

EXPLANATORY MEMORANDUM TO
THE ENTERPRISE ACT 2002 (AMENDMENT) REGULATIONS 2006
2006 No. 3363

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 These Regulations implement certain aspects of (EC) Regulation 2006/2004 (the Consumer Protection Cooperation Regulation) (“CPC”). In particular they confer entry and inspection powers on certain enforcers (by means of amendments to Part 8 of the Enterprise Act and section 50 of the Criminal Justice and Police Act 2001); add three additional instruments to schedule 13 of that Act; and amend section 31 of the Data Protection Act 1998 to prevent the subject access provisions contained in that Act from obstructing the proper functioning of the Regulation as it requires.
3. **Matters of special interest to the [Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments]**
 - 3.1 None
4. **Legislative Background**

Transposition

 - 4.1 CPC, although theoretically directly applicable, requires further implementation to give effect to some of its provisions (in this case by means of a Statutory Instrument). The SI, which makes amendments to Part 8 of the Enterprise Act and small amendments to the Criminal Justice and Police Act and the Data Protection Act, must be in place by 29 December 2006 to meet our EU obligations and avoid possible infraction proceedings.

Scrutiny Committee History

 - 4.2 The DTI submitted an explanatory memorandum to the EU Scrutiny Committees (EM 11830/03) on 9/9/03 on this Regulation entitled a “Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (“the Regulation on Consumer Protection cooperation”). The Commons European

Scrutiny Committee considered it politically important and not cleared, further information was requested (Report 36, Item 24786, Session 02/03). The Lords Select Committee on the EU kept it under scrutiny in Sub-Committee G (Progress of Scrutiny, 5/3/04, Sess 03-04))

- 4.3 The idea of a formalised enforcement co-operation framework first arose in the European Commission's Green Paper on EU Consumer Protection in 2001 (COM (01)531 = EM12613/01) submitted by the DTI on 12/12/01. The Commons European Scrutiny Committee considered it legally important and cleared it (Report 12, item 22924, Session 01/02). The Lords Select Committee on the EU cleared it by letter to Minister dated 12/6/02 (Progress of Scrutiny, 17/06/02), Session 01/02).
- 4.4 The Commission then undertook to develop a proposal in the Follow-up Communication to the Green Paper on EU Consumer Protection (COM (02)289 = EM 10045/02) submitted by DTI on 3/7/02. The Commons European Scrutiny Committee considered it not legally or politically important and cleared it (Report 36, Item 23575, Session 01/02). The Lords Select Committee on the EU cleared it by letter to the Minister, dated 17/7/02 (Progress of Scrutiny, 227/02, Session 01/02).

5. Territorial Extent and Application

- 5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The SI is subject to negative resolution procedure but amends primary legislation. Ian McCartney, Minister for Trade, Investment and Foreign Affairs has made the following statement regarding human rights. "In my view the provisions of the Enterprise Act 2002 (Amendment) Regulations 2006 are compatible with the Convention rights."

7. Policy background

- 7.1 Despite a substantial set of EU consumer protection laws, cross border enforcement is very difficult to achieve. Although the Injunctions Directive (98/27/EC) gave designated enforcement bodies the power to apply for injunctions in another Member State, where the interests protected by that enforcement body are affected by an infringement in that Member State, there remains the formidable hurdle of bringing an application in a foreign jurisdiction and under law with which the body may be unfamiliar. Indeed, it has only been used successfully once to date - an action taken against a Belgian direct selling company in 2004 by the Office of Fair Trading (OFT). This means there are gaps in consumer protection that can be exploited. The lack of a public enforcement

body in some countries is a particular problem as it means that co-operation and information sharing can be severely limited.

