

**dti**

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

A public consultation on the  
on-site inspection power  
required by Competent  
Authorities under the  
Consumer Protection  
Cooperation Regulation

JUNE 2006

**URN 06/1361**

## Explanation of the wider context for the consultation

This consultation follows on from an earlier consultation on the EU Regulation on Consumer Protection Co-operation.

The EU Regulation on Consumer Protection Co-operation will establish a network of public authorities with powers to co-operate and share information with each other for the purposes of enforcing certain EC legislation that protects consumers' interests. It operates to protect the 'collective interest of consumers' and will also provide an enhanced role for the European Commission in facilitating administrative co-operation and common projects designed to inform, educate and empower consumers.

The UK Government has strongly supported this Regulation from the start. Ensuring that laws are effectively and consistently enforced is an essential part of making consumer policy work.

In the UK, many of the basic tenets of the network established by the Regulation already exist. We have a long established public enforcement regime, and current legislation provides for most of the enforcement and information sharing powers required by this Regulation. However, some changes to the powers of enforcement bodies will be needed and in this consultation DTI is seeking views on the construction and scope of the on-site inspection power.

The Code of Practice on Consultation explicitly acknowledges that it can be appropriate to have a shortened period for re-consultation on proposals revised or developed in light of a previous consultation, consequently the response time for this consultation will be **one month** from the date of issue.

Issued 16 June 2006  
Respond by 14 July 2006

Responses to  
Duncan Lawson  
Consumer and Competition Policy Directorate  
Department of Trade & Industry  
1 Victoria Street  
London, SW1H 0ET

Email: [duncan.lawson@dti.gsi.gov.uk](mailto:duncan.lawson@dti.gsi.gov.uk)  
Tel: +44 (0)207 215 5465

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## *1. How To Respond*

The DTI welcomes comments, including supporting evidence by 14 July 2006. When responding please state whether you are responding as an individual or representing the views of an organization. If responding on behalf of an organization, please make it clear who the organization represents and where applicable, how the views of the members were assembled.

A response can be submitted by letter or email to:

Duncan Lawson  
Consumer and Competition Policy Directorate  
Department of Trade & Industry  
1 Victoria Street  
London, SW1H 0ET

E-mail :[duncan.lawson@dti.gsi.gov.uk](mailto:duncan.lawson@dti.gsi.gov.uk)

Tel +44 (0)207 215 5465

A list of those organizations consulted is detailed in Annex C.

## *2. Confidentiality & Data Protection*

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 organization'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), the Data Protection Act 1998 (DPA) 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, 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 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

### *3. Help with queries*

Questions about the policy issues raised in this document can be addressed to Duncan Lawson at the contact details given above.

### *4. Complaints*

The Code of Practice on Consultation can be found in Annex B of this document. If you wish to make a complaint about, or comment on, the way in which this consultation has been conducted, please contact:

Mary Smeeth  
Departmental Consultation Coordinator  
Department of Trade & Industry  
1 Victoria Street  
London SW1H 0ET

Email: [mary.smeeth@dti.gsi.gov.uk](mailto:mary.smeeth@dti.gsi.gov.uk)  
Tel: 020 7215 2146

### *5. Introduction*

The DTI launched a public consultation on the implementation of the EU Regulation on Consumer Protection Co-operation (CPC) in July 2005. The consultation closed on 3 October 2005. A copy of the original consultation document can be downloaded from [here](#).

In the Government response, published in December 2005, DTI indicated that a further consultation on the framing of the on-site inspection power would follow

by mid-2006. A copy of the consultation response can be downloaded from supplied upon request.

## *6. Responses to the original consultation*

In the responses to the original consultation, concerns were raised by business, consumer groups and enforcement organizations over the conduct of an on-site inspection. Primarily, these concerns were related to a lack of clarity within the Regulation itself over confidentiality, time limits, definitions and the establishment of robust risk based pre-inspection criteria.

Having studied consultation responses DTI has agreed with the Office Of Fair Trading (OFT), given the OFT's role as Single Liaison Office under the Regulation, that they will, in addition to hosting seminars for interested bodies, produce a "Statement of Principles" describing how the on-site inspection power will be used.

It is expected that the other Competent Authorities (CAs) will use the power in a similar way to the way OFT carries out on-site inspections under the Competition Act 1998 and that enforcement action will be proportionate and in line with the principles set out in the [Enforcement Concordat](#). OFT will produce this guidance, agreed with other CAs, before the date of implementation.

## *7. About the Draft On-Site Inspection Power*

Article 4.6(c) of the CPC Regulation explicitly requires all CAs to have the necessary powers to carry out on-site inspections. The previous consultation (July 2005) sought views on the framing of this power, in this draft DTI have attempted to address these views where possible. The main areas of respondent concern are addressed in (i) to (iv) below.

The provisions of this on-site inspection power are based on a number of well-established statutory precedents.

This gives relevant authorities powers under civil law to conduct on-site inspections – some authorities already have these powers under criminal law, others previously had no such powers.

As detailed in the December 2005 response, this power will apply to both domestic and intra-community infringements of the relevant Directives.

