Ecodesign Directive, but is also one of the guiding principles of Regulation (EC) No 765/2008 which sets out the mandatory requirements for accreditation and market surveillance relating to the marketing of products. In recital 27 of the Ecodesign Directive, it is also stated that surveillance authorities should exchange information according to Regulation (EC) No 765/2008. In addition, Article 3(3) of the Ecodesign Directive states that Member States are required to keep the Commission and, where appropriate, other Member States informed of their market surveillance results.

The desired outcome of the coordination and sharing of information regarding product inspection results is to create a collaborative approach to market surveillance. A collaborative approach ensures best use of resources amongst MSAs, avoids duplication of work and demonstrates to economic operators that compliance is a pan-European requirement, although addressed at national level.

Among MSAs that are sharing test results, the information is normally shared as soon as the process has ended or the non-compliance has been confirmed.

There are some practical opportunities and tools for sharing of test results. A number of support systems are in place for MSAs at EU level:

- ADCO: Member States are obliged to appoint MSAs in directive specific Administrative Cooperation (ADCO) Working Groups. The Ecodesign ADCO is currently (2015) chaired by the UK and meets twice a year as a forum for MSAs to exchange information and best practices.
- Circabc: The Communication and Information Resource Centre (Circa) is an electronic workspace developed by the Commission to allow with the secure sharing of documents for the various ADCO and other working or interest groups. It is accessible only to the members of these groups.
- RAPEX: The EU Rapid Alert System (RAPEX) is a system used to facilitate the rapid exchange of information and actions by MSAs to prevent or restrict products which present a serious risk to the health and safety of consumers. It is normally not relevant for Ecodesign aspects.
- ICSMS: ICSMS is the Commissions Information and Communication System for Market Surveillance. This database is owned by the EU Commission and all MSAs are obliged to use it to record information on products which present a risk (as specified in Regulation 765/2008). ICSMS

has so far generally been used more for recording market surveillance associated with product safety.

The Commission has recently stated that ICSMS should also be used for exchange of data regarding Ecodesign. It is however not possible to include detailed data on tested Ecodesign parameters in ICSMS.

- The Ecopliant database for Ecodesign data: The Ecopliant project has developed an online information repository that can allow Ecodesign MSAs to upload and communicate detailed results with each other. This tailor-made database, designed for use by all MSAs, can assist in developing ecodesign market surveillance. The database has been tried out within the Ecopliant project in order to assess its applicability and around 150 products from a number of different product categories have been uploaded by the partner MSAs.

The Ecopliant database has been built as a standalone Ecodesign-specific system and is not intended as a replacement for ICSMS^[1]. Ecopliant will offer the database to all Ecodesign MSAs in the end of the project (approximately April 2015). As using two repository systems can cause resourcing issues, a report outlining an approach towards enabling interactivity between ICSMS and the Ecopliant database has been prepared and submitted to the Project Partners and the Commission and a business analyst will be tasked with assessing the interface options and capabilities between ICSMS and the Ecopliant database. With this input, then the ICSMS technical team can carry out their element of the analysis towards enabling interactivity. The intention is that the two systems in a nearby future can merge or communicate with each other to avoid the duplication work.

The ability to share data has the dual benefits of improving the effectiveness of market surveillance across the EEA and at the same time of reducing its cost through the elimination of duplicated activity.

2.7.1.1 Recommendations for Ecodesign MSAs

- *Fulfil legislative obligations (European and national) relating to the exchange of information when carrying out market surveillance*
- *Make use of existing common and accessible formats or platforms:*
 - *The current version of the Ecopliant database could be used to share detailed data on all products inspected.*
 - *ICSMS could be used for sharing case data, especially regarding non-compliant products.*
- *Consider security and confidentiality issues which may restrict the sharing of information*
- *A register of MSA contacts should be created and maintained if successful communication is to be achieved.*

^[1] In the beginning of the Ecopliant project, ICSMS was reviewed for its suitability but was deemed to be more geared towards safety-based directives. Its use in the Ecopliant project was limited in that it only holds information on products which have been found to be non-compliant (excludes products inspected or tested which were found to be compliant) and cannot facilitate coordination or sharing of activities between Member States. Also, as the Ecopliant database is intended to contain classified and / or commercially sensitive information on testing plans of Member States and details of live enforcement cases, access must be restricted to EEA Ecodesign MSA's only.

