

dti

Part 9 of the Enterprise Act 2002 (Information)

Consultation by the Department of Trade and Industry on whether to amend Part 9 of the Enterprise Act 2002 to allow information to be released more easily for civil court proceedings

23 August 2005

URN 05/1381

dti

The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

Part 9 of the Enterprise Act 2002 (EA02) governs the release of consumer and competition information. It allows the release of information for specific reasons (gateways) by public authorities for performing their functions under specified legislation. There is not a gateway which allows information to be released to any person for the purpose of private civil proceedings. This means that sensitive competition information (for example about merger cases) is protected.

Some enforcers such as the Trading Standards Service have highlighted an issue whereby they are unable to release information to individual consumers who wish to pursue a civil case against a trader for example, where the consumer has been the victim of a scam or injured due to an unsafe product.

Intellectual property rights holders have voiced concerns that public authorities such as enforcers are unable to release information to rights holders so they can take action against counterfeiters in the civil courts.

Although amending EA02 Part 9 would please some business interests, it would be a cause of concern, and costs, to other business interests. The wider business community are concerned about making it easier to release information for civil cases. This is because it could, depending on the nature of the gateway and restrictions on disclosure of information under Community law, allow information which was previously confidential (for example, commercially sensitive information from mergers or market investigations) to be released to their competitors. In addition it may also mean an increase in the cases taken against businesses by consumers because of the wider scope of the information to which Part 9 applies, and therefore result in increased cost to businesses.

We are therefore consulting on the question of amending Part 9 to allow information to be released more easily for civil court proceedings and are seeking your views on the options set out in this document.

Issued 23 August 2005

Respond by 18 November 2005

Responses to part9.consultation@dti.gsi.gov.uk

Enquiries to part9.consultation@dti.gsi.gov.uk

or Re Mian
Consumer and Competition Policy
Department of Trade and Industry
Bay 464
1 Victoria Street
London, SW1H 0ET

Email re.mian@dti.gsi.gov.uk

Tel (020) 7215 5432

Fax (020) 7215 6414

Table of Contents

Page

Executive Summary	5
List of Questions	8
What is being consulted on and why this change is needed	10
The Way Forward	13
Option (i)	14
Option (ii)	17
Option (iii)	19
Option (iv)	21
Frequently asked questions	24
How to respond and what happens next	26
Annex A: Partial Regulatory Impact Assessment (RIA)	27
Annex A (i): Table attached to RIA	37
Annex B: DTI Consultation Code of Practice	38
Annex C: Organisations to be consulted	39

Executive Summary

This consultation concerns whether to amend Part 9 of the Enterprise Act 2002 (EA02) to allow information to be released more easily for civil court cases.

Part 9 governs the release of consumer and competition information. It allows the release of information for specific reasons (gateways) by public authorities for performing their functions under specified legislation. There is not a gateway which allows information to be released to any person for the purpose of private civil proceedings. This means that sensitive competition information (for example about merger cases) is protected.

Some enforcers such as the Trading Standards Service have highlighted an issue whereby they are unable to release information to individual consumers who wish to pursue a civil case against a trader for example, where the consumer has been the victim of a scam or injured due to an unsafe product.

Intellectual property rights holders have voiced concerns that public authorities such as enforcers are unable to release information to rights holders so they can take action against counterfeiters in the civil courts.

There are four options we wish to consult upon:

- 1) Do nothing. Part 9 remains unchanged.
- 2) Part 9 remains unchanged, but we explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.
- 3) Amend Part 9 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law.
- 4) Amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only, again respecting Community law restrictions.

How to respond

The Department of Trade and Industry welcomes comments, including supporting evidence, by 18 November 2005.

Where possible please send responses by email only to the following address: part9.consultation@dti.gsi.gov.uk

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A list of those organisations and individuals consulted is in Annex C. We would welcome suggestions of others who may wish to be involved in this consultation process.

An electronic version is available at:

www.dti.gov.uk/ccp/consultpdf/eapart9condoc.pdf

If you are not able to reply by email, a response can be submitted by letter, or fax to:

Re Mian
Consumer and Competition Policy
Department of Trade and Industry
Bay 464
1 Victoria Street
London
SW1H 0ET

Tel (020) 7215 5432

Fax (020) 7215 6414

Confidentiality of responses

Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA 2000), the Data Protection Act 1998 (DPA 1998) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA 2000, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

Questions about the policy issues raised in the document should be addressed in the first instance to:

part9.consultation@dti.gsi.gov.uk

If you are not able to make contact in this way, you can also contact:

Re Mian
Consumer and Competition Policy
Department of Trade and Industry
Bay 464
1 Victoria Street
London
SW1H 0ET

Tel: (020) 7215 5432
Fax: (020) 7215 6414

Complaints

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Nick Van Benschoten
DTI Consultation Co-ordinator
Department of Trade and Industry
Better Regulation Team
1 Victoria Street
London
SW1H 0ET

E-mail: nick.vanbenschoten@dti.gsi.gov.uk
Tel: (020) 7215 6206
Fax: (020) 7215 8303

A copy of the Code of Practice on Consultation is in Annex B.

List of Questions

Option (i) - Do nothing. Part 9 remains unchanged.

- Q1. What are your experiences of obtaining consumer and competition information from public authorities?
- Q2. Have you examples of when you have been unable to obtain information?
- Q3. If you were unable to obtain information for a civil case, can you estimate the cost to your business/yourself in not pursuing this case?
- Q4. If you are a public authority, how often do you get asked to release information for civil cases?
- Q5. Do you think Part 9 as drafted is causing problems? If so, please state how big a problem in quantitative terms.
- Q6. Do you think a problem is caused by the drafting of Part 9 or by an over-cautious interpretation by authorities?
- Q7. Do you think Part 9 should remain as drafted? Please give reasons why.

Option (ii) – Part 9 remains unchanged, but we will explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.

- Q8. What are your views on whether this option should be considered in addition or in isolation of any of the other options?
- Q9. If you are a public authority can you give examples of when you have innovatively used part 9 gateways to release information?
- Q10. Do you think option (ii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Option (iii) - Amend Part 9 of the EA02 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not imposed by Community law.

- Q11. If you are a business and feel this statement (market sensitive information could be released to competitors) would apply to you please could you provide examples with quantitative data of this.
- Q12. Do you think option (iii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Option (iv) - Amend Part 9 of the EA02 to allow the release of information for the purpose of private civil proceedings in some cases

only. Keeping the gateway narrow to reassure business that sensitive commercial information could not be released.

Q13. Is the list of legislation (set out further in this document) sufficient? If not should anything be added/deducted? Please give reasons why.

Q14. Can you think of any implications to both business and consumers, not indicated here of opening the gateways for release of information for civil proceedings?