### *i. Use of Courts*

Having taken note of the concerns under access to justice and speed of the procedures, highlighted in the consultation, under these proposals enforcement authorities can apply to a magistrate to obtain a warrant for search and seizure.

ii. Legal Professional Privilege (LPP)

Protection of Legal Professional Privilege was a concern of a number of business organisations. Article 13 of the Regulation implies that competent authorities (CAs) can obtain documents protected by LPP from businesses, disclose them to other CAs and only imposes a qualified restriction on those CAs from disclosing the documents to third parties other than CAs.

This goes far beyond the position which would be permitted in UK law. However, Recital 17 of the Regulation states that the regulation must be applied with respect to "fundamental rights" which include the European Convention on Human Rights (and the EU Charter of Fundamental Rights) which is likely to prevent such a power being exercised in practice.

For these reasons wording protecting LPP has been included in section 227C(4). The wording used mirrors the existing provision in section 227(8) of the Enterprise Act (which applies to existing enforcement action under Part 8).

iii. What if notice cannot be given?

It is conceivable that prior notice cannot be given due to, for example, a trader simply refusing to answer the door or respond to other attempts to get in touch with him. DTI has proposed text in line with S.27(3) of the Competition Act 1998 which enables the enforcer to dispense with the requirement to give notice if the enforcer has taken all reasonable steps to give the notice but is unable to do so.

iv. The Power to Remove Material

This concerns the power to remove material where it is not reasonably practicable to determine on the premises whether it could be seized or whether it contains something which could be seized.

This may be the case, for example, where there is a large bulk of material or where special technical equipment is needed to separate out material an enforcer would be entitled to take from material which it is not (for example, material held on a computer).

DTI has added the draft on-site inspection power to the list of provisions which S.50 of the Criminal Justice and Police Act 2001 (CJPA2001) applies to allow CPC enforcers to address this problem.

The proposed wording also anticipates the necessity of enforcers seizing documents, information and goods.

v. Proposed role of Trading Standards

It was clear from the previous consultation that Trading Standards had a role in the enforcement of the CPC Regulation but the creation over 200 additional Competent Authorities would create a confusing situation. Our proposed solution is to nominate Trading Standards Offices as 8.3 bodies (defined in the attached SI in s3 (b)) and allow the OFT to commission them to carry out on-site inspections as necessary. In order to exercise these powers Trading Standards would have to satisfy the same conditions as Competent Authorities.

**8. *Impact Assessment***

As with other consultations a partial impact assessment including analysis of policy options was carried out and included in the original consultation at Annex B (pages 24 – 38). The original document can be downloaded from [here](#). These proposals are in line with the Hampton Review of Regulatory Inspection and Enforcement recommendations on investigative activity.

**9. *QUESTIONS***

- a) Does the text of this draft Statutory Instrument meet the requirements of the Regulation?
- b) Do you foresee any unintended consequences of this text?
- c) The final Statutory Instrument will tie in with parts 8 of the Enterprise Act (2002) and make amendments to the Data Protection Act. We are also considering how it may be possible to tie it in with Part 9 of that Act. Is there anything else missing from the draft?

**10. *What Happens Next?***

The closing date for this consultation is 14 July 2006. We will then consider all submissions before finalizing and publishing our response within one month of the close of the consultation

# Annex A - Draft Enterprise Act 2002 (Amendment) Regulations 2006

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STATUTORY INSTRUMENTS

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2005 No.

## DRAFT ENTERPRISE ACT 2002 (AMENDMENT) REGULATIONS 2006

### Draft clauses re on-site inspection power

<i>Made</i> - - - -	***
<i>Laid before Parliament</i>	***
<i>Coming into force</i> - -	***

### Interpretation

1. In these Regulations—

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

2. In section 212(1) of the 2002 Act after “In this Part a Community infringement is an act or omission which harms” insert “or is likely to harm”.

3. 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.”.

4. 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.”.

5. After section 227 of the 2002 Act insert—

#### “Power to gain access to premises

**227A.**—(1) A duly authorised officer of a CPC enforcer may for the purposes set out in subsection (5) enter any premises other than premises used only as a dwelling in order for the officer to—

- (a) observe the carrying on of a business on the premises;
- (b) inspect goods;

- (c) inspect documents or information relating to the business;
- (d) seize and detain goods in order to carry out tests on them;
- (e) seize and detain goods or documents or information which he has reasonable cause to believe may be required as evidence in enforcement action under this Part;
- (f) for the purpose of exercising his powers under this subsection to seize goods or documents or information, he may require any person having authority to do so to break open any container and, if that person does not comply with the requirement, he may do so himself,

provided the following conditions are met.

(2) Those conditions are that 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) indicates the nature of the offences created by sections 227D, 227E and 227F.

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

(4) In a case falling within subsection (3) the power of entry conferred by subsection (1) is to be exercised by a duly authorised officer of a CPC enforcer on production of—

- (a) evidence of his authorisation; and
- (b) a document containing the information referred to in subsection (2)ii) and (iii).

