Co-funded by the Intelligent Energy Europe Programme of the European Union

ECOPLIANT
European Ecodesign Compliance Project

Work Package 2:
Overcoming Barriers and Establishing Best Practices

Task 1:
Identify and describe existing best practices for market surveillance and possible barriers to coordination

Subtask 1.4: Testing Programmes and Full Compliance Testing Activities

Final Report on
Current practice in the development of national testing programmes, Coordination of testing programmes, Full compliance testing activities, Sharing of test results, Third Party Funding, Databases.

October 2014

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with input from ECOPLIANT project partners

Contents

Current practice in the development of national testing programmes

The purpose of this section is to identify and analyse existing processes used by Market Surveillance Authorities (MSAs) when establishing testing programmes, and to establish best practice when planning national test programmes.

Introduction

The Ecodesign of Energy Related Products Directive[1] provides a framework which allows for the effective implementation of product specific regulations known as implementing measures. Implementing measures range from domestic (household refrigerating appliances) to commercial (electric motors) and even functions (standby and off mode).

The direct and indirect factors that influence the development of national testing programmes are not only vast but challenging for all MSAs and include, but are not limited to budget, national economies and consumer behaviour.

National testing programmes are developed in a variety of ways, throughout Member States. This can range from committee based discussions in Germany (where 16 federal States 'the Länder' are coordinated), to pre-testing document inspections in Luxemburg and The Netherlands and surveillance "*based on checking new products put into service and on products which, according to other legislation requires periodic supervisions*" in Slovenia.

Resources are also allocated to testing programmes, based on a number of factors. Sweden and Slovenia cite clear indications of non-compliance as a reason to allocate specific resource and Bulgaria, Finland, Germany and Hungary all cite risk profiling.

As such and due to the nature of the legislation there is no mandatory approach or methodology, however, several common themes can be identified when analysing how MSAs develop national testing programmes.

Of the 20 Member States which responded to the Ecopliant survey, approximately 50% stated that a national approach for developing testing programmes exists and is followed. In the vast majority of cases, testing programmes were identified as reactive and proactive, managed directly by the MSA, and are influenced by other areas of enforcement activity. Due to the close legislative relationship, this was primarily, but not limited to energy labelling. In all cases, national testing programmes are planned for a minimum duration of 12 months.

When developing a national testing programme it is the responsibility of each individual MSA to decide on the desired output. Article 3 (2) of the Ecodesign Directive states that:

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF

"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, regardless of such factors as national legislation or resource, national testing programmes should be designed and developed to detect non-compliant products that have been or are being placed on the market.

When developing national testing programmes, MSAs must therefore focus attention on outcome and content.

Outcome

There are several outcomes that can be considered:

1. To ensure non-compliance is dealt with by appropriate enforcement actions
2. To gauge levels of compliance for data collection
3. To use non-compliance as a means to initiate industry or business engagement

The method for achieving the outcome can be achieved in one or more of the following ways. This decision may be based on resource and national considerations.

- Verification or compliance testing
- Other requirements (e.g. document inspection or information requirements)
- Screen testing

1. To ensure non-compliance is dealt with by appropriate enforcement actions

Article 15(7) of Directive 2009/125/EC states that the "*requirements shall be formulated so as to ensure that market surveillance authorities can verify the conformity of the product with the requirements of the implementing measure. The implementing measure shall specify whether verification can be achieved directly on the product or on the basis of the technical documentation*."

Verification procedures imposed on MSAs when performing market surveillance checks are binding. Where verification procedures have been applied, in line with implementing measures, products can be found to either comply or not to comply.

Cases of non-compliance that will result in appropriate enforcement actions are normally but not exclusively associated with full compliance testing programmes and the following factors should be considered:

- National priorities
- Risk of non-compliance
- Budget
- Availability, capability, capacity of suitable laboratories
- Resource available for enforcement if non-compliance is discovered
- Procurement and Logistics
- Disposal

However, cases of non-compliance that will result in appropriate enforcement actions can also result from document inspection and the assessment of information requirements.

The legal requirement placed upon an economic operator to provide technical information to an MSA upon request provides a simple yet effective method of determining compliance by documentation. This can be used as an effective approach when operating within restricted budgets.

Document inspection can also be used to enable effective risk based decisions to be made where non-compliance or inconstancies with technical documentation have been identified. This ensures that MSA resources are directed at product groups or towards economic operators which demonstrate a potential risk of non-compliance.

In cases of non-compliance further enforcement actions, such as administrative or financial sanctions, in line with national legislation, can be applied. In the UK this includes but is not limited to product withdrawal, civil sanctions, financial penalties and cost recovery.

The outcome of the Ecopliant survey showed that 60% of MSAs consider a product to be non-compliant based on inaccurate technical documentation. 30% of MSAs stated that they would use the non-compliant technical documentation to select a product for further testing.

2. To gauge levels of compliance for data collection

Market surveillance can be defined as:

"*Those activities required to, monitor compliance with programme conditions once products are in the marketplace. It does not include the taking of products from the marketplace for verification testing*."[2]

This type of monitoring also referred to as data capture or market picture testing has been used to good effect in the UK, most notably through the Market Transformation Programme as a tool for supporting Government policy by:

[2] Compliance Counts: A Practicioner's Guidebook on Best Practice, Monitoring, Verification and Enforcement for Appliance Standards and Labeling

- Developing and maintaining a robust evidence base on impacts and trends arising from products across their life-cycles.
- Ensuring reliable product information is available and is used to inform policy decisions, consumer choices and instruments like public procurement.
- Working with stakeholders to harness their expertise to develop a robust evidence base for effective standards across product life-cycles and outcomes which stimulate innovation and Ecodesign.

It is however important to note that as this option does not always follow mandatory verification procedures, non-compliance cannot be evidenced and therefore enforced. This approach can only therefore be used for information only and is therefore limited in its impact on non-compliant goods placed or being placed on the market.

3. To use non-compliance as a means to initiate industry or business engagement

Methods to assess the probability of non-compliance such as single tests (not in line with full verification procedures) or screen testing ("*in which the specified procedure may not necessarily be followed precisely, in order to provide a reasonable indication of energy performance at a lower cost and more quickly than in a full verification test*"[3]) may be used to engage with business or industry.