Q15. Do you think option (iv) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Q16. Do you think there are better options, not identified here for ensuring that business and consumers can have access to this information without releasing sensitive competition information, not otherwise subjected to restrictions on disclosure under Community law?

Annex A – Partial RIA

Q17. Do you have further examples or evidence of cases where consumers are unable to pursue civil cases as a result of Part 9?

Q18. Do you have further evidence, (including quantification, even if only an order of magnitude) of the harm caused to IP rights holders by counterfeiting activity?

Q19. Can you provide practical examples or evidence to illustrate the nature and magnitude of problems from disclosure of information to competitors or overseas enforcers?

Q20. Do you have further suggestions on how to minimise the risk associated with disclosure of information?

Q21. Do you think the costs of amending Part 9 outweigh the benefits? Please give reasons why.

Q22. Do you agree with the competition assessment?

What is being consulted on and why this change is needed

Part 9 of the Enterprise Act 2002

1. The [Enterprise Act 2002](#) (EA02) received Royal Assent on 7 November 2002. The EA02 includes a range of measures to strengthen the UK's competition and consumer law framework. Part 9 came into force on 20 June 2003. Part 9 of the EA02 reflects the Government's strategy to widen and harmonise the regimes for protecting confidential information and for defining the gateways through which such information can be disclosed, in the UK. It also introduces appropriate safeguards.

2. Part 9 of the EA02 creates a gateway for the disclosure of information relating to specific consumer and competition matters. In addition, it also creates a gateway to allow certain information to be disclosed for certain civil investigations and proceedings overseas.

3. Part 9 of the EA02 lays down the requirements that have to be met, before public authorities may disclose information. The provisions apply to information which has been gathered for competition or consumer functions under parts of the EA02 and under other specified competition and consumer protection legislation (this legislation is listed in [Schedule 14](#) of the EA02) and in statutory instruments made under section 241(3). They apply whether the information obtained relates to the affairs of individuals or a business.

4. Part 9 provides a general restriction on the disclosure of information unless that disclosure is within permitted gateways or the information has previously been made public.

5. A public authority which holds information captured by the Part 9 provisions may disclose it only in the following circumstances:

- If the information is already lawfully in the public domain;
- There is an existing power/duty to disclose the information under another piece of legislation;
- The authority has gained consent from all relevant parties;
- There is a European Union obligation to release the information;
- If disclosing the information enables an authority to carry out its own statutory function;
- If disclosing the information enables another authority to carry out its statutory function;
- If the information will be used in a criminal investigation and/or
- To another public authority overseas (this also has other restrictions placed upon it, as set out in Part 9).

6. There are safeguards within Part 9 ensuring that recipients of information do not disclose it to anyone else unless they have permission from the public authority who gave them the information in the first instance. These safeguards also ensure that a recipient of information will only use it for the purposes for which it was disclosed.

7. When a public authority decides to disclose information, they must apply a proportionality test. They must consider if it is necessary to release all or only part of the information they hold to achieve the desired outcome. If it is not necessary to release all the information they hold then they must not do so. This proportionality test further protects the interests of the individual or business about whom the information is held.

History

8. Prior to June 2003 (when Part 9 provisions came into effect) various pieces of consumer and competition legislation, each with their own disclosure regimes, were in force. Part 9 was drafted to bring together these differing regimes therefore creating one information disclosure regime.

9. Under the Consumer Protection Act 1987 (CPA 1987) and sections of the Trade Descriptions Act 1968 ((TDA 1968) which was replaced by Part 9) there was a power for authorities to release information to any person for use in a civil proceeding – but this only covered the consumer information to which the particular statute applied. There was no similar power under competition law.

10. During passage through Parliament, the Enterprise Bill was amended to allow information to be released to any person for a criminal proceeding, but not for a civil proceeding, as this would also have allowed sensitive competition information to be released to any person for a civil proceeding.

Why are we consulting?

11. The current Part 9 gateways do not in general allow information to be released to business and individuals for the purpose of civil proceedings; they do permit the disclosure to such persons for criminal proceedings or in certain limited circumstances such as by consent.

12. Since Part 9 came into force, business and consumer groups have highlighted cases where Part 9 has had an adverse impact on them. This is because public authorities are unable to release information for the purposes of civil proceedings. However the scale of the problem is uncertain. We have asked business and enforcers to provide us with information and evidence of the problem.

13. The evidence we have received from the Trading Standards Service does not give a clear picture of the extent of the impact Part 9 is having on consumers as there is no requirement for Trading Standards Departments (TSDs) to record this type of request. Intellectual property (IP) rights holders have informed us that they can only give rough estimates (Annex A (i)) as to the level of counterfeit seizures, because under Part 9 some enforcers have refused to release information on the amount of counterfeit products seized unless it is to be used in criminal proceedings.

14. Business have also commented that there are variations in how Part 9 is applied around the United Kingdom. It is clear that some public authorities are more cautious than others about using the permitted information gateways under Part 9.

Business concerns

15. Representatives from brand owners' trade associations have argued that until they are aware of the size of seizures and types of goods seized by Trading Standards they are unable to decide which course of action they would take. Civil redress is on balance a quicker and speedier option and therefore more cost effective to the brand owner than pursuing a criminal action. The civil procedure also enables the brand owner to gather intelligence about the supply chain groups, which is crucial when dealing with criminal activity. This intelligence would then be used to pursue a civil action and stop the source of counterfeit goods suppliers higher up in the supply chain.

16. The wider business community are concerned about making it easier for public authorities to release information for civil cases. This is because it could allow information which was previously confidential (for example, commercially sensitive information from mergers or market investigations) to be released to their competitors, although under EU law certain information would continue to be protected. In addition, although introducing a civil gateway would, in relation to certain consumer information, simply restore the pre-EA02 position, it may mean an increase in the cases taken against businesses by consumers because of the wider scope of the information to which Part 9 applies. Some of these would be likely to be against businesses that had acted unlawfully.

Consumer concerns

17. Some enforcers such as the Trading Standards Service have highlighted an issue whereby they are unable to release information to individual consumers who wish to pursue a civil case against a trader; for example, where the consumer has been the victim of a scam or injured due to an unsafe product. Consumer organisations have indicated that many consumers are confused as to how much information can be released by the Trading Standards Service.

18. The Local Authorities Coordinators of Regulatory Services (LACORS) have said that it is difficult to accurately estimate how frequently authorities could potentially release information, as this will be dependent on the size of the authority, the investigations undertaken, information obtained etc. There are 203 Trading Standards authorities that could be asked to release information to consumers, businesses and various associations for the purpose of criminal or civil proceedings. LACORS were asked to provide some examples for requests for information which they obtained from the Trading Standards Service and have been used throughout this consultation document.

The Way Forward

There are four options we wish to consult upon:

19. Option (i): Do nothing. Part 9 remains unchanged. This would mean that public authorities would continue to be unable to disclose information to consumers/business for the purpose of enabling them to seek compensation or redress through civil law procedures.