(5) The purposes referred to in subsection (1) are—

- (a) where there is a reasonable suspicion that a Community infringement is likely to occur to ascertain whether a Community infringement is likely to occur;
- (b) where there is a reasonable suspicion that a Community infringement has occurred to ascertain whether a Community infringement has occurred;
- (c) to ascertain whether a person has complied with or is complying with an enforcement order or an interim enforcement order made on the application of the enforcer or an undertaking given under section 217(9) or 218(10) (as the case may be) following such an application or an undertaking given to the enforcer under section 219.

(6) Where a duly authorised 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.”.

6. 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 are on the premises specified in the warrant goods or information or documents which a CPC enforcer would be entitled to inspect or seize and detain under section 227A;
- (b) that if notice to enter premises in order to inspect or seize and detain such goods or information or documents were given—
  - (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 goods or information or documents appearing to be goods or information or documents specified in the warrant or information or goods or documents of a description so specified;
- (c) to take any other steps which may appear to be reasonably necessary for preserving such goods or 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.”.

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 227B may take such persons and equipment with him as he thinks necessary.

(4) But a CPC enforcer has no power under section 227A or 227B—

- (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 227C (inserted by regulation 7) insert—

***“Destroying or falsifying documents***

**227D.**—(1) *[A person is guilty of an offence if, having been required to produce a document under section 227A or 227B—*

(a) *he intentionally or recklessly destroys or otherwise disposes of it, falsifies it, or conceals it, or*

(b) *he causes or permits its destruction, disposal, falsification or concealment.*

(2) *A person guilty of an offence under subsection (1) is liable—*

(a) *on summary conviction, to a fine not exceeding the statutory maximum;*

(b) *on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or both.]”.*

9. After section 227D (inserted by regulation 8) insert—

***“Destroying or tampering with goods***

**227E.**—(1) *A person is guilty of an offence if, having been required to produce goods under section 227A or 227B—*

(a) *he intentionally or recklessly destroys or otherwise disposes of them, tampers with them or conceals them, or*

(b) *he causes or permits their destruction, disposal, tampering with or concealment;*

(2) *A person guilty of an offence under subsection (1) is liable—*

(a) *on summary conviction, to a fine not exceeding the statutory maximum;*

(b) *on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or both.]”.*

10. After section 227E (inserted by regulation 9) insert—

***“False or misleading information***

**227F.**—(1) *If information is provided by a person to a CPC enforcer in connection with any of its functions under this Part that person is guilty of an offence if—*

(a) *the information is false or misleading in a material particular, and*

(b) *he knows that it is or is reckless as to whether it is.*

(2) *A person guilty of an offence under subsection (1) is liable—*

(a) *on summary conviction, to a fine not exceeding the statutory maximum;*

(b) *on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or both.]”.*

11. 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.”.

**12.** In Schedule 13 of the 2002 Act:

After paragraph 7 insert—

**“7A.** Directive 98/6EC 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.”.

**13.** 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).”.

## **Annex B – Code of Practice on consultations**

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 coordinator.
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.

<http://www.cabinetoffice.gov.uk/regulation/consultation/index.asp>

### **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:

Mary Smeeth,  
DTI Consultation Coordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone: 020 7215 2146  
email: [mary.smeeth@dti.gsi.gov.uk](mailto:mary.smeeth@dti.gsi.gov.uk)

## **Annex C – List Of Consultees**

Advertising Association  
Advertising Standards Authority  
Air Transport Users Council  
Association of British Travel Agents  
Association of Timeshare Owners Committees  
British Bankers Association  
British Chambers of Commerce  
British Retail Consortium  
Cattles plc.  
Civil Aviation Authority  
Confederation of British Industry  
Confederation of Passenger Transport UK  
Consumer Credit Association  
Consumer Protection Group  
Consumer Council  
Consumers International  
The Consumer Action Network (Postwatch Rail Passengers Council, Age Concern, Consumer Council for Water, European Consumer Centre, Citizens Advice and Energywatch).  
Direct Marketing Association  
Direct Selling Association  
Federation of Small Business  
Financial Ombudsman Service  
Financial Services Authority  
Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)  
Institute of Directors  
Law Commission  
Law Society  
Law Society for Northern Ireland  
Law Society for Scotland  
Local Authorities Co-ordinators of Regulatory Services (LACORS)  
Local Government Association  
Mail Orders Traders Association  
Medicines and Healthcare Products Regulatory Agency  
Mid-Yorkshire Chamber of Commerce  
National Assembly for Wales  
National Consumer Council  
National Federation of Consumer Groups  
National Lottery Commission  
General Consumer Council for Northern Ireland  
Office of Communications  
Office of Fair Trading  
Office of Gas & Electricity Markets (OFGEM)  
Office of the Information Commissioner  
Office of the Rail Regulator  
Office of Water Services (OFWAT)  
Organisation of Timeshare in Europe

Scottish Consumer Council  
Scottish Executive  
SCOTSS  
Small Business Europe  
Timeshare Consumers Association  
Trading Standards Institute  
Watervoice  
Welsh Consumer Council  
Which?