This type of engagement should not be underestimated. If used effectively, positive changes in behaviour can be achieved and in turn lead to compliance within industry and specific businesses.

UK Case Study

In 2010 the National Measurement Office (NMO) responsible for enforcing the Energy Related Products Directive within the UK, commissioned a project which aimed to validate in house screening facilities by testing energy consumption with specific reference to the Ecodesign of Televisions (Regulation 642/2009/EC[4]).

The televisions tested by NMO had been previously tested by a UK based accredited facility. The results collected by NMO during this project could therefore be compared to existing accredited results.

The testing involved measurement of power consumption of the televisions in on-mode and standby mode. In the absence of a specific harmonised standard relating to all power modes for this regulation, the power consumption in standby is measured to the EN 62301: 2005 standard. On-mode is measured to the IEC 62087: 2008 standard.

[3] Compliance Counts: A Practicioner's Guidebook on Best Practice, Monitoring, Verification and Enforcement for Appliance Standards and Labeling

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:191:0042:0052:EN:PDF

Results:

		26" LCD TV	40" LCD TV
On-mode	Accredited Facility	75.6	63.8
	NMO	68.8	70.3
Standby	Accredited Facility	0.25	0.20
	NMO	0.26	0.20

The comparison of results between NMO and the accredited facility shows little difference in standby measurements. There is however significant difference in the on-mode results, the cause of this is likely to be the test disc specified in IEC 62087:2008 being unavailable and therefore the difference in video signal the reason for the variation. As such the products were re-tested using the specified test disc and the results are as follows:

Results:

		26" LCD TV	40" LCD TV
On-mode	Accredited Facility	75.6	63.8
	NMO	75.8	64.4

The second set of test results proved to be very close to that of the accredited facility. With the confidence NMO have in the accuracy of screen testing for Televisions in this instance, the opportunity to discuss areas of concern with specific economic operators is viable without verification in line with the Ecodesign Implementing Measures.

Denmark is another MSA which has performed screen tests on products for Standby and Off Mode. "*We used an instrument to measure standby consumption which was very close to specifications for the required lab instrument. We found less than 0.1% deviation from real tests*."

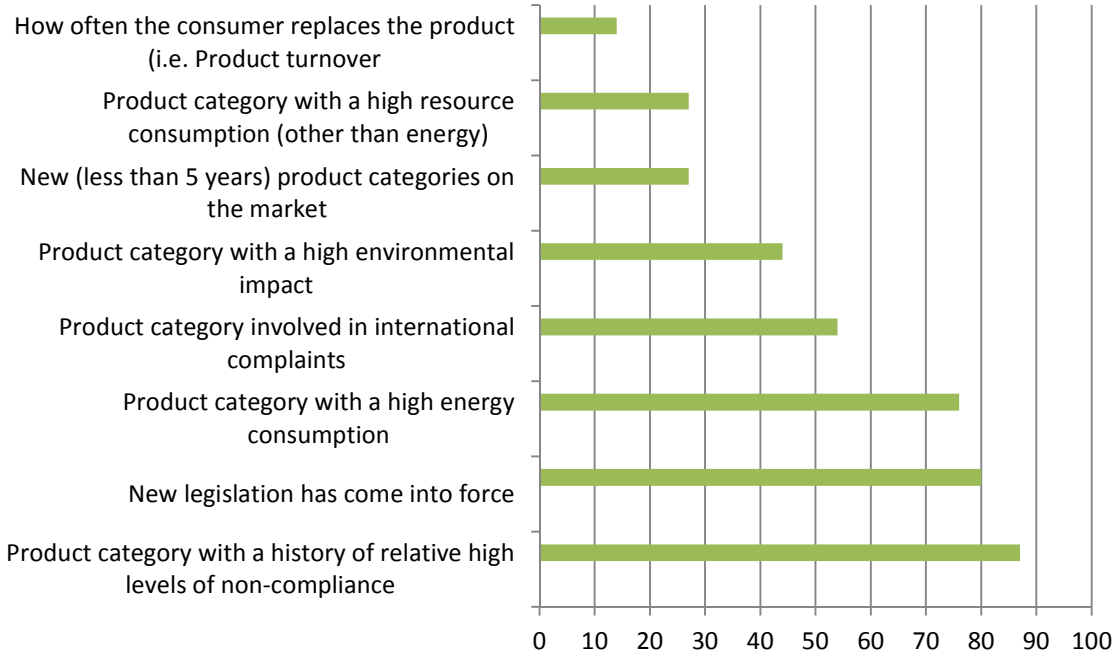
This approach is shared by Hungary who states that "*In our opinion in the simpler cases the MSAs can use their own meters for screening to measure the selected and required data. Sometimes this measure can be made on the spot*."

Content

Once the intended outcome and associated method have been established there are several factors that may help to influence and determine the content of the test programme.

- Product category with a history of non-compliance
- New legislation
- High energy consumption
- International complaints
- Environmental impact
- New product categories
- High resource consumption (other than energy)
- Consumer behaviour

The following data has been gathered from MSAs responding to the Ecopliant survey.



Disposal

A test programme must include a strategy for disposal. 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, addressing environmental concerns by using reliable disposal routes. Several strategies can be used and are explained below:

NMO UK

Products that fail compliance testing are collected by a third party at a cost and disposed of via appropriate waste streams in keeping with WEEE legislation[5]. The costs of disposal and the money recouped from resale are included in the budget estimates for the testing programme.

ATLETE

As successfully demonstrated during ATLETE[6] project, compliant models were donated to charity. Non-compliant models were sent to disposal platforms according to local waste treatment legislation.

Ecopliant

Ecopliant will adopt a sustainable disposal/recycle policy for products tested for compliance. Products that pass compliance testing will be disposed of, returned to the supplier, recycled, or donated to charity as appropriate and in keeping with member state legislation, policy and procedure. Products that fail compliance testing will be disposed of via appropriate waste streams in keeping with the WEEE Directive and local waste treatment legislation.