20. Option (ii): Part 9 remains unchanged, but we will explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways. This option could be quite effective at spreading awareness of what Part 9 permits, and examples of how some TSDs have exercised their powers innovatively and successfully without infringing it. This would contribute to more consistent application of Part 9 across the Trading Standards Service and other enforcers.

21. Option (iii): Amend Part 9 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law. This gateway would apply more widely than the previous civil gateway under the CPA 1987, because Part 9 applies to a more extensive class of information than the 1987 Act. In particular it would include information gathered on competition issues.

22. Business have voiced strong concern about the release of sensitive competition information particularly overseas through a wider civil gateway. However the gateway would not apply where the disclosure of information was prohibited by Community law¹.

23. Option (iv): Amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only. Keeping the gateway narrow to reassure business that sensitive commercial information could not be released. The simplest way of achieving this would be to limit disclosure by identifying the legislation under which information could be released. For example, were the Trade Marks Act 1994 to be specified, then IP right holders would be able to get information from enforcers to pursue civil cases against counterfeiters.

24. We would need to ensure that we draw a proper balance between protecting sensitive commercial information and enabling businesses and consumers to pursue civil proceedings. This option would involve a much reduced risk of the disclosure of such information relative to option (iii). Once again Community law restrictions on disclosure would be respected.

¹ For example Article 28 of Regulation 1 of 2003 and Article 17 of Regulation 139 of 2004.

Option (i)

25. Do nothing. Part 9 remains as drafted. This would mean that public authorities would continue to be unable to disclose information to consumers/business for the purpose of enabling them to seek compensation or redress through civil law procedures.

26. Currently public authorities such as TSDs are unable to provide information to any person (business or consumer) who wishes to use the information in a civil proceeding. The information that is being sought could be case notes, details of a trader's true/legal identity or address for the serving of documents etc (particularly where the trader does not operate from a fixed premise, uses a trading name or provides only telephone contact details). If a consumer/business were able to receive such information it would enable them to seek compensation or redress through the civil law courts.

27. However, if information has already been lawfully made public it may be possible for it to be disclosed for use in a civil court case (for example, company addresses; details of directors are already on the Companies House register), although this is not always possible.

The current situation

Impact on consumers

28. Many TSDs investigate unsafe products that may injure an individual or cause structural damage to a building. Test reports are obtained from forensic laboratories, suspects and witness interviews are kept on file and TSDs may seize goods or use their powers to obtain details of the chain of supply. Before Part 9, section 38 of the CPA 1987 permitted an authority to release information for the purposes of civil proceedings, to consumers, loss adjusters and insurance companies. This information was sought fairly regularly. One TSD estimated information was released for these purposes 6–10 times per year. Currently, Part 9 does not permit this type of information to be released.

29. One of the most difficult issues consumers face is tracing traders who have disappeared still owing the consumer contractual duties and/or money. The provisions of the Companies Acts 1985 and 1989 and the Business Names Act 1985 and Community wide consumer protection, such as the Directive on Distance Selling, mean that this information should always be available. But where the business has ceased to trade or disappeared the only means consumers have of finding the trader will often be through enforcement bodies, typically TSDs. Although legislation provides for enforcers to trace business owners, for example through telephone numbers, post office boxes or accommodation addresses, this information cannot now be shared with consumers. In contrast, if the same information is already in the public domain, for example because the trader's accountant has updated information at Companies House, then Part 9 will not restrict the passing on of that information.

Compensation Orders

30. If a product has caused personal injury and a TSD decides to prosecute a trader the TSD may seek redress for the consumer involved via a compensation order. However, on many occasions TSDs have issued a Formal Caution rather than prosecuting a dishonest trader. In these cases the possibility of the complainant receiving redress via a compensation order is lost. In such circumstances the authority often receives requests from consumers for the release of information to support subsequent civil proceedings. This information cannot be released under Part 9.

31. A West Midlands Council had a case where a consumer had been supplied an allegedly mis-described product, which she returned under her distance selling rights. The consumer could prove receipt of goods by the trader. However the trader denied having received the goods and refused a refund. The consumer tried to sue, but experienced difficulties because the documentation did not comply with the Business Names Act (ie they did not give the proprietor's details), and a request for the information did not elicit the required information. In addition the trader's website gave a freepost address, and not a geographical address. The Council concerned knew who the proprietor of the business was and his true address. However, they could not give the consumer the name and true address of the proprietor to assist the consumer's civil case because there was no clear legal gateway to release information.

Impact on intellectual property rights holders

32. Intellectual property (IP) theft is a criminal offence, therefore a TSD may disclose information to the rights holder for the purposes of criminal proceedings using the criminal gateway. It may be possible to disclose on the basis that the IP rights owners would use the information in gathering evidence about the copyright infringer and those included in the supply chain in order to bring a prosecution to the producer of the goods.

33. It would not be necessary for the IP rights owner to bring criminal proceedings against every person in the supply chain if they agree to cooperate with the rights owner by disclosing from whom they received the goods and agree not to continue to sell them. However Part 9 states that where information has been disclosed to a person for the purposes of criminal investigations then the information must not be used by that person for any other purposes. Therefore it could not be used for civil proceedings even though civil redress is on balance a quicker and speedier option and more cost effective to the brand owner than pursuing a criminal action.

Impact on the wider business community

34. Part 9 was drafted so that sensitive competition information would be protected from disclosure. Should Part 9 remain as drafted, such information would continue to be protected. Additionally, other information passed to public authorities in the course of complying with the law cannot be disclosed to third parties.

Q1. What are your experiences of obtaining consumer and competition information from public authorities?

Q2. Have you examples of when you have been unable to obtain information?

Q3. If you were unable to obtain information for a civil case, can you estimate the cost to your business/yourself in not pursuing this case?

Q4. If you are a public authority, how often do you get asked to release information for civil cases?

Q5. Do you think Part 9 as drafted is causing problems? If so, please state how big a problem in quantitative terms.

Q6. Do you think a problem is caused by the drafting of Part 9 or by an over-cautious interpretation by authorities?

Q7. Do you think Part 9 should remain as drafted? Please give reasons why.

Option (ii)

35. Part 9 remains unchanged, but we will explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.

36. Business have commented that there are variations in how Part 9 is applied by authorities and that some public authorities, such as enforcers, are more cautious about using the permitted information gateways under Part 9 than others.

37. This option could be effective at spreading awareness of what Part 9 permits, and examples of how some TSDs have exercised their powers innovatively and successfully without infringing it. This could contribute to more consistent application of Part 9 across the Trading Standards Service and other enforcers.