2.8 How to enforce the provisions of the ecodesign regulations

Enforcement is the action taken by the market surveillance authorities against manufacturers and importers of non-compliant products. Enforcement relies on transparent and rigorous product inspection. Investment in this effort is necessary in order to protect market and consumers against non-compliant products.

The recommendations laid out in this section are described in detail in subtask report “*Subtask 1.5 Enforcement Activity Follow Up*”.

The legal enforcement systems for ecodesign vary between EU Member States. In the Ecodesign Directive, some general requirements are set out in Articles 3 and 7:

Member States should ensure that the necessary means are available for effective market surveillance. Member States shall take all appropriate measures to ensure that only products come on the market that comply. They shall designate the authorities responsible for market surveillance. They shall arrange for such authorities to have and use the necessary powers to take the appropriate measures incumbent upon them under the Ecodesign Directive. Member States shall define the tasks, powers, and organizational arrangements of the competent authorities which shall be entitled to e.g.

- organize appropriate checks
- requires the parties concerned to provide all necessary information
- take samples of products and subject them to compliance checks.

Where a Member State ascertains that a product is not compliant the manufacturer shall be obliged to make the product comply with the provisions of the applicable implementing measure. Where there is sufficient evidence that a product might be non-compliant, the Member State shall take the necessary measures which, depending on the gravity of the non-compliance, can go as far as the prohibition of the placing on the market of the product until compliance is established.

In case of prohibition or withdrawal from the market, the Commission and the other Member State shall be immediately informed. Any decision by a Member State pursuant to the Ecodesign Directive which restricts or prohibits the placing on the market and/or the putting into service of a product shall state the grounds on which it is based. Such decision shall be notified forthwith to the party concerned, who shall at the same time be informed of the legal remedies available under the laws in force in the Member State concerned and of the time limits to which such remedies are subject.

Member States should determine the penalties to be applied in cases of non-compliance; these penalties should be effective, proportionate and dissuasive, taking in account the extent of the non-compliance and the number of units of non-complying products placed on the Community market.

Member States shall ensure that appropriate measurements are taken to encourage the authorities responsible for the implementation of the Directive to cooperate with each other and provide each other and the Commission with information in order to assist the operation of the Ecodesign Directive.

Further legal requirements are also included in Regulation 765/2008:

- According to Article 16(2) Member States shall ensure that products that do not comply with the legislation are withdrawn or their being made available of the market is prohibited or restricted and that the other Member States are informed accordingly. Article 19(1)-(2) states that MSAs shall perform appropriate checks on the characteristics of products on an adequate scale, by means of documentary checks and, where appropriate, physical and laboratory checks on the basis of adequate samples. Economic operators are obligated to submit all necessary documentation and information that the MSA require.
- There are also some articles regarding cooperation and mutual assistance, e.g. Article 24. Article 23 concern information management. It is stated that the Commission shall develop and maintain a general archiving and exchange of information system, using electronic means, on issues relating to market surveillance activities, programmes and related information on non-compliance with Community harmonization legislation.

For several product directives, including the Ecodesign directive, it has been decided ICSMS is the system that is referred to in 765/2008.

In practice, when finding a suspected non-compliant product, many MSAs follow an approach that starts with confronting the manufacturer/importer with the results of the inspection. The reaction of the manufacturer decides how the MSA will proceed. If remedy actions are proposed by the manufacturer, and these are acceptable and completed in a satisfactory manner, the MSA might close the case. In other scenarios, the MSA might decide to initiate a physical test of the product, or, if the product has failed Step 1 of the verification procedure, to test additional three unit of the product (Step 2 of the verification procedure). Depending on the circumstances, fines and sales bans can be executed.

Example of current practice:

Denmark: Enforcement is more than legal prosecution

When non-compliance has been established by the market inspection, the manufacturer is informed and given the opportunity to comment on the result of the inspection. The manufacturer is offered – on a voluntary basis – to correct or to withdraw the non-compliant product from the market, short-cutting the legal procedure, which can be both costly and cumbersome for the manufacturer.