- 7.2 In the UK, the Enterprise Act 2002 provided enforcers with more power to disclose information on consumer cases to overseas public enforcement bodies. It also gives our consumer protection a more international focus by providing that enforcement authorities can act in the interest of foreign consumers under certain circumstances. Welcome though these developments were, they are only effective if a public enforcement body exists in another Member State. There was also no guarantee that other countries would reciprocate by acting in the interests of UK consumers.
- 7.3 The Regulation on Consumer Protection Co-operation (CPC) was designed to eliminate these barriers and gaps in cross border enforcement. In summary its key features are:
- Formalized co-operation through a network of public authorities (called ‘competent authorities’) on the enforcement of intra-Community laws that protect consumers’ interests (14 directives and a regulation listed in the annex to the Regulation);
 - Required enforcement powers for those authorities;
 - Requirements to provide mutual assistance for the exchange of information and co-operation on cross-border cases;
 - A single liaison body in each Member State to facilitate this co-operation;
 - A coordinating and supporting role for the Commission;
 - The establishment of an Advisory Committee to assist in implementing the practical procedures for the operation of the Regulation and to facilitate co-operation of a broad range of enforcement co-operation activities.
- 7.4 The Regulation was formally adopted and published by the Commission in July 2003 and political agreement was reached in April 2004 under the Irish Presidency. The relative speed of this negotiation (agreed after First Reading in Parliament) reflects the widespread view amongst Member States, MEPs and stakeholders that stronger cross border enforcement co-operation is needed. The UK was one of the most vocal supporters of this Regulation as we have for some time called for a more formalized enforcement co-operation structure. The Regulation is due to be fully implemented by the end of 2006.

Consultation

- 7.5 DTI have consulted twice on this Regulation, the first resolved a number of implementation issues including the nomination of the Single Liaison Office (OFT will act as a national contact point through which all requests for assistance are routed) and a number of the Competent Authorities (enforcers who will do the investigations). The minister of state for trade, investment and foreign affairs at the time, Gerry Sutcliffe, also decided that the Regulation would apply domestically as well as cross-border to afford UK citizens the same level of protection as those in other Member States and allow consistency of approach from enforcers.
- 7.6 The second consultation contained the text of the draft SI required to give effect to a number of the provisions of the Regulation and sought comments on the scope of the draft entry and inspection powers. The consultation was sent to over fifty interested parties but only thirteen responses were received, of these only eight were substantive. This reflects the uncontentious nature of the Regulation. The SI has been amended to reflect comments and concerns of some enforcers, business and Parliamentary Counsel.

8. Impact

- 8.1 A Regulatory Impact Assessment is attached to this memorandum.
- 8.2 The impact on the public sector is examined in the Regulatory Impact Assessment

9. Contact

- 9.1 Duncan Lawson at the Department of Trade and Industry Tel: 0207 215 5465 or e-mail: Duncan.Lawson@dti.gov.uk can answer any queries regarding the instrument.

Regulatory Impact Assessment For The EU Consumer Protection Cooperation Regulation

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1. Purpose And Intended Effect

(A) Objective

1. To give UK businesses and consumers more confidence to trade and conduct business across borders by creating an EU-wide co-operation network of enforcement authorities to tackle cross-border infringements.

(B) Background

2. Despite a substantial set of EU consumer protection laws, cross border enforcement is very difficult to achieve. Although the Injunctions Directive (98/27/EC) gave designated enforcement bodies the power to apply for injunctions in another Member State, where the interests protected by that enforcement body are affected by an infringement in that Member State, there remains the formidable hurdle of bringing an application in a foreign jurisdiction and under law with which the body may be unfamiliar. Indeed, it has only been used successfully once to date - an action taken against a Belgian direct selling company in 2004 by the Office of Fair Trading (OFT). This means there are gaps in consumer protection that can be exploited. The lack of a public enforcement body in some countries is a particular problem as it means that co-operation and information sharing can be severely limited.
3. In the UK, the Enterprise Act 2002 provided enforcers with more power to disclose information on consumer cases to overseas public enforcement bodies. It also gives our consumer protection a more international focus by providing that enforcement authorities can act in the interest of foreign consumers under certain circumstances. Welcome though these developments were, they are only effective if a public enforcement body exists in another Member State. There was also no guarantee that other countries would reciprocate by acting in the interests of UK consumers.
4. As well as the existing legal framework, informal co-operation arrangements exist. The main forum the International Consumer Protection Enforcement Network, and its European branch ICPEN Europe. ICPEN Europe facilitates co-operation and best practice sharing, and while this informal network is valuable, it can only operate within the existing legal co-operation frameworks.
5. The UK is signatory to multilateral and bilateral consumer protection co-operation agreements. In 2003, the Organisation for Economic Co-operation and Development (OECD) agreed a set of Guidelines designed to improve co-operation between its members, including information sharing and co-operation on cases of cross-border fraud¹. The DTI and OFT are also signatory to co-operation agreements with the United States Federal Trade Commission and Canada, Australia and New Zealand.
6. Consumers and consumers associations have a role in bringing private civil law actions in courts, although the difficulty, length and cost of these actions mean this route is not an effective driver for consumer protection and redress in the EU.

