

dti

**IMPLEMENTING THE EU
REGULATION ON CONSUMER
PROTECTION COOPERATION**

Response to a public
consultation on the On-Site
Inspection Power of the
Consumer Protection
Cooperation Regulation

13 SEPTEMBER 2006

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A Consultation on the Consumer Protection Cooperation Regulation

Summary of Responses

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Introduction

The DTI launched a public consultation on the implementation of the EU Regulation on Consumer Protection Cooperation (CPC) in July 2005. The consultation closed on 3 October 2005 and included an undertaking to consult further on the on-site inspection power. This second consultation was published on 16 June 2006. The DTI received 13 responses and is grateful for the constructive input. A copy of the consultation document can be downloaded from [here](#).

1. *Breakdown Of Responses*

A total of 13 responses were received representing 32 organizations (excluding individual memberships of organizations). These comprised:

- Enforcement or regulatory organizations - 6
- Industry - 2
- Consumer organizations – 3
- Other - 2

A full list of respondents is attached in Annex A.

2. *Executive Summary*

The consultation paper included a draft of the proposed Statutory Instrument on the new on-site inspection power (attached in Annex B). Consultees were invited to address three questions - did the draft meet the requirements of the Regulation; were there any unintended consequences; and whether there was anything missing from the draft (besides provisions dealing with the interplay with Part 9 of the Enterprise Act).

Respondents from all areas again gave a considerable degree of support for the aims and objectives of the Regulation although there were opposing views in some specific areas.

The main area of divergence was the issue of notice of an intended inspection. The draft, which is based on similar powers in the Competition Act 1998, proposed giving traders two days written notice of an intended inspection unless under warrant. Consumer groups and some enforcers argued that the Regulation did not stipulate notice and any such prior notice would allow an unscrupulous business to either destroy evidence or close down operations. On the other hand business representatives contended that two days notice was insufficient on the grounds that a sole trader may be away from his premises for more than two days, or alternatively, that two days notice was insufficient to allow a business to seek legal advice.

Given the respective polarity of views, consensus is unlikely. The Government believes two days would be consistent with the Competition Act 1998 and would allow time for a small enterprise to plan their activities around an expected visit. It should also be remembered that if an enforcer has reason to believe that evidence will be destroyed they have the option to seek a warrant from the court. If, in the execution of the warrant, the business attempts to destroy or tamper with evidence the draft Statutory Instrument contains criminal sanctions.

In other areas respondees provided helpful comments on oversights, inconsistencies, general drafting suggestions and linkages to Part 9 of the Enterprise Act. The Government is grateful for all contributions.

Some comments were outwith the scope of the Consultation and will be addressed directly with the organizations rather than in this document.

3. *Detailed Summary Of Responses*

The consultation solicited responses to three questions. The nature of the responses and divergence of views lends itself to dealing with the issues holistically rather than by individual question. A summary of each comment received during the consultation is highlighted in italics, followed by a Government response.

The requirement to provide two days written notice of an inspection.

This was the most contentious area of the consultation. Enforcers and Consumer groups were keen to remove this restriction completely. Business representatives and the Law Society favoured extending the notice period. **The Government feels that two days notice strikes the right balance allowing companies to plan their business activities around an inspection, while if the enforcer suspects evidence will be destroyed or falsified, they have the option to go directly to court and seek a warrant which would allow them to conduct a search without giving prior notice.**

The right to use test purchases.

This subject was dealt with in the previous consultation. Test purchases are not foreseen by the Regulation and to include this ability would be to “over-implement” (gold-plate) the Regulation. Generally, EU Regulations should be implemented to the minimum level unless there is a cost/benefit advantage in doing otherwise. **In this case the ability to make test purchases will not be included in the Statutory Instrument.**

The right to enter a dwelling

Again opinion was divided between business on one hand and enforcers/consumer groups on the other. The Government is sympathetic to the concern that an unscrupulous business might store incriminating documents away from the place of business but feel we have struck an appropriate balance by only excluding those premises used **solely** as a dwelling and we have borne in mind the use of the term “on-site” in Article 4(6)(c) of the CPC regulation. Enforcers’ powers to seek a warrant for an unannounced inspection of business premises (in certain circumstances) should ensure consumers are sufficiently protected. **To extend the right of inspection to premises used solely as a domestic dwelling would be disproportionate.**

The right to inspect documents not relating to business

Some enforcers believe the right to inspect documents “relating to business” are too restrictive, particularly when investigating scams, citing information derived from mobile telephone bills and request that this wording is deleted.