38. However, there are limits to what this option can achieve. Part 9 is more restrictive on the issue of releasing consumer information for civil proceedings than the CPA 1987. In addition every case is unique, the judgement of an authority and ultimately a Court is a key factor in many cases in determining what information can or cannot be released.

Examples of how option (ii) could work

39. There are cases where a public authority investigates a complaint and successfully prosecutes the guilty party. In situations like this, certain information that has been used during court proceedings would be classed as coming into the public domain and therefore authorities would be able to disclose to individuals requesting it. In other situations public authorities may be in the process of conducting criminal proceedings and therefore cannot release information as it may impact upon the case. However they may disclose the information once the criminal proceedings are over and a judgment has been passed.

40. There have also been cases reported where public authority X will not disclose information to public authority Y because X feels they would be in breach of Part 9. However, Part 9 allows for disclosure if:

- disclosing the information enables an authority to carry out its own statutory function; or
- disclosing the information enables another authority to carry out its statutory function.

41. In these situations it is apparent that some authorities may not fully understand when and how they can release the information under Part 9.

Q8. What are your views on whether this option should be considered in addition or in isolation of any of the other options?

Q9. If you are a public authority can you give examples of when you have innovatively used part 9 gateways to release information?

Q10. Do you think option (ii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Option (iii)

42. Amend Part 9 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law.

43. This would be a wider gateway than the previous civil gateway under the CPA1987 because Part 9 applies more extensively than the 1987 Act. In particular it would include information gathered on competition issues.

44. Business has voiced concern about the release of sensitive competition information, particularly overseas through a wider civil gateway. However the gateway would not apply where the disclosure of information was prohibited by Community law.

Examples of how option (iii) could work

Consumers

45. Prior to Part 9, under section 28 of the TDA 1968 and section 38 of the CPA 1987, information on the true mileage of vehicles was frequently requested by consumers who suspected the mileage on their cars had been altered (car clocking). If consumers had known the true mileage of the vehicle, they may not have bought the car or would have paid far less for the vehicle. Many consumers were able to seek mileage information in order to take their own civil proceedings against the trader. Prior to Part 9, TSDs estimated that between 5 – 40 individual requests for this information per year, per authority were received. Under Part 9, consumers cannot be given this type of information.

46. In cases of misdescribed holidays, consumers may request information on whether the holiday company were aware of the misdescription at the time they travelled in order to bring a civil claim. This type of information was released quite frequently under section 28 of the TDA 1968 and section 38 of the CPA 1987. Under this option, this type of information would be able to be released again.

IP rights holders

47. An authority in South West England used to carry out extensive enforcement action to control the sale of counterfeit goods and work together with trade mark holders to combat breaches. The authority is now unable to share information with trademark holders for the purpose of civil proceedings against rogue suppliers.

48. TSD cases involving investigations into the sale of counterfeit goods highlight that since the enactment of Part 9 the TSD is no longer permitted to divulge details obtained in the course of their duties. Consumers who wish to pursue a civil proceeding are unable to, as the authority cannot disclose the name and address of the person who sold the counterfeit goods (if this is not otherwise on the public record).

49. This option would allow information to be disclosed to IP rights holders who have had their intellectual property stolen, or to consumers who have been sold counterfeit goods to pursue civil action against those who have committed the IP crime.

Wider Business Community

50. There are concerns from the wider business community if this option were chosen.

51. Market sensitive information could be released to competitors (especially those overseas), giving them unfair competitive advantage over the business. Worse still, if a company is in merger talks with another company, a competitor could access the information and use it to their advantage.

Q11. If you are a business and feel this statement would apply to you please could you provide examples with quantitative data.

52. Initial discussions with stakeholders have highlighted that this option may allow sensitive information to be made available to competitors, and in a small number of cases allow civil action to be taken against business that have been trading lawfully.

53. Individuals or groups who are thinking of bringing civil proceedings but have not yet committed themselves to doing so may use this option as an opportunity to go on a 'fishing expedition' to see where there might be material to bring a case.

54. Business are also concerned that confidential information they have provided to an authority because of regulatory requirements could be accessed and used in evidence against them.

55. This will be an untried and untested option; although public authorities will reassure business that sensitive information will not be disclosed, there is no guarantee of this – even if the proportionality test (discussed earlier) has been applied.

Q12. Do you think option (iii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Option (iv)

56. Amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only. Keeping the gateway narrow to reassure business that sensitive commercial information could not be released.

57. The simplest way of achieving this would be to limit disclosure by identifying the consumer legislation in relation to which information could be released. For example, were the Trade Marks Act 1994 to be specified, then IP right holders would be able to get information from enforcers to pursue civil cases against counterfeiters.

58. We would need to ensure that we draw a proper balance between protecting sensitive commercial information and enabling businesses and consumers to pursue civil proceedings. This option would involve a much reduced risk of the disclosure of such information relative to option (iii). Once again Community law restrictions on disclosure would be respected.

59. An indicative list of consumer legislation is included below:

Consumer Credit Act 1974
Consumer Protection (Northern Ireland) Order 1987
Consumer Protection Act 1987
Copyright, Designs and Patents Act 1988
Prices Act 1974
Property Misdescriptions Act 1991
Timeshare Act 1992
Trade Descriptions Act 1968
Trade Marks Act 1994

60. However, as mentioned in option (iii), there is the possibility of an increase in costs for business, because there may be an increase in cases taken against them (some of these would be likely to be against businesses that had acted unlawfully).

Q13. Is the list of legislation sufficient? If not, should anything be added/deducted? Please give reasons why.

Examples of how option (iv) could work

Consumers

61. A Southern England Council had a case where a woman received severe chemical burns to her arm from using an oven cleaner. They received a letter from the consumer's solicitor asking for full disclosure. Mindful of Part 9 and the offences they could commit, the authority asked the trader concerned to allow disclosure, but he refused. The consumer's solicitor was advised that the authority could not disclose any information and stated Part 9 as the reason. Under the previous statutory gateway provided by the CPA this information could have been released for civil proceedings. The authority believed that the information they held would have been a great help to the

consumer in deciding whether or not to continue with her action and seek personal injury compensation.

62. A North West England Council dealt with a complainant who was pursuing a claim for serious skin burns suffered by his young daughter. The time limit for taking criminal proceedings had passed and it was thought by the authority that the manufacturer knew about the specific risk associated with the product. The solicitors acting for the complainant requested access to the file on the case, but the authority was unable to release any information under Part 9.

63. This option would allow consumers to receive information from the authority to assist them in pursuing these types of personal injury claims.

IP rights holders

64. Prior to Part 9, information relating to counterfeit goods that was obtained by enforcers was frequently requested by the brand holder under section 28 of the TDA and section 38 of the CPA. Such information could include a name of the seller of goods, seized products, expert reports, witness statements, and financial information (eg scale operation, chain of supply, parties involved etc). The IP rights holder could ask for the information for the purpose of civil proceedings, in order to seek damages. One authority estimated that this information was sought approximately 6-10 times a year.