In each case of non-compliance, the Danish MSA considers to provide information and guidance instead of legal action, especially if:

- The regulation is new, or a new tier in the regulation has recently entered into force
- The violation is minor
- Similar infringements seems to be common in the market
- The manufacturer is not a recurrent deviator

Information and guidance activities are often faster and easier to carry out than legal action. Guides published on the MSA's website and/or distributed in a newsletter may lead to a higher compliance rate than legal prosecution against a limited number of proven non-compliant models. However, information and guidance can both supplement and replace legal action.

Results of both compliant and non-compliant products are published on the DEA website. The publication always includes a notice stating complaint products are not to be taken as an endorsement by DEA since not all testing parameters may have been validated.

Example of current practice:

Enforcement in the UK

Within the UK, Statutory Instrument 2010 No. 2617 (The Ecodesign for Energy-Related Products Regulations 2010)¹⁴, provides the National Measurement Office (NMO) with powers to enforce the ecodesign regulations. A key component of this is via the use of civil sanctions and cost recovery. Civil sanctions allow for discretionary, proportionate and cost effective courses of enforcement action to be taken.

NMO: Where an offence has been committed and after considering all of the evidence available to us and all of the actions of the economic operator concerned we will consider issuing some form of sanction as well as any other preventative or remedial action as deemed appropriate. Where appropriate we will require manufacturers to pay for the costs of testing, if it is proven that their product does not comply with the Regulations.

In 2006 the Macrory Review¹⁵ identified six principles that should underpin any regulatory sanctioning regime, which are included in the Regulators Compliance Code¹⁶:

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

The sanctions available under the Ecodesign for Energy-Related Products Regulations 2010 are:

-Compliance Notice - A compliance notice is a written notice which requires an economic operator to take actions to bring products into compliance with the law and/or return to compliance within a specified period.

-Variable Monetary Penalty - A variable monetary penalty is a monetary penalty designed to eliminate financial gain or benefit which we may impose for moderate to serious offences. A variable monetary penalty can be issued in conjunction with a compliance notice or a stop notice.

-Stop Notice - A stop notice is a written notice which requires the economic operator to take immediate action in relation to an offence prohibiting an economic operator from carrying on an activity.

-Enforcement Undertaking - An enforcement undertaking is a voluntary agreement driven by an economic operator to undertake specific actions that would make amends for non-compliance and its effects within a specified timeframe.

The Government believes that regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of workers, consumers and the environment when tackling non-compliance by economic operators. These sanctions should be flexible enough to reflect the regulatory needs of legitimate economic operators, as well as being able to ensure that where economic operators have saved costs through non-compliance, they do not gain an unfair advantage over those that have complied with their regulatory obligations.

Example of current practice:

Suspected non-compliance often handled with voluntary remedy actions in Sweden

When finding suspected non-compliance, whether it is from a document inspection or from Step 1 in the verification procedure (testing one single unit, if applicable), the Swedish MSA always starts with approaching the manufacturer (or importer). The manufacturer will receive a letter explaining the case, including possible test report and other documentation that is showing suspected non-compliance. In this letter, if applicable in the specific case, the Swedish MSA also informs the manufacturer that if necessary, three additional units of the product might be tested, and in case of proven non-compliance, the manufacturer will be charged for the whole testing cost. Sweden is a relatively small market and lots of goods come from other EU-countries. The company is therefore asked to fill in a form where he can state if he is only a retailer and therefore not the responsible manufacturer or EU-importer. In that case, he has to state from whom he has bought the products and he is asked to provide an invoice. By receiving the information in this form, the Swedish MSA knows in which country the responsible manufacturer or importer is situated, and the MSA can plan its future actions based on this.