Section Summary

When developing a national testing programme:

- Ensure that there is a clearly defined desired outcome
- Ensure that there is sufficient methodology to develop content
- Ensure that there is a suitable disposal strategy in place

[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:197:0038:0071:EN:PDF
[6] http://www.atlete.eu/

Coordination of testing programmes

The purpose of this section is to analyse opportunities and barriers to sharing details of planned testing programmes, based on the results of the Ecopliant survey and aims to establish best practice when sharing details of testing programmes with other MSAs.

Introduction

Sharing details of planned testing programmes is not a legislative requirement of the Directive, although provision for an exchange of information is outlined (but not explicitly defined) in Article 12 of the Directive, which states that:

"*The precise nature and structure of the exchange of information between the Commission and Member States shall be decided in accordance with the regulatory procedure referred to in Article 19(2)*."

Article 19(2) states:

"*Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof*."

The Ecopliant survey has shown that MSAs currently share information in order to met mutual objectives as opposed to satisfying any perceived legislative objectives. The key findings of the survey with regard to this are as follows:

- 50% of respondents have experience of planning, sharing and co-ordinating testing programmes and testing activities with national or EU-wide MSAs using other product directives.

- 40% of respondents say that they have positive experiences of the exchange.

- 38% of respondents develop their testing programme to match those of other member states or regional states.

- 63% of respondents have received feedback from a MSA as a consequence of sharing data.

But as Hungary recognise; "*It is important that the coordinator has the ability and experience to manage the different tasks and work of MSAs*."

Opportunities

Sharing details of planned testing programmes must be partnership based, participant driven and the following opportunities, outlined in the survey, should be taken into consideration:

Ecodesign ADCO

The Ecodesign ADCO is provided for through Article 12 ('Administrative Cooperation and Exchange of Information') of the Directive. The aims of the ADCO include but are not limited to:

- Informing each other of one's own national market surveillance mechanisms.
- Harmonising the effect of different surveillance practices.
- Fixing joint actions to be carried out.
- Sharing details of planned testing programmes.

Geographical

Opportunities to sharing details of planned testing programmes can also be found where benefits are to be gained and common goals achieved through regional cooperation.

Throughout the survey all of the Nordic countries mentioned regional cooperation, which began in 2011, called the Nordic Project. The concept, described by Norway, is as follows: "*Nordic countries share their sketch market surveillance plan, and we consider both type of monitoring and product categories when we make our final national plan. We also wish to avoid to choose the same model as somebody else for testing compliance, so if we plan to test the same product category we ask the others which models they are going to test*."

Barriers

Barriers to sharing details of planned testing programmes can be typically explained by the following factors which must be addressed if details of planned testing programmes are to be shared successfully:

Defined objectives – The purpose of sharing planned testing programmes must be clearly defined.

Detail - The level of detail (e.g. product category or model specific) requested for the purposes of sharing planned testing programmes must be clearly defined as this may impact on resource.

Confidentiality – Ownership and access to data such as planned testing programmes must be clearly established and agreed in advance.

Communication – Clear points of contact must be established to ensure clear communication.

Section Summary

When coordinating test programmes:

- Ensure that suitable and simple opportunities are identified and taken advantage of
- Ensure that barriers are identified first so as they can be overcome

Full compliance testing activities

The purpose of this section is to identify how accredited laboratories in the EEA can be used by MSAs to get formal test results and to analyse why MSAs cannot always use the test results from those accredited test laboratories.

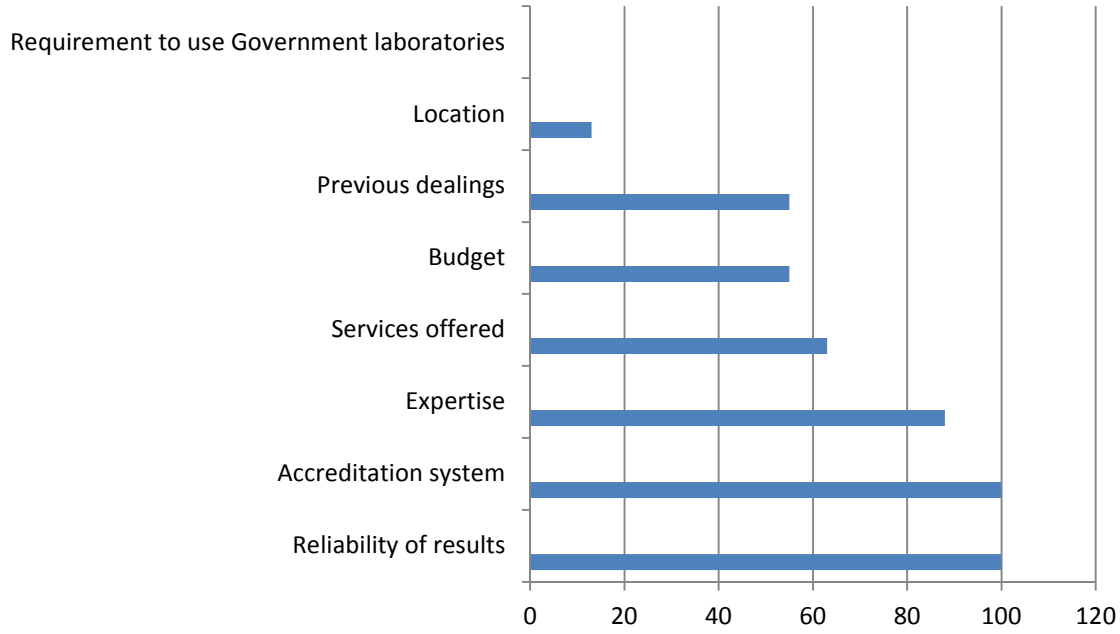
Introduction

The importance and use of accurate measurement in relation to the Ecodesign Directive is stated throughout the product specific implementing regulations, 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 testing or verification of products 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.

55% of respondents to the Ecopliant survey with experience of selecting laboratories for compliance testing against the requirements of the Ecodesign directive or similar directives stated that the following criteria were important when making that selection:



It is clear that accreditation, which can guarantee a degree of reliability and expertise, is the most important influencing factor when selecting laboratories.