65. More recently, a few TSDs have set up an IP Group to tackle regional IP crime. The group works together with other enforcement agencies, brand owners and trade representatives who share information and knowledge in order to be effective in its enforcement. However, Part 9 prohibits enforcers from disclosing information for the purpose of assisting a brand owner who wishes to take civil action against someone for trademark or copyright infringements.

66. This option would allow information to be disclosed to IP rights holders to pursue civil action against those who have committed the IP theft.

Wider business community

67. For this option, the concerns remain the same as highlighted under option (iii). However, this option would be targeted at where the real problems lie. The release of information would be limited to specific [consumer] law. This would allow IP rights holders to pursue civil action against counterfeiters; consumers to claim compensation from dishonest traders; and not allow the release of sensitive information that could be of a detrimental effect to individual businesses within the wider business community.

Q14. Can you think of any implications to both business and consumers, not indicated here, of opening the gateways for release of information for civil proceedings?

Q15. Do you think option (iv) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.

Q16. Do you think there are better options, not identified here, for ensuring that business and consumers can have access to this information without releasing sensitive competition information not otherwise subjected to restrictions on disclosure under Community law?

Frequently Asked Questions

Q. What is the definition of the information that is covered by the Information Disclosure provisions under Part 9?

On the consumer side, the definition of information includes information acquired in connection with the individual pieces of consumer protection legislation listed in Schedule 14 of the EA02 and the Statutory Instruments specifying secondary legislation.

On the competition side, the definition of information is intended to include all information held in connection with competition matters. It covers information acquired in connection with merger investigations, market investigations, monopolies investigations, investigations into the new cartel offence and investigations into breaches of the Chapter I and II prohibitions in the Competition Act 1998. This means that it covers information acquired in connection with the competition provisions in Part 3 (mergers), Part 4 (Market investigations), Part 6 (cartel offence), and Part 7 (miscellaneous competition provisions) of the EA02 and also information acquired in connection with the competition legislation listed in Schedule 14 of the EA02, namely specified parts of the Fair Trading Act 1973, the Competition Act 1980, the Competition Act 1998 and the Financial Services and Markets Act 2000. The references to the Fair Trading Act are listed because the disclosure provisions on Part 9 will apply to any information obtained in the past under the relevant sections of that Act even though those sections have been repealed. The definition also covers certain provisions in the Financial Services and Markets Act 2000 as these provisions enable information relation to competition matters to be collected.

Q. Under option (iii) and option (iv), what do you mean by '.... where restrictions on disclosure of the information are not required by Community law'?

There are restrictions on disclosure of information under Community law. For example; the restrictions in Articles 12 and 29 of Council Regulation 1/2003/EC restrict the use of information acquired for the purpose of applying Articles 81 and 82 of the EC Treaty (these are the Articles which mainly deal with competition law); and those in article 17 of Council Regulation 139/2004/EC in relation to information acquired for merger purposes.

Q. Who does Part 9 apply to?

Part 9 applies to all public authorities.

A public authority is defined by reference to the Human Rights Act 1998 which states that a public authority includes a "court or tribunal and any person certain of whose functions are functions of a public nature". Examples of public authorities to which Part 9 applies are the Office of Fair Trading, Local Weights and Measures Authorities in Great Britain, the Department of Enterprise, Trade and Investment in Northern Ireland and the utility regulators.

Q. What legislation does Part 9 apply to?

There are two Schedules in the Enterprise Act (Schedules 14 and 15) to which Part 9 applies:

[Schedule 14](#) lists consumer and competition legislation that Part 9 applies to. Public authorities that have received information that falls under one of the Acts in Schedule 14 can only disclose it via a Part 9 gateway.

[Schedule 15](#) lists legislation under which public authorities enforce and creates a gateway between public authorities allowing them to disclose information to each other for Part 9 purposes.

Schedules 14 and 15 do not list secondary legislation. This is specified by statutory instrument with the effect that information received in connection with a function under that secondary legislation is subject to the disclosure regime in Part 9 or may be disclosed for the purposes of exercising functions under that secondary legislation.

The statutory instruments specifying secondary legislation include:

Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003 (2003/1400)

Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) (No 2) Order 2003 (2003/2580)

Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Specification) Order 2004 (2004/693)

The General Product Safety Regulations 2005 (2005/1803)

These can be found on the Office of Public Sector Information [website](#).

Q. Are these disclosure provisions subject to the Data Protection Act and Human Rights Act?

The Data Protection and Human Rights legislation also apply to the information which is held subject to the provisions in Part 9.

How to respond and what happens next

How to respond

The Department of Trade and Industry welcomes comments, including supporting evidence, by 18 November 2005.

Where possible please send responses by email only to the following address: part9_consultation@dti.gsi.gov.uk

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A list of those organisations and individuals consulted is in Annex C. We would welcome suggestions of others who may wish to be involved in this consultation process.

An electronic version is available at www.dti.gov.uk/ccp/consultpdf/eapart9condoc.pdf

If you are not able to reply by email, a response can be submitted by letter or fax to:

Re Mian
Consumer and Competition Policy
Department of Trade and Industry
Bay 464
1 Victoria Street
London
SW1H 0ET

Tel (020) 7215 5432
Fax (020) 7215 6414

What happens next

The closing date for this consultation is 18 November 2005. We will then consider all views submitted before making any further decisions.

Annex A- Partial Regulatory Impact Assessment

Title of proposal

A1. This document supports and is being issued with the consultation paper on Part 9 of the Enterprise Act 2002 (EA02) which governs the release of consumer and competition information. Interested parties are asked to comment on the possible options put forward. We will be finalising this RIA after the consultation and would value any comments on the analysis of costs and benefits indicated. We would be particularly interested in receiving any further data which would enable us to reflect a more accurate assessment.

Purpose

A2. This Regulatory Impact Assessment (RIA) examines the implications of the four proposed options including the possible amendment of Part 9 of the Enterprise Act (information disclosure) to allow easier release of information for civil proceedings.

Objective

A3. The objective of reviewing Part 9 of the EA02 is to strengthen opportunities for consumers to seek compensation for harm and or injury incurred when dealing with business; and to enable business to seek redress from counterfeiting and piracy activities through civil routes.

Background

A4. The Enterprise Act 2002 (EA02) received Royal Assent on 7 November 2002. Part 9 came into force on 20 June 2003.

A5. Part 9 of the EA02 governs the release of consumer and competition information. It allows the release of information for specific reasons (gateways) by public authorities for performing their functions under specified legislation.

A6. Part 9 lays down the requirements that have to be met, before public authorities may disclose information. The provisions apply to information which has been gathered for competition or consumer functions under parts of the EA02 and under other specified competition and consumer protection legislation. They apply whether the information obtained relates to the affairs of individuals or businesses.