¹ More information about the OECD and the Guidelines can be found at www.oecd.org.

7. Redress can also be sought via alternative dispute resolution (ADR), through ombudsmen or by arbitration. To facilitate ADR, the EC set up the European Extra Judicial Network (EEJ-Net) of alternative dispute resolution bodies. EEJ-Net is designed to help consumers access ADR schemes if they have disputes with traders in other Member States. Although a valuable low cost and user-friendly complement to formal enforcement mechanisms, it can only be part of the enforcement picture, as it ultimately relies on the businesses involved being willing to co-operate and seek a resolution to the complaint. This is not always the case.
8. The Regulation on Consumer Protection Co-operation (CPC) was designed to eliminate these barriers and gaps in cross border enforcement. In summary its key features are:
 - Formalized co-operation through a network of public authorities (called 'competent authorities') on the enforcement of intra-Community laws that protect consumers' interests (14 directives and a regulation listed in the annex to the Regulation);
 - Required enforcement powers for those authorities;
 - Requirements to provide mutual assistance for the exchange of information and co-operation on cross-border cases;
 - A single liaison body in each Member State to facilitate this co-operation;
 - A coordinating and supporting role for the Commission;
 - The establishment of an Advisory Committee to assist in implementing the practical procedures for the operation of the Regulation and to facilitate co-operation of a broad range of enforcement co-operation activities.
9. The Regulation was formally adopted and published by the Commission in July 2003 and political agreement was reached in April 2004 under the Irish Presidency. The relative speed of this negotiation (agreed after First Reading in Parliament) reflects the widespread view amongst Member States, MEPs and stakeholders that stronger cross border enforcement co-operation is needed. The UK was one of the most vocal supporters of this Regulation as we have for some time called for a more formalized enforcement co-operation structure. The Regulation is due to be fully implemented by the end of 2006².
10. The Government is mindful that there are wider questions about the UK enforcement framework that have yet to be finalised. This is particularly with regard to implementation of the Hampton Review of Regulatory Inspection and Enforcement³ which will affect the structure of consumer protection enforcement in the UK. This document refers to these bodies as they currently stand.

² Full text of the Regulation be found at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_364/l_36420041209en00010011.pdf.

³ The full report can be found at www.hm-treasury.gov.uk/hampton

Implementation of this Regulation will also take due account of the Hampton recommendations on investigative activity.

(C) Rationale for Government intervention

11. The Regulation stipulates that full implementation should be complete by December 2006 (the single liaison office and Competent Authorities were notified to the EC by 29 December 2005). It essential that the Government meet the 2006 deadline in order to comply with our Community obligations and avoid infraction proceedings. Further, having been a vocal supporter of this measure, it is also important that we implement this Regulation in a way that is practically workable from day one. Beyond fulfilling our Community obligations, intervention through this Regulation will address the objective by improving consumer protection and protecting the extension of the internal market.

Protecting consumers

12. Failure to implement this Regulation properly will weaken UK consumers' protection from scams and other fraudulent trading that emanate from abroad. In 2004 (when the Regulation was negotiated) the OFT received an average of 386 cross border consumer complaints per month. The European Consumer Centre (ECC) and European Judicial Network (EEJ-Net) reported a 36 per cent increase on the number of cross-border queries dealt with during the first half of 2004, with the majority of these coming from consumers based in the UK or from UK Citizens' Advice Bureau⁴. In 2006, OFT now receive over 500 cross-border complaints per month.