Accreditation

Accreditation, defined as "*an attestation by a national accreditation body that a conformity assessment body meets the requirements set by harmonised standards and, where applicable, any additional requirements including those set out in relevant sectoral schemes, to carry out a specific conformity assessment activity*[7]" is viewed by many MSAs as an essential component in the process of laboratory selection.

However, it must be noted that the costs associated with maintaining an accredited system can be prohibitive and passed on to the customer, which may in turn influence the laboratory selection process. Accreditation however does increase the robustness of results and reduces the possibility of results being challenged by manufacturers.

This can be illustrated by using Germany as an example: "*Measurements have to be done in a "competent lab", accreditation is not mandatory. However, if the lab is accredited, it has already proven its competence and the authorities have an easier job determining whether they have found a good lab. State owned labs may prefer to not use accreditation because of costs but then of course have to prove that they are measuring correctly case by case*."

The United Kingdom Accreditation Service (UKAS)

Appointed as the national accreditation body by Accreditation Regulations 2009 (SI No 3155/2009[8]) and Regulation (EC) 765/2008[9], UKAS operates under a Memorandum of Understanding with the UK Government through the Secretary of State for Business, Innovation and Skills (BIS).

UKAS remains independent of Government and is the sole national accreditation body recognized by the UK Government to assess by way of internationally agreed standards, organizations that provide certification, testing, inspection and calibration services.

UKAS is a non-profit-distributing private company, limited by guarantee. It is licensed by to use and confer the national accreditation symbols which symbolize UK Government recognition of the accreditation process. Not only does UKAS accreditation demonstrate the competence, impartiality and performance capability of laboratories, but also assures the competence, impartiality and integrity of conformity assessment bodies.

UKAS accreditation reduces the need for individual customer assessment and its international involvement provides for mutual recognition, as a consequence helps to reduce barriers to trade. It is therefore UK government policy to recommend the use of UKAS accredited conformity assessment services whenever this is an option.

[7] http://www.european-accreditation.org/publication/ea-2-17-m
[8] http://www.legislation.gov.uk/uksi/2009/3155/contents/made
[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF

Mutual Recognition

When conducting verification testing, mitigation or control of results should always be a consideration. Mutual recognition is one way of achieving this.

In basic terms mutual recognition can be defined as the increased use and acceptance of results from accredited laboratories, including results from laboratories in other countries. In this way, the free-trade goal of a *'product tested once and accepted everywhere*[10]' can be realised.

ILAC - The International Laboratory Accreditation Cooperation[11]

ILAC is an international cooperation of laboratory and inspection accreditation bodies formed to help remove technical barriers to trade. Accreditation bodies are established in many countries with the primary purpose of ensuring that conformity assessment bodies are subject to oversight by an authoritative body.

Accreditation bodies that have been evaluated by peers as competent (against the requirements of ISO/IEC 17011[12] and shown to meet ILAC's criteria for competence), sign arrangements that enhance the acceptance of products and services across national borders, thereby creating a framework to support international trade through the removal of technical barriers. These arrangements are managed by ILAC, in the field of laboratory and inspection accreditation.

ILAC was formalised as cooperation in 1996 when 44 national bodies signed a Memorandum of Understanding providing the basis for the further development of the Cooperation and the eventual establishment of a multilateral recognition agreement between ILAC member bodies.

Over 40 laboratory accreditation bodies have signed the multi-lateral, mutual recognition ILAC Arrangement to promote the acceptance of accredited test and calibration data. The ILAC Arrangement provides significant technical underpinning to international trade.

A formal cooperation with a charter to establish a network of mutual recognition agreements among accreditation bodies ILAC provides a focus for**:**

- Developing and harmonising laboratory and inspection accreditation practices
- Promoting laboratory and inspection accreditation to industry, governments, regulators and consumers
- Assisting and supporting developing accreditation systems
- Global recognition of laboratories and inspection facilities via the ILAC Arrangement, thus facilitating acceptance of test, inspection and calibration data accompanying goods across national borders

[10] Source – ILAC https://www.ilac.org/home.html
[11] Source – ILAC https://ilac.org/
[12] http://www.iso.org/iso/catalogue_detail?csnumber=29332

Twenty countries have established national accreditation bodies since 2001. The ILAC network of members includes 139 bodies covering a total of 92 different economies

The number of accredited laboratories has also increased significantly, with almost 40,000 accredited laboratories representing a growth of over 50% since 2004.

As demonstrated by the results of the Ecopliant survey, accreditation is also gaining greater recognition amongst MSAs. Regulatory acceptance of results from accredited organisations has increased by 36% since 2002. In 2010, 77% of Regulators accept the results from accredited organisations.

Based on the results of the 2010 survey of ILAC Full Members, restricted acceptance of results has been reduced to zero, demonstrating the confidence that Regulators place on the value of accreditation to deliver accurate results.

The ILAC Arrangement builds upon existing or developing regional arrangements established around the world. The bodies participating in these regional arrangements are responsible for maintaining the necessary confidence in accreditation bodies from their region that are signatories to the ILAC Arrangement. In Europe this is the European cooperation for Accreditation (EA).

The EA has been established by the European Commission as the official European accreditation infrastructure following the adoption of Regulation (EC) no 765/2008[13] (RAMS).

Practical considerations

When choosing accredited laboratories, the following practical considerations should be made at a national level:

Clear objectives

The services required of the laboratory by the MSA must be clearly defined. MSAs must should specify what the verification procedure to be used is and if possible gain an understanding of the procedures involved.

Legal considerations

As verification testing can form the basis of enforcement actions, legal considerations, in line with national processes, which may include but are not limited to the following, should be planned for.

- Handling of evidence in line with national processes.
- Ability for the laboratory to provide expert witness in the event of court proceedings.
- Capacity in line with national legal timeframes.

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF

Financial planning

Ensure that procurement processes are transparent and agree on costs prior to testing (including potential unforeseen costs such as transport, storage, disposal etc.) to allow for financial planning.

Contingency planning

Ensure that contingency planning is discussed with the appointed laboratory in the event of unforeseen circumstances to ensure that national test programmes are not compromised.

Commercial incentives

Some laboratories require guarantees of work to ensure that acquiring accreditation is commercially viable.