On reflection the Government concedes that deleting the words “relating to the business” implements the CPC regulation more faithfully but is content that the power is sufficiently limited (e.g. by the provisions of section 227(6) so as to meet human rights concerns while protecting enforcers against allegations of “fishing expeditions”.

The power to obtain information in s224 / 225 of the Enterprise Act 2002 has not been extended to CPC enforcers in their capacity as such.

The Government have always recognised that CPC enforcers will require the powers set out in sections 224 and 225 of the Enterprise Act when carrying out their activities under the Regulation and will make the necessary provision in the final form of the regulations.

Inclusion of a definition of a “duly authorised officer”

The draft Statutory Instrument does refer to “a duly authorised officer” but this simply reflects the equivalent provisions in the Trade Descriptions Act, on which it was partly based. Other statutory enforcement regimes (such as the Consumer Credit Act) do not require individual officers carrying out enforcement activities to be authorised and no doubt enforcers will have internal rules governing which officers are entitled to carry out such work. **The Government believes that it is sufficient to confer the necessary powers on CPC enforcement organizations rather than on certain officials.**

Protection from criminal damage allegations e.g. where files on a computer were damaged during access of them.

This is not foreseen by the Regulation and will not be included in the Statutory Instrument.

In s227A(2)(ii) the “necessary” test is too onerous to obtain warrants.

This concern relates to the conditions an enforcer must meet in order to secure a warrant. One of these conditions was thought to be that the enforcer must set out why an inspection is “necessary”.

This concern is misplaced because the “necessary” test only applies to inspections undertaken with the consent of the company and does not apply to warrants.

Enforcers to use inspection powers to monitor compliance of orders and undertakings

Strictly speaking this is not in the Regulation but is wholly in keeping with its spirit and intention, the draft will be amended appropriately. It is reasonable, under a Regulation designed to provide a framework for effective enforcement, that if an undertaking has been given or a court order issued, to follow this undertaking or order up if the enforcer has reasonable suspicion that a trader has not complied.

Alter the definition of “occupier” in line with CA98.

The definition of “occupier” in CA98 covers, in addition to the actual legal occupier, a person whom an enforcer has reasonable cause to believe to be the occupier.

The Government agrees and will make the necessary amendments to the draft.

Section 227B(2)(b)(ii) does not refer to the risk of tampering with goods.

Currently this section only refers to tampering with documents or information.

The Government agrees and will make the necessary amendments to the draft.

In s. 227B(3)(a) after the word “warrant” an enforcer would like the wording “to use such force as may be reasonably necessary” added.

This relates to the steps the enforcer can take to gain entry to premises.

The Government believe this point is captured in s. 227B(3) subsection (d) which qualifies the powers in the preceding subsections and no change is necessary.

In s. 227B(3)(d) the current draft implies that force can be used against a person.

The wording in this section, which deals with the use of force, is drafted in general terms and therefore could be construed as applying to persons.

It is reasonably clear that a warrant authorizing a search does not in itself entitle the police to search persons on the premises. Thus it follows that in order to do so enforcers would have to use other statutory powers which may be available to them.

On the basis that enforcers only enjoy powers under the warrant in relation to property (as opposed to people) the right to use reasonable force only relates to property also.

S. 227B does not contain a provision similar to s. 227A(6) relating to assistance from persons on the premises.

This relates to the assistance which the occupier must ensure that persons on the premises give to the enforcer.

The Government agrees and will amend s. 227C to reflect this.

Section 7 should include an express power to require goods to be produced.

The current text only requires documents and information to be produced.

The Government agrees and will make the necessary amendments to the draft.

S. 227B gives enforcers the right to take such persons and equipment as necessary to the premises. Enforcers would like similar rights under s. 227A.