13. Two of the biggest areas of consumer detriment – timeshare fraud and fake lotteries or prize draws often target UK consumers from other parts of Europe and beyond. Within the timeshare sector, the Organisation for Timeshare in Europe (OTE), estimates that approximately 8-10 per cent of sales are lost to rogue operators in Spain out of total revenue of more than €431 million per annum.

14. The OFT estimated that UK consumers lose £1 billion per year to a variety of scams that exploit low cost, mass marketing techniques. This includes £250 million a year on prize draws, sweepstakes and lottery mailings⁵. Sir John Vickers, the OFT Chairman at the time, said "Cross-border fraud against consumers, such as deceptive telemarketing, is a growing problem, costing UK consumers many millions of pounds a year."⁶

Extending the internal market

15. Previous work by the European Commission⁷ gives an analysis of the extent of the limits to cross-border shopping which, even with reductions in the 'natural'

⁴ www.euroconsumer.org.uk/ecc.eej.interim_report_0704.doc

⁵ <http://www.of.gov.uk/NR/rdonlyres/556C3C01-AD57-4C1A-8144-8751CF2D03FE/0/ft40scams.pdf>

⁶ www.sourceuk.net/articles/a03553.html

⁷ Commission staff working paper: Extended impact assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), 26 June 2003 (1094/03 ADD 1)

barriers (such as cultural, language, distance and currency barriers) in recent years, has remained at low levels with only around 13% of EU consumers, and 14% of UK consumers, having made one or more cross-border purchases in the previous 12 months.

16. In a contemporary Eurobarometer survey on business experience of, and attitudes to, cross-border shopping, business reported that cross-border sales make up only a small percentage of sales to final consumers: 3% of Internet sales, 3.7% of telephone/mail order, 8% of door-to-door, 4.8% of sales to tourists in shops. Only 6.6% of advertising and marketing budgets are aimed at encouraging cross-border sales. The Commission argues that these low levels of cross-border transactions limit consumer choice, reduce competitive pressure for efficient pricing and represent a lost opportunity in terms of economic growth¹⁶. They suggest that the potential economic gains of addressing these problems are significant. A genuine internal market for consumers would also contribute to the Lisbon European Council goal of enhancing the EU's competitiveness and creating sustainable economic growth.
17. The Commission attributes the low level of cross-border shopping to a combination of business reluctance to market their products across borders and the unwillingness of consumers to purchase from businesses established in other countries.
18. Of the 26 per cent of consumers who said they were less confident about purchasing goods or services cross border, a large majority (over 80 per cent in each case) said that important or fairly important contributors to their lack of confidence were:
 - It is harder to resolve after sales problems;
 - It is harder to take legal action through the courts;
 - It is harder to ask public authorities or consumer associations to intervene on my behalf.
19. Around three quarters of those same respondents said that if they were able to ask their own authorities or an independent body to intervene on their behalf that they would be more confident to shop cross border.
20. A study prepared for the Commission suggests that up to 80 million European consumers might buy more cross-border if they were confident about making purchases from shops or sellers located in another EU country.

2. Summary and recommendations

21. The Government has been a vocal supporter of this Regulation throughout its negotiation, and we therefore aim to implement it promptly and effectively. The Regulation itself had 2 implementation dates. Member States were to notify the European Commission of their designated Single Liaison Office (SLO) and Competent Authorities (CAs) by 29 December 2005, the mutual assistance provisions and the Regulations itself come fully into force on 30 December 2006.

22. Two public consultations on the implementation of this Regulation have been held. In preparation for the first implementation date the first consultation, in July 2005, sought views on the designation of the Single Liaison Office (SLO), Competent Authorities (CAs), scope of the Regulation and the framing of the on-site inspection power.

23. Following this consultation, the Government decided that

- the SLO would be the Office Of Fair Trading;
- the UK would designate other willing enforcement authorities that deal with specific sectors or Directives. The main CA will be the Office of Fair Trading. Other CAs notified to the European Commission are the Civil Aviation Authority, the Department for Health [the Department of Public Safety in Northern Ireland] in respect of medicinal products, and the Ministry of Trade and Industry (Gibraltar) . The Independent Committee for the Supervision of Standards of Telephone Information Services will act as an 8.3 body. This list was not exhaustive, others will be added at a later date as necessary;
- the Regulation will apply to both intra-community and domestic infringements;
- the on-site inspection power will be based on the existing Competition Act 1998 and Consumer Credit Act 2006; and
- a further consultation on the draft text of the Statutory Instrument would follow in 2006.