Section Summary

When identifying laboratories consider:

- Accreditation
- Competence
- Mutual recognition

Sharing of test results

The purpose of this section is to analyse opportunities and barriers to the sharing of either preliminary screening test results or verification test results between MSAs.

Introduction

Market Surveillance, defined as "*the activities carried out and measures taken by public authorities to ensure that products comply with the requirements set out in the relevant Community harmonisation legislation and do not endanger health, safety or any other aspect of public interest protection*"[14] has been acknowledged as a priority by the European Commission.

It has also 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 test results.

Legal Requirements

The concept of exchanging information is not only mandatory under Article 12 of the Energy Related Products Directive (2009/125/EC)[15], but is also one of the guiding and mandatory principles of Regulation (EC) No 765/2008 which sets out the requirements for accreditation and market surveillance relating to the marketing of products.

Recital 27 of the Energy Related Products Directive (2009/125/EC) states that:

"*Surveillance authorities should exchange information on the measures envisaged within the scope of this Directive with a view to improving surveillance of the market, having regard to 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.*

Such cooperation should make the utmost use of electronic means of communication and relevant Community programmes. The exchange of information on environmental life cycle performance and on the achievements of design solutions should be facilitated. The accumulation and dissemination of the body of knowledge generated by the ecodesign efforts of manufacturers is one of the crucial benefits of this Directive."

The desired outcome of the coordination and sharing of information, such as testing results, is to deliver a collaborative approach to market surveillance. A collaborative approach ensures best use of resources amongst market surveillance authorities, avoids duplication and demonstrates to economic operators that compliance, with regard to the Energy Related Products Directive, is a Pan-European requirement.

[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF
[15] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF

It also helps to build trust between MSAs, an important point that was made by Ireland during the Ecopliant survey; "*A consistent approach to market surveillance practices among MSAs and a reliable communication channel should increase the level of trust among MSAs allowing for more effective co-operation*."

Regulation (EC) No 765/2008 - (RAMS)

The Regulation on Accreditation and Market Surveillance (RAMS) has been applicable since 1 January 2010 and as a European Regulation is directly applicable in national member state law.

RAMS establishes a European Framework for Accreditation, and details what Member States must do to fulfil their obligations to ensure that only compliant goods are allowed onto the market. This includes appointing MSAs with the ability to deal with non-compliance.

The importance of sharing information, such as test results, in this context is made in Regulation (EC) No 765/2008[16] which states:

"*For the purpose of ensuring the equivalent and consistent enforcement of Community harmonisation legislation, this Regulation introduces a Community market surveillance framework, defining minimum requirements against the background of the objectives to be achieved by Member States and a framework for administrative cooperation including the exchange of information among Member States*."

The principles behind the exchange of information between Member States are defined in Article 24 as follows:

1. *Member States shall ensure efficient cooperation and exchange of information between their market surveillance authorities and those of the other Member States and between their own authorities and the Commission and the relevant Community agencies regarding their market surveillance programmes and all issues relating to products presenting risks.*

2. *For the purposes of paragraph 1, the market surveillance authorities of one Member State shall give the market surveillance authorities of other Member States assistance on an adequate scale by supplying information or documentation, by carrying out appropriate investigations or any other appropriate measure and by participating in investigations initiated in other Member States.*[17]

Practical opportunities and tools

Cooperation is enabled, in part, through Article 12 ('Administrative cooperation and exchange of information') (1) of Directive 2009/125/EC which states that:

[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF
[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF

"*Member States shall ensure that appropriate measures are taken in order to encourage the authorities responsible for implementing this Directive to cooperate with each other and provide each other and the Commission with information in order to assist the operation of this Directive*."[18]

This has been achieved with regard to Ecodesign through the creation of the Ecodesign Administrative Cooperation (ADCO) group, which meets twice a year and the objectives of which are:

- To inform each other of one's own national market surveillance mechanisms.
- To harmonise the effect of different surveillance practices.
- To spread good surveillance practice and techniques across the Community.
- To exchange views and solve practical problems.
- To exchange information on market surveillance interventions.
- To fix joint actions to be carried out.
- To contribute to the examination of the effectiveness of the established market surveillance mechanisms, in accordance with Article 18 of the Ecodesign Directive.

Membership is open to Market Surveillance Authorities from the Member States of EU-EEA and EFTA-EEA, Candidate and Accession Countries and other Third Countries with recognised agreements with EU to apply the Ecodesign Directive. In order to satisfy Article 12(3) of Directive 2009/125/EC which states that "*The Commission shall take appropriate measures in order to encourage and contribute to the cooperation between Member States*"[19] the European Commission also have membership.

The exchange of information is facilitated via CIRCABC and is treated in confidence.

CIRCABC

CIRCABC ("Communication and Information Resource Centre for Administrations, Businesses and Citizens") is used to create collaborative workspaces where communities of users can work together over the web and share information and resources, and is intended to replace CIRCA (Communication and Information Resource Centre for Administrations), an e-government solution supporting the online collaborative activities of the European Union's public administrations.

Since 1997, CIRCA has been running as an IDA (BC) service and has been used by more than 30 Directorates-General and in particular by the committees and consultative bodies established to support collaboration between the Member States and the EU institutions. More than 100 national administrations have received a free license and use it for their own needs.

CIRCABC is an extranet tool, developed under the European Commission IDA programme, and tuned towards Public Administrations needs. It enables a given

[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF
[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF

community, in the case of the Ecodesign ADCO which is geographically spread across Europe, to maintain a private space on the Internet where information and documents can be stored and shared, as well as other functionalities such as contact details.

With the ADCO group and CIRCABC extranet tool in place it can be strongly argued that an infrastructure that allows for opportunities to sharing information such as test results is already in place and functioning.

Barriers to sharing

Several barriers exist that either prevent or frustrate the sharing of information. These range from basic administrative requirements, to incompatibility of information with national requirements, security and factors which are more difficult to define such as trust. These factors are explained in more detail in the following two case studies.

Ecodesign ADCO Case Study

In March 2010 the Eco-design ADCO agreed that that a cross boarder project would be initiated and carried out across all Member States that wished to participate.