A7. There is a general restriction on the disclosure of information unless that disclosure is within permitted gateways or the information has previously been made public.

A8. In the Consumer Protection Act 1987 (which was replaced by Part 9 of EA02), there was a power for public authorities to release information to any person for use in a civil proceeding – but this only covered certain consumer information. There was no similar power under competition law. Part 9

changed this and includes certain competition legislation in its information disclosure provisions.

Rationale for Government Intervention

A9. Some enforcers such as the Trading Standards Service have highlighted that they are unable to release information to individual consumers who wish to pursue a civil proceeding against a trader for example, where the consumer has been the victim of a scam or injured due to an unsafe product. As a result consumers are unable to seek compensation via this route and traders face a weaker deterrent effect than they might without Part 9 in its current form.

A10. One Trading Standard Department has confirmed that more than 40 individual consumers (since June 2003) have sought information from them in order to pursue civil claims. Consumers may also refer to the Trading Standards Service when they are having difficulty getting information from the local press about their advertisers. The press pass on the detail to the Trading Standards but they cannot and do not disclose this information to consumers.

Q17. Do you have further examples or evidence of cases where consumers are unable to pursue civil proceedings as a result of Part 9?

A11. Intellectual property (IP) rights holders have voiced concerns that public authorities such as enforcers are unable to release information to rights holders so they can take action against counterfeiters in the civil courts.

A12. Counterfeiting and piracy is an illegal activity which is growing within the UK and in Europe. According to studies carried out by the Organisation for Economic Co-operation and Development (OECD) in 1998 it was reported that counterfeits accounted for 5 to 7% of world trade which is approximately 250 billion euros per year; and was responsible for the loss of 200,000 jobs in Europe.

A13. A recent National Criminal Intelligence Service Baseline Threat Assessment (Annual Enforcement Report 2004, published by the Patent Office) identified there is an inherent risk of harm to consumers from counterfeit items as the market is unregulated and counterfeit goods are not subject to British or other quality standards. IP criminals are able to infiltrate the legitimate supply chains of reputable retailers to sell counterfeit goods. These goods can not only cause physical harm to the consumer but also have a significant impact on both industry and Government revenue through a loss in consumer confidence.

A14. It is difficult for business to estimate the volume of counterfeit goods seized by enforcers as this information cannot be released to them if they are not pursuing a criminal prosecution. One famous luxury brand owner estimates since June 2003 there have been 310 seizures by Trading Standards officials where the retail value of the goods came to £2.3 million.

A15. Representatives from brand owner's trade associations have argued that until they are aware of the size and types of goods seized by Trading Standards they are unable to decide which course of action they would take. Civil redress is on balance a quicker and speedier option and therefore more cost effective to the brand owner than pursuing a criminal action. The civil

procedure could enable the brand owner to gather intelligence about the copyright infringer and those included in the supply chain. This intelligence could then be used to pursue a civil action and stop the source higher up in the supply chain.

A16. The table at Annex (i) attempts to estimate the scale of the problem from samples received from brand owners. These are examples of a proportion of cases they are not pursuing because of the present situation. However it underestimates the true situation, as not all seizures are reported to IP rights holders. For example, if a trader accepts straightaway that seized goods are counterfeit and the case is suitable for a caution, there is no need to ask IP rights holders for statements confirming the goods to be counterfeit. The quantity of goods seized is not often disclosed by the Trading Standards Service.

A17. The table at Annex (i) demonstrates examples of where counterfeit goods are seized. These examples alone amount to a retail value of £5.9 million. This does not correspond directly to losses to affected companies. The detriment to these companies is in potential sales lost to counterfeiters and damage to the reputation of the brand, which is hard to quantify but the combination of factors is likely to amount to millions of pounds.

Q18. Do you have further evidence, (including quantification, even if only an order of magnitude) of the harm caused to IP rights holders by counterfeiting activity?

A18. Since Part 9 came into force, business and consumer groups have highlighted cases where Part 9 has had a detrimental impact on them because public authorities are unable to release information for the purposes of civil proceedings. However the scale of the problem is uncertain. We have asked business and enforcers to provide us with information and evidence of the problem.

A19. The evidence we have received from the Trading Standards Service does not give a clear picture of the detrimental impact Part 9 is having on consumers as there is no requirement for Trading Standards to record this type of request. IP rights holders have informed us that they can only give rough estimates (Annex (i)) as to the level of counterfeit seizures, because under Part 9 some enforcers have refused to release information on the amount of counterfeit products seized unless it is to be used in criminal proceedings.

A20. Business has also commented that there are variations in how Part 9 is applied around the United Kingdom. It is clear that some public authorities are more cautious than others about using the permitted information gateways under Part 9.

A21. However, although amending Part 9 would please some business interests, it would be a cause of concern to other business interests.

A22. The wider business community are concerned about making it easier for public authorities to release information for civil cases. This is because it could allow information which was previously confidential (for example, commercially sensitive information from mergers or market investigations) to

be released to their competitors, although under EU law certain information would continue to be protected. In addition, although introducing a civil gateway would, in relation to certain consumer information, simply restore the pre-EA02 position, it may mean an increase in the cases taken against businesses by consumers because of the wider scope of the information to which Part 9 applies. Some of these would be likely to be against businesses that had acted unlawfully.

Consultation

A23. Informal discussions and meetings have been held with various consumer organisations, trade bodies and brand owner groups. Individual Trading Standards Departments, LACORS and representatives of the Trading Standards Institute have also been contacted. A list of all those organisations to which the consultation document (including this RIA) has been sent to is in Annex C.

A24. Government Departments which have been consulted are: HM Treasury, Department for Culture, Media and Sport, Department for Constitutional Affairs, Department for Enterprise Trade and Investment, Scottish Office, Welsh Office, Office of the Deputy Prime Minister, Department for Environment, Food and Rural Affairs, Department for Transport, Department of Health, Cabinet Office, HM Revenue and Customs and the Home Office.

Options

A25. Option (i): Do nothing. Part 9 remains unchanged. This would mean that public authorities would continue to be unable to disclose information to consumers/business for the purpose of enabling them to seek compensation or redress through civil law procedures.

A26. Option (ii): Part remains unchanged but we explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways. This could be effective at spreading awareness of how Part 9 actually works, and examples of how some Trading Standards Departments have exercised their powers innovatively and successfully without infringing it. This could contribute to more consistent application of Part 9 across the Trading Standards Service and other enforcers.

A27. Option (iii): Amend Part 9 to allow the release of information for the purposes of civil proceedings for all cases where restrictions on disclosure of the information are not restricted by Community law². This would be a wider gateway than the previous civil gateway under the Consumer Protection Act 1987 because Part 9 applies more extensively than the 1987 Act. In particular it would include information gathered on competition issues.