In most cases (~90 %), the manufacturer submits some kind of information or proposal that can solve the case already at

¹⁴ http://www.legislation.gov.uk/uksi/2010/2617/pdfs/uksi_20102617_en.pdf

¹⁵ <http://www.berr.gov.uk/files/file44593.pdf>

¹⁶ <https://www.gov.uk/government/publications/regulators-code>

this stage. Often the manufacturer proposes a voluntary remedy action that will stop the suspected non-compliance, e.g. changes of the technical characteristics of the products, changes in the technical information, or voluntary withdrawal from the market. If voluntary remedy actions are considered appropriate, the MSA will close the case. Follow-ups will be made, if necessary. It is unfortunately also quite common that the manufacturer provides some information that shows that the product is out of scope of the applicable regulation, e.g. by providing information on when the product was placed on the market, or by claiming “special purpose” product, which is possible according to some regulations. Often, the MSA will close these cases.

If no acceptable response from the manufacturer, the Swedish MSA can go ahead and test three additional units of the product. If confirmed non-compliance, the Swedish MSA has the possibility to issue sanctions and fines and also to ban products.

The Swedish MSA has recently had a number of cases where the responsible manufacturer or importer has been situated in Germany. The complete case with suspected non-compliance has in these cases been sent to BAM, who is coordinating the Ecodesign market surveillance in Germany.

When finding suspected non-compliance that is deemed as “minor”, the Swedish MSA sometimes only sends out an administrative “warning” or “observation”, informing the manufacturer that minor non-compliance has been detected and that it should be corrected. “Minor” non-compliance can for example be small mistakes or problems in the technical documentation.

Example of current practice:

Short picture of enforcement approach for Ecodesign in The Netherlands

The Inspectorate Human Environment and Transport is responsible for Ecodesign market surveillance in the Netherlands:

Till now there is not yet much experience with enforcement based on results of testing products by (accredited) labs. Now in the context of Ecopliant, we are starting with full compliance testing on for instance lamps and external power supplies.

At the moment, the focus is on the regulations 1275/2008 and 278/2009 (stand by and external power supplies). In inspections focused on manufacturers and importers, we currently judge the documents and when possible we do an indicative test on energy use with a Wattman meter.

In most situations there is compliance for the energy use requirements but non-compliance for the documents; they are often very incomplete. So we have a lot of situations where the conclusion is that products are non-compliant.

Our procedure is that we give a warning and give the importer/manufacturer a period (in case of non-compliant based on incomplete documents for example 2 months) to eliminate the offense. In case that the non-compliance situation still continues after 2 month, the next step is to impose a penalty. This means that the manufacturer gets again a period to realize a compliant situation; if there is still a situation of non-compliance after this period, a penalty will be imposed. The amount of the penalty and the periods given to realize a compliant situation depend on the situation. The period must be reasonable regarding to the type of deficiency. The amount of the penalty will be determined by e.g. the extent of marketed products or the benefits conferred.

Till now we had a lot situations in which we have given warnings and a few with announced a penalty. So far manufacturers /importers take action during the period of the warning or before the end of the period for imposing a penalty.

Example of current practice:

The role of remedy actions and technical documentation in Spanish enforcement system

Once the document inspection or the tests performed in the first sample detect that a product is in non-compliance with the relevant regulation, the manufacturer is warned about the non-compliance and forced to solve or clarify the problem. In parallel, the retailer is informed about the problems found and invited to collaborate in the solution of the problem.

There is a specific period for the manufacturer to react. If no answer, or the answer cannot be accepted the Authority, an immediate solution is requested. The Authority also informs the Regional Governments that are the responsible to impose penalties.

If the manufacturer accepts to modify the information of the product voluntarily, the Authority asks for an official list of products and shops in which the problem could be present. A detailed plan about how the modifications are going to be done by the manufacturer is requested. The plan need to be approved by the Authority, otherwise the procedure followed is as stated in the above paragraph.

If the non-compliance is related to the tests done for market surveillance in one unit (step 1 of the regulation procedure), the manufacturer is also asked to provide the relevant technical information. If this information is missing, or if the technical information cannot evidence the compliance with the values required by the regulation, then the appliance is considered not to meet the requirement of the Directive. In this situation, it is possible to force the removable of the product from the market, including the equivalent models, without proceeding with test of three new samples.

For that purpose, the Regional Authorities are informed of the non-compliance in order to allow the checking of the existence of the products in the market and to ask for removal in their correspondent areas in Spain. Normally, the manufacturer or the retailer voluntarily removes products in this situation.