The purpose of this project was to:

- Share information informally.
- Use CIRCA as a secure tool.
- Avoid duplication of testing.
- Align testing programmes.
- Build trust between member states.
- Increase ADCO understanding of standby and off mode compliance.

The project focused on standby and off mode (Regulation EC 1275/2008[20]) and although UK volunteered to lead the project, this role was not explicitly defined.

Seven MSAs expressed interest in the project; four of which expressed an interest in testing products and sharing results and the remaining three a generic interest in the project.

Once testing had been completed, all test results and associated information would be collated for use by all ADCO members. The products tested were diverse and comprised a range of domestic appliances and other consumer equipment.

Although the project focused on 'testing' of products, the sharing of information was as important as the results themselves. The format in which the results and reports were presented ranged from summary test house reports, to power-point presentations, stand alone tabular results to word documents. English was the common, but not exclusive, language used.

[20] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:339:0045:0052:EN:PDF

A recommendation from the project was that should a similar project be initiated, a common approach to the presentation of results is agreed and adopted. Set forms would encourage familiarity and provide for user friendly interface and encourage accessibility in much the same way that ICSMS offers. ICSMS is discussed in greater detail on page 29.

Security

During the course of the project the security of information uploaded to CIRCA was also questioned following a request made to the Commission for access to documents under Regulation EC 1049/2001[21] in relation to information on results of market surveillance on Regulation EC 1275/2008.

The request was refused under Article 4 (2) of Regulation EC 1049/2001 it was felt that disclosure of these documents would undermine the protection of commercial interests of a natural or legal person, including intellectual property, and the purpose of inspections, investigations and audits. However, these decisions are made on a case by case basis.

ATLETE Case Study

The purpose of the ATLETE Project was to increase European-wide implementation and control of energy labelling and eco-design implementing measures for appliances.

ATLETE was successfully designed to demonstrate that market surveillance and testing can be done in a systematic, effective and cost-efficient way, through verification testing of household refrigerating appliances. In turn the project outcomes would help transform the market and ensure benefit for consumers, manufacturers and the environment.

It must be noted that unlike Ecopliant, project partners comprised policy, industry, consultancy, research and development and not market surveillance authorities. Testing results were indicative only, not legally binding and without prejudice to any determination of compliance or non-compliance by a national market surveillance authority. In particular, they could not be used to prove in law that an appliance is compliant or non-compliant.

Each market surveillance authority would have to establish non-compliance in accordance with national legislation.

Following verification testing, the ATLETE project ensured that all compliant and non-compliant models were disclosed the national Market Surveillance Authorities where each model was reported to be sold. From a UK MSA perspective, while this sharing of information was encouraged and supported, there were lessons to be learned.

[21] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:EN:PDF

Contact information – Incorrect contact information was used and in some cases information made available to UK policy and not MSA contact points.

Appointing different MSAs is common throughout Europe is common. In the UK there is more than one authority responsible for the Energy Information Regulations (which transpose the Energy Labelling Directive) and in Hungary, two market surveillance authorities are responsible for Ecodesign. This can create challenges when identifying those responsible for enforcing legislation and highlights the importance of maintaining contact points.

Legal frustrations – Lack of understanding of UK legal systems resulted in lack of continuity of evidence and potential issues surrounding time limits for prosecution of offences.

Section Summary

When sharing test results:

- Consider legislative obligations (European and national)
- Consider common and accessible formats or platforms
- Consider security
- Consider contact information

Third Party Funding

The purpose of this section is to identify and analyse opportunities and barriers as well as legal and administrative issues to third parties contributing to the costs of testing.

Introduction

The monitoring, verification and enforcement of the Ecodesign for Energy Related Products Directive 2009/125/EC[22] can be costly and in some cases prohibitive in delivering the Directives intended economic and environmental benefits.

This is in part due to the verification procedure used to determine compliance, which most implementing measures state that for the purposes of checking conformity Member State authorities shall test a single product.

If this product does not meet the requirements of the implementing measure a further three additional products must be tested and an average of these results is used to determine compliance.

The resulting financial implications of verification procedures can make the case for additional funding for testing from a third party.

A third party can be described as any person or group of people not directly involved in market surveillance e.g. trade association, industry or grants, and other funding initiatives.

With regard to third parties contributing to the costs of testing, the following results of the Ecopliant survey should be observed:

- 5% of respondents have experience of funding by third parties.
- None of the respondents fully consider that funding by third parties, in all situations, is acceptable for conducting market surveillance.
- 50% of respondents consider that funding by third parties is not at all acceptable when it comes to conducting market surveillance
- 50% of respondents consider that funding by third parties could be acceptable provided certain conditions are fulfilled.
- 70% of respondents, consider that their organisation does not have the resources to conduct routine monitoring of organisations that might provide testing through third party funded testing.

Opportunities

There are several opportunities that can be applied to third party funding which include but are not limited to the following:

1. Regulatory

[22] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF

2. Industry Cooperation
3. EU Programmes

1. Regulatory Opportunity

Some Member States have provided MSAs with 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.

Case Study

The Energy Related Products Directive 2009/125/EC[23] is transposed into UK law under The Ecodesign for Energy Related Products Regulations (Statutory Instrument 2010 No. 2617).[24]

Regulation 13 of Statutory Instrument 2010 No. 2617[25] provides the appointed market surveillance authority with the power to impose civil sanctions and also to recover testing costs where appropriate, stating that:

(1) If an article or substance tested under Article 19 of RAMS fails to comply with an applicable implementing measure, the market surveillance authority may recover its testing costs.

(2) Costs include in particular—
(a) All the costs of purchasing and disposing of the articles or substances;
(b) All the administration and labour costs throughout the testing period.

(3) The market surveillance authority is not entitled to recover any costs proven to have been incurred unnecessarily.

Notice of Intent

Where it is considered appropriate to recover testing costs a notice of intent must be served within 20 days of obtaining proof that the product has failed with an applicable implementing measure.

The notice of intent will include a statement that the product has been tested and has failed to comply with the applicable implementing measure, details of the tests carried out, the amount to be paid, detailed test reports, the right to make representations and objections and the circumstances in which testing costs may not be recovered.