24. Based on this, the UK informed the EU of the nominees for SLO and CAs by 29 December 2005, meeting our obligation under the Regulation.

25. In February 2006 the OFT began an ongoing series of enforcers workshops which addressed various implementation issues and drew up an enforcers training plan.

26. The OFT also volunteered to be a part of an EU user group which is involved in the development and testing of the database which will support the Regulation and aid the swift, accurate transfer of information. This group has met several times and has allowed the UK enforcers to shape and influence the development of the system.

27. In July 2006 the DTI launched a second consultation on the text of a draft Statutory Instrument. As indicated above, the draft was based on aspects of the existing Competition and Consumer Credit Acts. Despite circulating the consultation widely the DTI only received 13 responses, of which only 8 were substantive. DTI also met with a number of interested groups to discuss the text and the rationale behind it, particularly business organizations and enforcers. The relatively low number of substantive responses and the feedback from meetings is indicative of the wide level of support business and enforcers bring to a Regulation aimed at scams and the rogue businesses who effect the market in legitimate business functions.

28. The second consultation document which includes the draft Statutory Instrument is available from www.dti.gov.uk/files/file30090.pdf and the Government response is available from www.dti.gov.uk/files/file34034.pdf .

29. The main issues were that;

- enforcers would use magistrates courts to seek a warrant rather than the High Court. The Department of Constitutional Affairs will issue guidance for magistrates;
- protection of legal professional privilege was ensured;
- The Financial Services Authority and OFCOM are added as Competent Authorities for their respective Regulations and local trading standards offices (the DETI in Northern Ireland), are nominated as Article 8.3 bodies (a body with a legitimate interest in the cessation of an infringement);
- the Regulation is underpinned with a criminal sanction for obstruction; and
- there will be small consequential amendments to the Data Protection Act and Part 8 of the Enterprise Act.
- 2 days notice is required for inspections undertaken without a warrant

30. In order to meet our EU commitments and avoid infraction proceedings the UK must ensure that the Statutory Instrument is approved by Parliament and come into force by 29 December 2006.

31. Being an EU Regulation, there is no question as to whether the UK will implement or not, however the Government did have several options to consider on how the Regulations was implemented. These options are examined in detail in Annex A.

3. Small firms impact test

32. The Regulation will only directly affect small businesses that are trading fraudulently or unfairly. It could also impact those businesses wrongly suspected of doing so, which are then subsequently subject to inspection. This should be addressed by the standards set in the Cabinet Office Enforcement Concordat and the establishment of a robust risk based assessment criteria by enforcers.

4. Competition assessment

33. The Regulation does not create new consumer protections. Instead it creates a new structure for the enforcement of consumer protection law, so that the existing law is enforced properly. This focus on strong enforcement will have the effect of protecting legitimate business and deterring bad practice and should have a positive effect on both national and intra-community trade and competition.

5. Enforcement, sanctions and monitoring

34. The Regulation sets out in detail the procedures and practices for enforcement activity by the Competent Authorities. We hope and expect that execution of this cooperation will not be cumbersome and overly bureaucratic but simple and in the spirit of goodwill. The Government will encourage competent authorities to collectively agree Guidelines as to how this Regulation will be implemented including how and when enforcement powers will be used; how cases will be handled if more than one agency needs to be involved; and how cases will be handled where another agency is acting on behalf of a competent authority. We also envisage that Government departments, business, and consumer representative groups will play a role by, inter alia, helping to identify problem areas for consumers shopping across borders. The Government will also encourage competent authorities to ensure that this Regulation is implemented in light of the principles of the Hampton Review, for example in the way that inspections are carried out and the Cabinet Office Enforcement Concordat.
35. Regular monitoring of levels and efficacy of enforcement is built into the Regulation, but it will also be subject to Parliamentary review every three years. The DTI has responsibility for ensuring the Regulation continues to be implemented effectively.
36. UK enforcement and policy officials will continue to attend EU Consumer Protection Cooperation comitology committee meetings. Ongoing problems and questions of interpretation will be addressed collectively in this forum.