A28. Option (iv): Amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only. Keeping the gateway narrow to reassure business that sensitive commercial information could not be released. The simplest way of achieving this would be to limit disclosure

² For example Article 28 of Regulation 1 of 2003 and Article 17 of Regulation 139 of 2004.

by identifying the legislation under which information could be released. For example, were the Trade Marks Act 1994 to be specified, then IP right holders would be able to get information from enforcers to pursue civil cases against counterfeiters.

A29. We would need to ensure that we draw a proper balance between protecting sensitive commercial information and enabling businesses and consumers to pursue civil proceedings. This option would involve a much reduced risk of the disclosure of such information relative to option (iii). Once again Community law restrictions on disclosure would be respected.

Costs and Benefits

A30. This RIA has identified that the two groups who are particularly affected by Part 9 are consumers and certain sectors of business, more specifically, IP rights holders such as major brand holders. If Part 9 were amended there would not be any additional burden placed on business, only those trading unlawfully would be adversely affected.

Option (i) –No change to Part 9

Benefits

A31. Business would continue to be assured that there would not be the possibility of competitors gaining access to commercially sensitive information such as that related to mergers cases.

Costs

A32. However there are potential costs to both consumers and business. There are cases where enforcers are unable to pass on basic information, such as professional contact details to consumers, which would enable them to take civil action. (For example, where a business has ceased to trade or disappeared, the only means consumers have of finding the trader will often be through enforcement bodies, typically Trading Standards Departments. Although a Trading Standards Department may hold that information, under Part 9 it cannot be shared with consumers.) This could lead to a lack of consumer confidence and enable a climate where the activities of dishonest traders could flourish. Enforcers are also spending time trying to act as a facilitator between the injured party and the trader, which is an added resource and cost burden.

A33. Compensatory simplification: Does not apply as there is no change.

Option (ii) – Part 9 remains unchanged, however explore the best way to provide public authorities with best practice on how to use Part 9

Benefits

A34. Business has commented that there are variations in how Part 9 is applied around the United Kingdom. It is clear that some public authorities are more cautious than others about using the permitted information gateways under Part 9. Examples of best practice would allow public authorities to use Part 9 gateways effectively and consistently.

A35. A more consistent application of Part 9 across the country would mean an increase in business and consumer confidence as they would have a better understanding what information could/could not be obtained from enforcers.

A36. Additionally, as highlighted under option (i), there would not be the possibility of competitors gaining access to commercially sensitive information.

Costs

A37. There would be no additional costs to consumers or business for the guidance option however all consumer detriment costs as highlighted under Option (i) would remain. There are limits to what can be achieved given that Part 9 is more restrictive on the release of consumer information for civil proceedings than the Consumer Protection Act 1987 was. Therefore there may not be any radical change to the situation as outlined in option (i).

A38. There would be a small cost to enforcers to provide resources to train staff and improve their understanding of Part 9, however this is not expected to be significant. The increase in knowledge of Part 9 gateways, would allow enforcers to save time as they become more efficient when dealing with related queries.

A39. There would also be a small cost to Government in issuing new guidance and ensuring its effective distribution.

A40. Compensatory simplification: this option is in itself a simplifying option as it is making guidance clearer on how and when to use Part 9 and does not impose additional costs on business.

Option (iii) – Amend Part 9 to allow the release of information for private civil proceedings respecting EU law prohibitions

Benefits

A41. IP rights holders may be able to obtain information to pursue civil action when counterfeiting activity has been identified. The table in Annex (i) shows that for a sample of counterfeit seizure cases the retail value of goods seized was £5.9 million. By making it easier for IP rights holders to pursue civil proceedings against counterfeiters, chances of recouping these losses, which we believe amount to millions of pounds, increase. Further, as counterfeiters are more likely to face financial penalties for their actions, there may over time be an increased deterrent effect (this is more likely if cases are successfully pursued). Sales of counterfeit goods reduce VAT, so if the change enhanced the deterrent effect, losses to HM Revenue and Customs would be reduced.

A42. Consumers could benefit as there is an increased possibility of obtaining compensation following injury as a result of a faulty good or service. In the long run, if such cases are pursued they may send a strong message to businesses acting unlawfully and therefore increase deterrent effects. The magnitude of benefits is likely to be higher for IP rights holders than for

consumers, but we hope to gather more evidence during consultation to confirm this view.

A43. This option could mean an increase in the deterrent effect which is not publicly funded, and possibly a potential saving to local authority budgets. If the option did increase the deterrent effect, it could serve to reduce the level of counterfeit trading or incidents of personal injury from faulty goods or services, through privately pursued cases, rather than at the expense of public enforcers.

Costs

A44. Businesses have voiced concern about the release of sensitive information, particularly overseas through a wider civil gateway. This is a risk, which, if realised, could have negative impacts on competition between firms. The likelihood and impact of this eventuality occurring is uncertain and is likely to vary according to the business affected, the market it operates in, the nature of information released and to whom the information is released.

Q19. Can you provide practical examples or evidence to illustrate the nature and magnitude of problems from disclosure of information to competitors or overseas enforcers?

A45. According to initial discussions with stakeholders, there are also concerns that in a small number of cases, information released may allow civil proceedings to be taken against legitimate business. However, where information is released and used to pursue a case it will be because it supports the case, therefore there seems to be only a small risk that legitimate business would be affected.

A46. Compensatory simplification: this option should not impose additional costs on legitimate business; however, business has raised concerns about the risk of releasing sensitive information and it will be essential to carefully manage this risk. Any additional costs in terms of legal advice or adaptation will be offset by best practice examples to help public authorities use gateways effectively and consistently. Further, we will work to ensure that best practice examples provided to guide are as clear as possible.

Q20. Do you have further suggestions on how to minimise the risk associated with disclosure of information?

Option (iv) – Amend Part 9 to allow the release of information for private civil proceedings in some cases only, respecting EU law prohibitions

A47. This option would allow for some disclosure of information through a very narrow gateway and would reassure business that sensitive information could not be released. The simplest way of achieving this would be to limit disclosure by identifying the legislation under which information could be released, for example the Trade Marks Act 1994, therefore allowing IP right holders to obtain information from enforcers to pursue civil cases against counterfeiters.

A48. Legislation identified would need to be carefully considered to ensure that sensitive information is not inadvertently released. The consultation

document includes an indicative list of legislation questioning whether the list should be longer or shorter, and explore whether legitimate business would face an increase in costs as a result of this option.

Benefits

A49. This option could contribute towards tackling the counterfeiting problem with the desired outcome being a reduction in the criminal activity. Option (iv) could allow IP rights holders to obtain information to pursue civil proceedings when counterfeiting activity has been identified. This may act as a deterrent to counterfeiting activities in the same way as outlined for option (iii) as counterfeiters could face a higher risk of penalties as a result of their actions. This may also benefit legitimate business through a reduction in unfair competition.