Making representations and objections

A person upon whom a notice of intent has been served may, within 28 days beginning on the day on which the notice was received, make written

[23] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:285:0010:0035:en:PDF
[24] http://www.legislation.gov.uk/uksi/2010/2617/pdfs/uksi_20102617_en.pdf
[25] http://www.legislation.gov.uk/uksi/2010/2617/pdfs/uksi_20102617_en.pdf

representations and objections to the market surveillance authority in relation to the proposed recovery of costs.

Final Notice

Within 20 days following the end of the period for making representations and objections the market surveillance authority must decide whether to impose the requirements of the notice of intent with or without modification. This will be made in the form of a final notice.

A final notice must include a statement that the product has been tested and has failed to comply with the applicable implementing measure, details of the tests carried out, the amount to be paid and the period within which the payment must be made which must not be less than 28 days, a detailed breakdown of the testing costs incurred, how payment must be made, the consequences of failing to comply with the notice within the specified period and rights of appeal.

Appeal

Any appeal must be made to the First-Tier Tribunal who must determine the standard of proof. Tribunals are specialist judicial bodies which decide disputes in a particular area of law.

The Tribunal may, withdraw the notice, confirm the notice, vary the notice, remit the decision whether to confirm the notice, or any matter relating to that decision, to the market surveillance authority. A notice under this part is suspended pending appeal.

It may not always be appropriate to recover all or any costs associated with the purchase, disposal, administration and labour throughout the testing period, where a product tested under Article 19 of Regulation (EC) No 765/2008[26] fails to comply with an applicable implementing measure.

Each decision with regard to the recovery of testing costs must be made on a case by case basis and all decisions will be reached based on the company's ability to pay and will be calculated in consultation with the company concerned.

The market surveillance authority is not entitled to recover any costs proven to have been incurred unnecessarily.

This regulatory opportunity is also available to other MSAs such as Hungary: "*If the test result proves a non-compliant product, the authority recovers the cost of the laboratory testing from the manufacturer or from the distributor*." However, Hungary considers that "*The MSAs have to remain totally independent.*"

[26] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:en:PDF

Regulatory Barrier

Barriers to regulatory opportunities can be varied and can include administrative and/or practical barriers.

Using the UK example, in all cases where the legislation allows, the appointed market surveillance authority will pursue cost recovery. However, all monies recovered are to be paid into the Consolidated Fund and will not be retained by the MSA.

The Consolidated Fund is the Government's general bank account at the Bank of England.

The practical and financial implications of cost recovery, e.g. administration, finance and follow up placed on the market surveillance authority, must be considered before cost recovery is pursued. As monies are not retained by the MSA, cost recovery may in practice prove to be a deterrent to the MSA.

2. Industry Cooperation Opportunity

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 forms; direct funding (subsidies), indirect funding (resource) and shared work.

This form of funding is considered as a mutually proactive form of third party funding.

Trade industry association objectives are all dependent on the industry that they represent. The majority of trade associations strive to strengthen the industry they represent and to promote the benefits of good quality products by representing aspects of national and international legislation and standards whilst protecting the interests of both the public and members. To achieve this, competitive, high quality marketplaces are essential.

Shared actions between the MSAs and trade industry associations are often tabled, to assess compliance of sector specific product groups under Ecodesign Implementing Regulations. Trade industry association publicity is often a suitable deterrent and can move industry towards compliance as one.

In this example, the third party is the trade industry association, and the funding provided indirect through use of specialist laboratory facilities.

However, Sweden indicate that "*there could be some negative media interest if MSAs are too involved with industry*" while Norway argues that "*third party funding can bring along inefficient management of the market surveillance if the funding cover all the costs*."

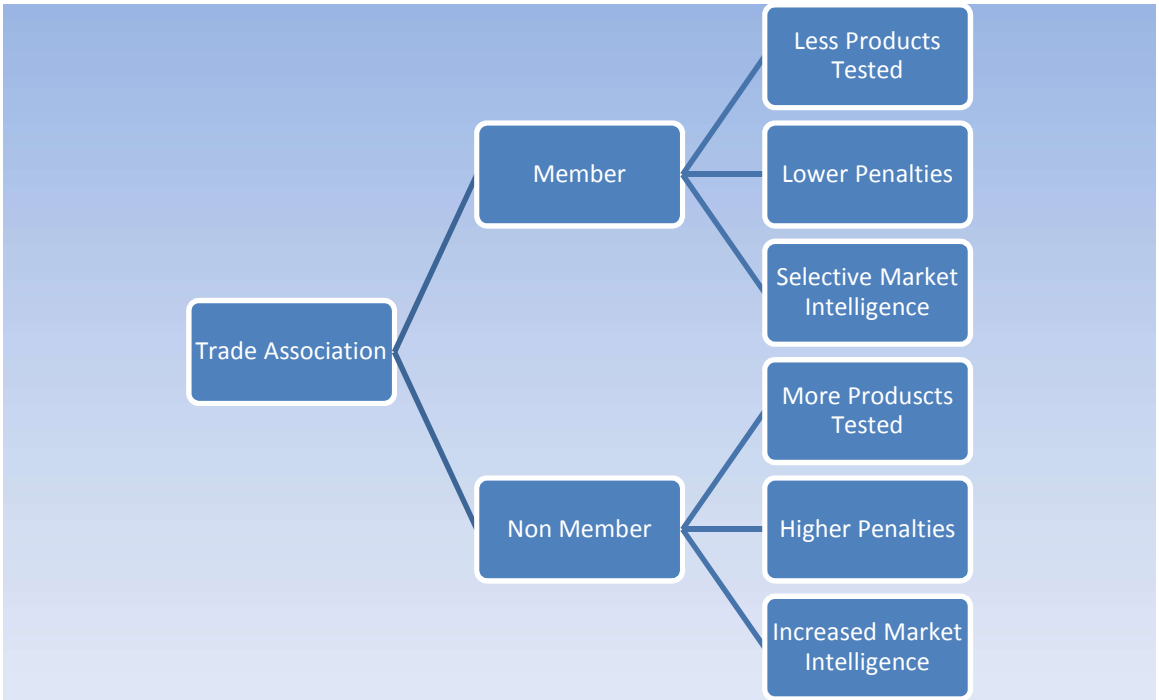
Industry Cooperation Barrier

There are several challenges and concerns associated with this type of industry funding, which on a basic level is manifested by the need for impartiality and objectivity throughout an investigation.