Annex A

1. Options

1. This is a Community Regulation and directly applicable in UK law therefore the scope for interpretation and choice when implementing is very limited however the UK will need to pass a statutory instrument to give effect to some of the provisions. There are two other key areas where the Government has some discretion – designation of Competent Authorities and design of new enforcement powers. The ‘do nothing’ option is also included for completeness and as a benchmark. As noted earlier, the UK - in line with its obligations under the Regulation - notified the EU of its Single Liaison Office (SLO) and first batch of Competent Authorities in December 2005.

Do nothing

2. Doing nothing would incur the penalties associated with non-compliance with our Community obligations. Any beneficial cost saving through non-action is vastly outweighed by potential financial and reputational costs of infraction proceedings. The costs to consumers of not tackling cross border infringements of consumer rules as set out above under section **1(C) Rationale for Government Intervention** apply to this option.

Options for designation of Competent Authorities

3. Member States have the responsibility to select competent authorities, and in the UK, there are a number of public consumer protection enforcement authorities that could be designated, including the OFT, sectoral regulators and Local Trading Standards Authorities.

Option 1. Do nothing

4. Designation of competent authorities is the core function of this Regulation. No action in this area therefore risks the same penalties as identified in the ‘Do Nothing’ action above.

Option 2. Designation of the OFT only

5. The OFT plays an active and leading role in cross border consumer protection enforcement and, combined with their role as national enforcement coordinator, they are the natural choice for the main competent authority and single liaison office. Designation of the OFT only would ensure that there is a streamlined structure with cases of this type being dealt with or processed by one authority. In practice, we envisage that the types of cross border cases that this Regulation is aimed at (e.g. misleading lottery scams, timeshare fraud) are those that would be dealt with by the OFT as things stand.
6. However, this Regulation will require the involvement of other authorities that deal with certain sectors or Directives. This includes infringements relating to

financial services, air travel and medicinal products where the OFT may not have competence to take action.

7. Only designating the OFT would not necessarily mean that they would act in cases where they felt another enforcer was better placed to act. Article 8(3) provides that a requested authority may, with the agreement of the applicant authority, pass the mutual assistance request to another body which has a “legitimate interest in the cessation and prohibition of intra-Community infringements”. This means a public or private body can act where it has the power and ability to take action that would be at least as effective as that taken by the competent authority and can guarantee the same confidentiality safeguards.
8. In other words, bodies can take enforcement action on behalf of the OFT without making any changes to their status or powers. However, this does create a second level of cooperation action, and it may be preferable to have some other public enforcement agencies directly in the network. It should also be noted that competent authorities could be added or removed at any time.
9. In terms of meeting the implementation objectives this option would do so to some degree but the practical difficulties should not be understated. The OFT would have difficulty enforcing legislation it is wholly unfamiliar with, e.g. denied boarding, and it would have a significant impact on resources for OFT thereby prejudicing enforcement action across the board.

Option 3. Designation of the OFT and other enforcement authorities by agreement with each enforcement authority

10. Designating other enforcement authorities as ‘Competent Authorities’ would therefore enable these bodies that deal with specific sectors or areas of consumer law to be directly involved. This option would meet the implementation objective to the greatest extent and was the Government’s preferred option.

Option 4. Designation of all relevant public enforcement agencies

11. Designating all public authorities would mean that all authorities were directly involved in the network and it might be thought that the right authority could start taking action without the need for a second co-operation request to be made. However, this could have resource implications for all enforcers and threatens the simple, streamlined procedure that this Regulation is aimed at providing.
12. This option would meet the implementation objective to some extent. However this risks creating unnecessary burdens on enforcers and complicating the cooperation network.