A50. This option could mean an increase in the deterrent effect which is not publicly funded, and possibly a potential saving to local authority budgets. If the option did increase the deterrent effect, it could serve to reduce the level of counterfeit trading or incidents of personal injury from faulty goods or services, through privately pursued cases, rather than at the expense of public enforcers.

A51. Option (iv) would benefit consumers as outlined in option (iii). Action could be taken against dishonest traders and there could be an opportunity for consumers to obtain compensation.

Costs

A52. As in option (iii), this option does not impose costs on legitimate business. However, by limiting the type of information disclosed, the risk of releasing sensitive information is much smaller.

A53. Compensatory simplification: As for option (iii) we do not anticipate additional costs for legitimate business but there is still a small risk (albeit significantly reduced relative to option (iii)) of releasing sensitive information. In further refining this option, it will be essential to manage this risk. Any additional costs in terms of legal advice or adaptation will be offset by best practice examples to help public authorities use gateways effectively and consistently. Furthermore, we will work to ensure that best practice examples provided to guide are as clear as possible and welcome any further suggestions for minimising risks to business.

Q21. Do you think the costs of amending Part 9 outweigh the benefits? Please give reasons why?

Small Firms Impact Test

A54. The policy proposal has four options. Options (i), (ii) and (iv) do not involve any significant or complex impact on small firms.

A55. Initial discussions with stakeholders have highlighted that allowing full disclosure (option iii) may allow sensitive information to be made available to competitors, and in a small number of cases allow civil proceedings to be

taken against legitimate business. The concerns related to option (iii) are applicable to both small and large enterprises.

Competition Assessment

A56. We have applied the competition filter test to these proposals and do not consider that a detailed competition assessment is necessary.

A57. Options (i), (ii) and (iv) will not be detrimental to competition. The measures in options (iii) and (iv) will improve consumers' chances of seeking redress and businesses' chances of taking action in response to counterfeiting activity. In this sense they seek to improve enforcement of existing legislation and act as a deterrent to dishonest traders. This will make it harder for dishonest traders and aid fair competition between legitimate traders.

A58. However option (iii) has been identified as the option which would cause business most concern as there is the potential that commercially sensitive material (such as information on mergers related cases) may be disclosed to third parties, and to overseas authorities which is of particular concern for competition. There are fears that competitors could discover confidential information about companies and use this to their advantage, which could lead to unfair competition.

A59. The risk of this happening is higher with the broader gateway in option (iii), rather than the narrower gateway in option (iv) which could allow the release of information for civil procedures in some cases only, (ie consumer detriment and in cases of counterfeit goods).

Q22. Do you agree with this competition assessment?

Enforcement Sanctions and Monitoring

A60. The options would not require formal enforcement activity, however, options (ii), (iii) and (iv) should enable enforcers to have a clearer understanding of what information can and cannot be released. Options (iii) and (iv) may have the effect of increasing likely sanctions for breaches of legislation, as IP rights holders and consumers should find it easier to pursue civil claims. The effect of options (iii) and (iv) is to release information that supports the case being pursued, so the risks of harming business that have acted lawfully are limited.

A61. We will need to monitor the impacts on counterfeiting activity and track any impact on consumers pursuing civil proceedings (if options (iii) or (iv) are pursued). In addition, we will need to assess whether any identified risks were realised. During the consultation we will be establishing which body will be best placed to monitor these impacts and how this will be carried out.

Contact Details

A62. If you have any further questions and would like to contribute comments and or evidence please contact in the first instance:

part9.consultation@dti.gsi.gov.uk

or:

Re Mian
DTI, Bay 464
1 Victoria Street
London, SW1H 0ET

E-mail: re.mian@dti.gsi.gov.uk

Tel: 020 7215 5432

Fax: 020 7215 6414

Annex (i)

	TRADE MARK	TOTAL SEIZURES (Excl. Customs)	RETAIL VALUE IF GENUINE (Where known)	CIVIL ACTION BUT FOR PART 9 √ would have taken action X would not have taken action ? insufficient info to decide
A	Sports Brand	147	£500k	√ 15 X 35 ? 97
B	Luxury Clothing & cosmetic brand	63	£201k	√ 29 X 7 ? 27
C	Fashion Retailer	97	£200k	√ X ? Majority
D	Computer software Co	150	£ see note below	√ see note below X ?
E	Sports Brand	229	£1.4m	√ (litigation) X ? Majority
F	Mobile Phone Accessories TM	78	£1.3m	√ Majority X ?
G	Famous Luxury Goods TM	310	£2.3m	√ 12 X 23 ? 166
		TOTAL	£5.9 m + see note below ³	

³ Most businesses that are investigated in relation to counterfeit software keep low stock levels, but trading records reveal both the extent to which the counterfeit product has penetrated the market, as well as supply and distribution intelligence. In example D in the table the IP rights holder is aware of a number of cases annually in which a trader's liability to them for IPR theft would be in the £6 million - £20 million range, (with expected recovery of damages up to £ low millions). These cases cannot be pursued due to Part 9.

Annex B

The DTI Consultation Code of Practice Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your Department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the Cabinet Office's web site, address <http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm>

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Nick Van Benschoten
DTI Consultation Co-ordinator
1 Victoria Street
London
SW1H 0ET

Email nick.vanbenschoten@dti.gsi.gov.uk

Annex C – Organisations to be consulted

This consultation document has been sent to the following organisations. We would welcome suggestions of others who may wish to be consulted.

Alliance Against IP Theft
Anti-Counterfeiting Group
British Chambers of Commerce
British Retail Consortium
Citizens Advice
Citizens Advice Scotland
Confederation of British industry
Convention of Scottish Local Authorities
Department for Enterprise Trade and Investment Northern Ireland
Energywatch
Entertainment and Leisure Software Publishers Association
Federation Against Copyright Theft
Federation Against Software Theft
Federation of Small Businesses
Financial Services Authority
Food Standards Agency
General Consumer Council for Northern Ireland
Heads of Trading Standards Services – England, Scotland, Wales, N. Ireland
Health and Safety Executive
Information Commission
Information Commission (Scotland)
Law Commission
Law Society
Local Authorities Coordinators of Regulatory Services
Local Government Association
Microsoft
National Consumer Council
National Weights and Measures Laboratory
Northern Ireland Local Government Association
Ofcom
Office of Fair Trading
Ofgem
Ofwat
Patent Office
Postcomm
Postwatch
Scottish Consumer Council
Scottish Executive
Society of Chief Officers of Trading Standards in Scotland
Society of Chief Trading Standards Officers
Trading Standards Institute
Watervoice
Welsh Assembly
Welsh Consumer Council
Welsh Local Government Association
Which?