This need is highlighted in Regulation (EC) No 765/2008[27] setting out the requirements for accreditation and market surveillance where Article 19 (4) states that "*Market surveillance authorities shall carry out their duties independently, impartially and without bias*."

Based on the survey results and desk studies undertaken, it is apparent that there is a perception (whether factually correct or not) among market surveillance authorities that industry funding can be problematic with regard to retaining independence and impartiality.

The chart below aims to illustrate this perception and highlight some of the concerns raised by market surveillance authorities, which include but are not limited to disproportionate engagement with and assessment of the market, where outcomes and investigations may be favourable to third party members.



3. EU Programme Opportunity

Third party funding can also come via programme initiatives such as the Intelligent Energy Europe (IEE) programme.[28]

[27] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:en:PDF
[28] http://ec.europa.eu/energy/intelligent/

This form of funding is considered as a proactive form of third party funding.

The majority of the IEE programme's budget goes to funding projects across the EU that support and promote energy efficiency and renewable energy. Funds can be used to cover up to 75% of the project's costs. Applicants have to respond to a call for proposals setting out their project idea and plan. Calls are published annually. The eligibility, selection and award criteria are set out clearly in the call documents.

The Ecopliant project is funded in this manner and the funding provided by IEE allow for the wide scope and ambition of the project.

EU Programme Barrier

Barriers to accessing EU funding are specific to each project; in the case of the IEE programme, the upfront, yet necessary investment of resource by a project partner with no guarantee of success can be seen by some as a barrier. This resource goes beyond providing a detailed description of the action and a detailed breakdown of the expected budget, as the negotiation process can be can be sustained prior to any final agreement being made.

Section Summary

Each of the models listed above can exist autonomously as part of a balanced approach to third party funding in the context of market surveillance.

However, regardless of the model or models used, it is essential that a market surveillance authority retain the following characteristics as these factors help to support the operational effectiveness and efficiency of market surveillance.

- Independence
- Transparency
- Impartiality
- Objectivity

Database

The purpose of this section is to identify information and technical parameters necessary for a database for accredited test laboratory information, coordinated testing programmes and test results and how that information should be checked and included in an accessible and user friendly database.

Introduction

The success of the Ecodesign Directive is not solely based on the activities of a single Member State, but on the collaboration of all Member States. This ensures that economic operators within the EU can be confident in a consistent understanding and approach to market surveillance.

A vital mechanism in achieving this is the development and implementation of a viable information repository (database), available for use by all MSAs. An information repository of this nature would go beyond the capabilities of an established system such as CIRCA by creating a degree of uniformity through set forms and agreed protocols.

Although the exchange of information is mandatory under RAMS, the method of exchange, or the content, is not specified beyond Article 12 (1) of the Ecodesign Directive which directs Member States to:

"Take utmost advantage of electronic means of communication."

Information and Communication System for Market Surveillance (ICSMS)[29]

Several electronic communication systems and platforms exist to support MSAs, however, ICSMS is considered by many as the "*most comprehensive Europe-wide database of consumer and professional products which have been tested as non compliant by market surveillance authorities. It promotes co-operation between its members and facilitates their tasks*." ICSMS is also the Commissions preferred electronic tool for use by MSAs and is specifically outlined in Article 21 of the draft Market Surveillance Regulations[30].

ICSMS gathers test results and relevant product data on thousands of products and lists authorities in all EEA countries for 22 Directives. It therefore allows for a wealth of information to be stored and shared and includes over 70 individual descriptors, which include Product Identifier, Notifying Authority, GTIN (EAN) Code, TARIC Code, Model, Brand, Serial Number, Photo of product, Declaration of Conformity, Test report, Test Laboratory etc.

[29] SOURCE ICSMS https://www.icsms.org/icsms/App/blankAboutIcsms.jsp?threadId=9326&callId=2&winId=1
[30] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0075:FIN:EN:PDF

Survey Results

With regards to the current use of ICSMS, the results of the Ecopliant survey showed that:

- 36% of respondents stated that they are using or were going to use ICSMS.
- 36% of respondents stated that they might use ICSMS.
- 5% of respondents stated that it will not use it.

The results of the survey also show that when answering whether adopting a position on whether data on shared databases influences national market surveillance strategy:

- 40% of respondents stated that it did
- 60% of respondents stated that it did not or that there is insufficient information to adopt a position and to answer the question.
- 90% of respondents stated that it represents an opportunity that a facility within the database for providing feedback on reports submitted could be useful to gauge MSA opinion and assist in the development and co-ordination of future projects.

These survey results allow for some early conclusions to be made with regard to identifying what information is necessary for a database for accredited test laboratory information, coordinated testing programmes and test results.

Results

In order to prevent duplication of verification and therefore other associated resources (both human and financial), the database should be compatible to accept results. The option to accept raw data, indicative screen testing results and/or full verification laboratory reports should all be considered on merit as all will be reliant on national resources.

- Raw data and indicative screen testing results can be used as a basis or factor to inform MSAs and therefore influence future programmes or projects.

- Laboratory reports from accredited laboratories could be accepted from one member state to another as actionable, reliable and therefore enforceable data.

Information on accredited EEA laboratories

Up to date information on accredited EEA laboratories is beneficial as a source of information but not essential as this information is widely available elsewhere. What may be of interest is MSA feedback, both positive and negative, with regard to service. However, this information is only valuable if maintained.

National test programmes (established or planned)

To have knowledge of or insight into national test programmes and projects is useful when coordinating between Member States. However, due to legal issues, national policy and procedures, this may not be possible.

It must also be remembered that market surveillance must be its nature retain the ability to be reactive and flexible and so information must be maintained. It should also be noted that the sharing of this information may be best conducted via the Ecodesign ADCO.

Section Summary

When identify parameters necessary for a common database:

- Consider existing platforms
- Consider legislative obligations
- Consider maintenance