Options for new inspection powers

13. The majority of these powers required by this Regulation are provided for in existing UK laws, but not all are available to all enforcers. The on-site inspection

power is, for example, held by local Trading Standards Offices when investigating a criminal infringement, and is also available to some sectoral bodies in pursuance of their statutory duties. However, in the majority of cases, this power is not available to enforcement authorities, including the OFT, when investigating infringements of civil laws, and therefore would be new. The new inspection powers need exact framing in UK law. The basis of the powers were subject to public consultation in July 2005, a second consultation on the draft Statutory Instrument took place in July 2006. This section sets out the original options that were subject to consultation.

Option 1: Do nothing

14. Taking no action in this area therefore risks the same penalties as identified in the 'Do Nothing' action above.

Option 2: Minimum inspection powers

15. In order to comply with the Regulation at a minimum level, enforcement agencies should be able to request in writing that a visit be made to a business premises. This request would state the nature of the visit and explain why the visit was necessary. This option would meet the objectives of the Regulation to some degree. However, it would not assist investigators in cases where rogue traders are likely to vacate premises or destroy evidence if the inspection was announced. For example the OFT have taken cases against several holiday clubs where investigations have been hampered by the business winding up and individuals disappearing or starting other businesses using aliases. There is a strong risk therefore that this minimum power would be ineffective.

Option 3: New inspection powers modeled on equivalent provisions in competition and consumer law.

16. The Directives that are covered by this Regulation are all currently enforced in the UK under civil law. The nearest equivalent powers on which to model a new inspection power are the powers available under the Competition Act 1998. These enable inspections to be made without warning, under a warrant, if necessary (e.g. if there is a suspicion that evidence may be destroyed if notice were given) and allows for inspections with and without warrants (the latter giving wider entry and search powers). This approach would also look to existing inspection powers in consumer law, such as those attached to the Trade Descriptions Act, which also enable searches without warning under warrant as well as inspections without warning without a warrant. The exact framing of the power would be the subject of separate public consultation and guidance (primarily aimed at business) would be produced setting out how the power would be used.

17. This option would meet the objectives of the Regulation to a great degree.

Option 4: New powers modeled on equivalent provisions in competition and consumer law and applied to domestic and cross border breaches of the laws covered by this Regulation.

18. The Regulation only requires Member States to make the powers available to competent authorities in cross border cases. In theory therefore this risks creating a situation where an enforcer would be able to use a wider range of enforcement powers when the harmed consumers are based abroad than if they were based in the UK. This anomaly could be addressed by applying these powers to domestic, as well as cross border, infringements of these rules covered by the Regulation. Although this would increase the scope of the measure beyond the minimum level set out in the Regulation, it could be defended on the grounds that it addresses a prejudicial inconsistency that would otherwise emerge.
19. This option would meet the objectives of the Regulation to the greatest degree, and ensure parity and consistency of enforcement activity for all cases.

Community enforcers

20. We have extended the powers of community enforcers under Part 8 so as to include the two directives and one regulation which CPC applies to but Part 8 currently does not. (Community enforcers are bodies based in other Member States which are entitled to take action in relation to cross border infringements under the Injunctions Directive). They will therefore be able to take action in relation to the same pieces of legislation as of domestic enforcers.
21. It would have been possible to avoid this by making relatively complex amendments to Part 8 of the Enterprise Act or by extending the powers of community enforcers to two of the directives and a regulation to which CPC applies – the remainder of the regulations and directives already contain sufficient provision and do not require amendment.

2. Costs and benefits

Option 1: No action

22. The potential costs and benefits of action are set out in section 1(C) ***Rationale for Government Intervention*** above.

Designation of competent authorities

Option 1: No action

23. This option would have no benefits and substantial costs, as it would involve reneging on our Community commitments. These costs are difficult to precisely quantify but clearly would involve officials, lawyers and Ministers time, and fines in the event the court found for the Commission. Additionally there would be reputational damage given the UK's strong support for CPC whilst it was negotiated

Options 2 & 3: Designation of the OFT only and designation of the OFT and other enforcement authorities by agreement.