There is a question as to whether such a power would be disproportionate without the backing of a warrant. On reflection, the Regulation foresees the exchange of officials between member states in the spirit of cooperation. **In order to do this effectively enforcers will need a similar power to that proposed. The Government therefore agrees with the proposal and will make the necessary amendments to the draft regulations. This is not a new power since other enforcement regimes contain a similar power in relation to inspections carried out without a warrant (e.g. the Trade Descriptions Act on which the draft Statutory Instrument is partly based).**

It was suggested that the only documents protected by legal professional privilege (s. 227C(4)) relate to the High Court.

This is not so. The reference to the High Court is simply part of the test as to whether documents are protected. It is identical to the existing

protection for privileged documents in section 226(8) of the Enterprise Act.

The explanatory section on the use of courts states that Competent Authorities “can” apply to the court to obtain a warrant for search and seizure. It would provide greater protection if this were changed to “must” apply.

It would be disproportionate to require enforcers to apply for a warrant in every case. In many cases a warrant will not be necessary as it will be possible to gain entry to premises by consent. Given the text of the [Enforcement Concordat](#) rather than apply for a warrant before every inspection, the Government prefers the option of a rising scale to allow for the cooperation of the business and assessed risk. The enforcer can write to the company seeking information, conduct an inspection by agreement having first given written notice, or alternatively, apply for a warrant (if the necessary conditions are satisfied). **The Government believes these options allow the enforcers to take appropriate proportionate actions given their assessment of the risk.**

There should be an explicit right of redress for anyone subject to an inspection where “reasonable suspicion” is later found to be completely unsubstantiated.

Redress is not foreseen by the Regulation and will not be introduced in the implementing Statutory Instrument. Again, this would amount to gold-plating or over-implementation. This does not preclude the possibility of a private action against the enforcer.

The powers granted to remove material appear too broad and no provision is made for protecting the business concerned against the removal of material on which they rely for the continued conduct of their business.

The removal of documentation is a necessary consequence of enforcement, however if a business feels it has been seriously inconvenienced it has the possibility of a private action against the enforcer.

The original proposal for the CPC states that injunctions would be seen to be the main enforcement tool, yet the Regulations allow unnecessarily wide powers to enter premises without obtaining an injunction (s. 227A(3)) if the officer has taken all steps necessary to give notice and has not been able to do so. There should be a stricter test to prevent s. 227A(3) being used as a green light by the enforcing authorities for entry on the premises without notice.

These powers are related to evidence gathering. Clearly gathering and assessment of evidence is necessary to establish whether a breach has

occurred which is a prerequisite before any injunctive action could be taken .The Government anticipates that the majority of disputes should be capable of being resolved without the need for court action.

S. 227A(5) states that the test for entry on the premises is a 'reasonable suspicion' that a Community infringement is likely to occur or has occurred. A stricter test should be put in place to prevent frivolous claims being investigated in this manner. Further, similar to the information required when obtaining an injunction, specifically information should be provided at the outset on what documents etc the enforcer seeks to investigate to prevent a costly and time wasting exercise.

The “reasonable suspicion” threshold in the draft Statutory Instrument is taken from Article 4.6 of the Regulation. **To impose a higher or lower threshold on enforcers is likely to amount to over-implementation (gold-plating) or a breach of our EC obligations as the case may be.** In addition enforcement will be in line with the enforcement concordat and a risk based assessment criteria will be established by the OFT to prevent frivolous claims. The entry test is not dissimilar from other powers of entry and experience has shown that this threshold is sufficient to ensure that enforcers do not engage in “costly and time-wasting exercises”.

The definition in s. 222(1) of the Enterprise Act 2002 of a "community infringement" does not properly and fully reflect that the CPC is aimed at "intra-community infringements" which are defined in Article 3(b) of the CPC.

The applicable provision is s. 212 not section 222 of the Enterprise Act. The Government is content, following reflection, that the term “community infringement” in s. 212 of the Enterprise Act is as broad, if not broader, than the term “intra-community infringement” as defined in the CPC.