If the technical information provided after the test of step 1 seems to be correct, then the three samples are acquired again in the market and proceed to be tested. If non-compliance is confirmed after step 2, the procedure followed is the same as above.

Taking enforcement action against a manufacturer or importer that is situated in another EU-country is found to be a challenge for some MSAs. The prerequisites for the MSA's possibility to act depend on the respective national legislation. When these problems arise, some MSAs can or will try to address the economic operator within their own country. Other MSAs forward the suspected non-compliance cases to the MSA in which country the manufacturer or importer is situated. Until this issue is clarified further either through a revised Ecodesign Directive or new regulation on market surveillance, each country must follow its own national legislation and practices when handling cases of this nature.

The possibility for MSAs to use foreign data as a basis for national enforcement actions is important in order to make optimal use of existing resources. Foreign data in this context is defined as data that has not been gathered under the supervision of the MSA in question itself, but comes from another source. One example is data that has been obtained by a MSA in another EU-country. It is also possible that foreign data can come from a project like ATLETE and ATLETE II¹⁷. Another possibility is that foreign data can come from an industry organisation. In principle, all these kinds of foreign data could, under certain conditions, be used for enforcement actions. To what extent this is possible depends on the legal system in each country but also on other factors like accreditation of the laboratory responsible for the measurements, sampling procedure, handling of tested products and so on. The starting point for MSAs should be to always assess the foreign data and to try to make the best possible use of it. See also chapter 2.7 Sharing of inspection results.

¹⁷ Read more: www.atlete.eu for the ATLETE project on refrigerating appliances and ATLETE II project on washing machines.

2.8.1.1 Recommendations for Ecodesign MSAs:

- *National legislation and national practices will determine the enforcement system of each country, but it can be useful for MSAs to study enforcement systems of other EU-countries in order to compare the way suspected non-compliance cases are handled.*
- *A guiding principle, set in the EU legislation, is that enforcement actions should always be appropriate, proportionate and dissuasive.*
- *Consider if public publishing of market surveillance results is in line with your national legislation and strategies. If publishing, be clear about which parameters have been inspected and which have not.*
- *Handling of non-compliant cases where the manufacturer or importer is situated in another EU-country may differ depending on national legislations. If no specific procedure is stipulated in the national legislation, the MSA could*
 - 1. try to address the manufacturer or importer in the country where he is situated (even if no legal jurisdiction in this foreign country)*
 - 2. transfer the case to the MSA in the country where the manufacturer or importer is situated*
 - 3. prohibit the product from being placed on the national market.*

Note: Legal requirements of the national legislation should always be fulfilled when handling non-compliant cases.

- *Scale up the level of enforcement activities by using the EU-wide available inspection resources in the most efficient manner, e.g. by optimal use of information and available data, including foreign data.*
- *Assess the quality of foreign data and make a risk-assessment to evaluate if the results can be acted upon. Try to make the best possible use of foreign data.*
- *If not possible to use foreign data directly, at least use this data to start your own investigation or to target products within your own market surveillance programme.*
- *Share your own data with other MSAs in EEA countries.*
- *If possible, make sure your inspection data can be made available in a commonly shared language (such as English) for easier transfer to other EEA countries.*
- *Arrange good support and communication between MSA supplying and receiving data.*
- *Communicate good results and possible problems and barriers to the data supplier.*
- *Record inspection results in EU-wide databases in order to spread available data.*
- *Consider participation in exchange of EU experience and data (e.g. ADCO), and participation in EU projects, in order to strengthen the enforcement level.*
- *For improved cross-border cooperation in market surveillance, the MSAs can ask in which countries the product and its equivalent models are sold.*
- *For improved cross-border cooperation in market surveillance, the MSAs can ask in which country the manufacturer or importer is situated.*

3 Summing up

The purpose of these guidelines is to describe *best practices for ecodesign market surveillance*. The guidelines have been formulated based on collected information and experiences and analyses gained within the Ecopliant project.

This is the final version of the guidelines made by the Ecopliant project. As experiences and practices amongst Ecodesign MSAs continue to evolve over time, best practices in the area of Ecodesign market surveillance will most probably change and evolve as well.