If additional national enactment is planned which goes beyond the obligations set out in the CPC Regulation it has to be considered whether such enactment should be included into Schedule 15 of the Act in order to facilitate the disclosure of information by or to enforcers who are not competent authorities under S.241 (3) of the Act. This is due to the fact that any information gathered under the new on-site inspection powers of Part 8 of the Act will fall as specified information (S. 238 (1) (a) of the Act) under the general restrictions of S. 237 of the Act.

DTI is currently considering the interplay between Part 9 and the CPC regulation and will make such amendments to Part 9 to take account of enforcement under the Regulation as are permitted by EC law and necessary in policy / legal terms.

The Statutory Instrument proposed adds section 213(5B) after section 213(5) of the Enterprise Act. Within this new section (5B) a CPC enforcer is defined. At (b) this includes a body with a legitimate interest in stopping community infringements and designated by the Secretary of State under Article 4(2) of the CPC Regulation. This would not appear to include a competent official of the applicant authority within the role detailed in Article 6.3 and to comply with Article 16.1(f). These enforcers will need to be included to comply with Article 16.2. Without this, an enforcer from France attending with a UK Trading Standards Officer during an inspection to protect French consumers would not be authorised to enforce the Regulation.

DTI is committed to ensuring the enforceability of all aspects of the Regulation and will therefore consider what amendments may be necessary in order to take account of these points.

4. The Next Steps.

The redrafted Statutory Instrument will now go forward to the office of the Parliamentary draftsman for their input and it is intended that it will be in place in good time for the CPC Regulation's entry into force on 29 December 2006.

In addition to any amendments from the Parliamentary draftsman, the final version will also include consequential amendments to the Data Protection Act and Parts 8 and 9 of the Enterprise Act.

Annex A.

List of respondents

1. Trading Standards Institute.
2. The Law Society.
3. SCOTSS.
4. Friends Provident
5. The Office of Fair Trading.
6. Cattles plc.
7. The National Consumer Federation.
8. Ofcom.
9. The Civil Aviation Authority.
10. Trading Standards (South East).
11. Citizens Advice Bureau.
12. The Scottish Consumer Council.
13. The Scottish Executive.

*Annex B - Draft Enterprise Act 2002 (Amendment) Regulations
2006*

STATUTORY INSTRUMENTS

2005 No.

**DRAFT ENTERPRISE ACT 2002 (AMENDMENT)
REGULATIONS 2006**

Draft clauses re on-site inspection power

Made - - - - - ***

Laid before Parliament ***

Coming into force - - - ***

Interpretation

1. In these Regulations—

“2002 Act” means the Enterprise Act 2002 (c.40);

2. After section 213(5) of the 2002 Act insert—

“(5B) A “CPC enforcer” is—

- (a) a competent authority designated by the Secretary of State under Article 4(1) of the CPC Regulation; or
- (b) a body with a legitimate interest in the cessation or prohibition of Community infringements designated by the Secretary of State under Article 4(2) of the CPC Regulation.”.

3. In section 215 of the 2002 Act after subsection (4) insert—

“(4A) A CPC enforcer may make an application for an enforcement order in respect of a Community infringement.”.

4. After section 227 of the 2002 Act insert—

“Power to gain access to premises

227A.—(1) An officer of a CPC enforcer may enter any premises in order for the officer—

- (a) to observe the carrying on of a business; or
- (b) to inspect such documents relating to such a business as are situated on the premises

provided the following conditions are met.

(2) Those conditions are—

(a) an officer of a CPC enforcer has given the occupier of the premises a written notice which—

(i) gives at least two working days' notice of the intended entry;

(ii) sets out the reasons why the entry is necessary;

(iii) specifies or describes the documents which inspection is required of.

(3) The premises which an officer may enter do not include premises which are used only as a dwelling.

(4) Subsection (2) does not apply if the officer of the CPC enforcer has taken all such steps as are reasonably practicable to give notice but has not been able to do so.

(5) In a case falling within subsection (4) the power of entry conferred by subsection (1) is to be exercised by the officer of the CPC enforcer on production of—

(a) evidence of his authorisation; and

(b) a document containing the information referred to in subsection (2)(a)(ii) and (iii).

(6) Where an officer of a CPC enforcer enters any premises by virtue of this section, the occupier shall secure that persons on the premises give the officer such assistance or information as he may reasonably require in connection with his observation or inspection of documents (as the case may be).”.

5. After section 227A of the 2002 Act (inserted by [regulation] 4 of [these regulations]) insert—

“Entry to premises under warrant

227B.—(1) A justice of the peace may issue a warrant under this section if satisfied on information on oath given on behalf of the CPC enforcer that there are reasonable grounds for believing that the following conditions are satisfied.

(2) Those conditions are—

(a) that there is on the premises specified in the warrant information or documents in relation to which—

(i) the OFT would be entitled to require production of under section 224;

(ii) a CPA enforcer (other than the OFT) would be entitled to require production of under section 225;

(b) that if such a requirement were to be made in relation to the information or documents—

(i) it would not be complied with; or

(ii) the information or documents would be tampered with.

(3) A warrant under this section shall authorise an officer of a CPC enforcer—

(a) to enter the premises specified in the warrant;

(b) to search the premises and to seize and detain any information or documents appearing to be information or documents specified in the warrant or information or documents of a description so specified;

(c) to take any other steps which may appear to be reasonably necessary for preserving such information or documents or preventing interference with them; and

(d) to use such force as may be reasonably necessary.

(4) In the application of this section to Scotland—

(a) the reference to a justice of the peace includes a reference to a sheriff;

(b) for “information on oath” there is substituted “evidence on oath”.

(5) In the application of this section to Northern Ireland the reference to a justice of the peace shall be construed as a reference to a lay magistrate.”.

6.—(1) In section 227(1) of the 2002 Act after “given under section 224 or 225” insert “or 227A”.

(2) In section 227(3) after “the purposes mentioned in section 224 or 225” insert “or 227A”.

7. After section 227B (inserted by regulation 6 of these regulations) insert—

“Power to require provision of information or documents etc.

227C.—(1) The powers conferred on CPC enforcers under section 227A include the power—

- (a) to require information to be provided or produced in such form as the enforcer may specify, including, in relation to information recorded otherwise than in a legible form in a legible form;
- (b) to take extracts from, any documents provided or produced by virtue of the exercise of the power;
- (c) to require the person who is required to provide or produce any information or document by virtue of the exercise of the power—
 - (i) to state to the best of his knowledge and belief, where the information or document is;
 - (ii) to give an explanation of the document;
 - (iii) to secure that any information provided or produced whether in a document or otherwise is verified in such manner as may be specified by the enforcer;
 - (iv) to secure that any document provided or produced is authenticated in such manner as may be so specified.

(2) The power conferred on CPC enforcers in sections 227A or 227B shall include the power to take copies of documents provided or produced or inspected or seized by virtue of the exercise of the power.

(3) An officer entering premises by virtue of section 227A or 227B may take such persons and equipment with him as he thinks necessary.

(4) But a CPC enforcer has no power under this Act—

- (a) to require another person to provide or to produce,
- (b) to seize from another person, or
- (c) to require another person to give access to premises for the purposes of the inspection of any information or document which the other person would be entitled to refuse to provide or produce—
 - (i) in proceedings in the High Court on the grounds of legal professional privilege;
 - (ii) in proceedings in the Court of Session on the grounds of confidentiality of communications.”.

8. After section 235 of the 2002 Act insert—

“CPC Regulation

235A. In this Part the CPC Regulation means Regulation 2006/2004 of the European Parliament and of the Council of 27th October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.”.

9. In Schedule 13 of the 2002 Act:

After paragraph 7 insert—

“**7A.** Directive 98/96EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.”.

After paragraph 7A insert—

“**7B.** Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.”.

After paragraph 9A insert—

“**9B.** Regulation (EC) No 271/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights.”.

10. In Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 (c.16) (powers of seizure to which section 50 applies) after paragraph 73B insert—

“**73BA.** The power of seizure conferred by section 227B of the Enterprise Act 2002 (entry to premises under warrant).”.

End

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Consumer & Competition Policy Directorate
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