24. These options have considerable benefits as they enable the OFT to continue in its role as the primary authority on cross border enforcement action. Through this role, OFT has amassed the expertise, experience and resource to effectively handle cross border cases. These options also have the potential to significantly improve the ability of the OFT and other designated enforcement agencies to deal with cross border cases as they can call on the assistance of equivalent bodies to take enforcement action or help gather evidence against traders that are harming UK consumers. This mutual assistance will be increasingly important as the scope of EU consumer protection rules has just expanded through the adoption of the Directive on Unfair Commercial Practices, which establishes a 'general duty not to trade unfairly' and which will be added to the Annex of this Regulation when the UCPD is implemented.
25. These options also offer higher levels of protection for consumers by establishing an effective enforcement co-operation network. This also benefits business, as it will help close the net around wrongdoers, thereby ensuring legitimate business is not undermined by rogue elements in a market.
26. Option 3 has the additional benefit of enabling some authorities with a specific interest in a sector or Directive to be directly involved in the network. Having sector specific knowledge makes successful action against particular breaches of consumer protection more likely, reduces the possibility that the authorities will pursue frivolous or unfounded cases and is a more efficient use of resources and time.
27. In terms of costs, most are administrative costs that fall to enforcement agencies in order to effectively act under this Regulation although of course there is a cost to business in terms of interruptions to trading as a result of investigations, particularly those which turn up insufficient evidence to take further action. It is anticipated this would be minimal to legitimate business due to the use of the Cabinet Office Enforcement Concordat and the rising scale of interventions for an on-site inspection (beginning with a letter to the business and progressing through various stages leading to an unannounced inspection supported by a warrant). One potential outcome is an increase in requests for enforcement action from other Member States. It is not expected however that there will be a substantial increase because:
- a) Enforcers already handle cross border cases and this Regulation will ensure that cases can be dealt with more effectively by improving co-operation. Further, this network will work positively in this regard as it will oblige authorities in other Member States to take action on our behalf, replacing the need for UK authorities to pursue cross border cases on their own volition and expense.
 - b) Enforcers will not be required to investigate frivolous or unsubstantiated cases as the Regulation requires that requests for assistance meet clear thresholds of reasonable suspicion and evidence.
28. Implementation of the Regulation may also incur some administrative costs to those authorities designated as Competent Authorities. OFT estimate that 6 Full Time Equivalent (FTE) staff between October 2005-April 2007, including input

from in-house lawyers, will work on Regulation related duties. This period will involve putting in place the necessary processes, teams, training, IT enhancements etc. to be able to operate as a Single Liaison Office. After full implementation (from January 2007) OFT anticipate being net receivers of cases through the network. Based on resources currently used on cross border cases, OFT anticipate around 12 FTE staff will spend some part of their time on Regulation related duties , encompassing resource spent on: co-ordination with other UK and EEA enforcers, case work (investigation, taking action etc.), participating in EU comitology meetings and IT support and liaison.

Option 4: Designation of all relevant public enforcement agencies

29. As in option 3, the sector specific knowledge would be available to maximize the effectiveness of the authorities. However, this option could result in new resource commitments and enforcement responsibilities for authorities that do not necessarily need to be directly involved in these cases. It also risks unnecessarily complicating the co-operation network with increased costs for all concerned as a result.

New inspection powers

Option 1: No new inspection power

30. This option would have no benefits and serious costs as it would involve renegeing to some degree on our Community commitments.

Option 2: Minimum inspection powers

31. This option would have the advantage of requiring minimal resource and training for enforcement authorities and minimal costs to business in terms of interference with their activities. This approach however runs a serious risk of creating a power that would be ineffectual for enforcers when tackling wrongdoers who are likely to change locations and guises to evade detection. While this option is unlikely to require any new resources, it may have no real benefit to enforcers and ultimately consumers. The reduced cost in terms of interference with business' activities may (to some degree) be set off against the distortion of competition as a result of the (illegal) activities of such businesses which would be more likely to continue unchallenged thereby prejudicing fair trading businesses.

Option 3: New powers modeled on equivalent provisions in competition and consumer law

32. This option has the advantage of being able to benefit from existing experience of an inspection power in civil cases (e.g. under the Competition Act 1998). Its exact parameters however were the subject of public consultation.

33. The Regulation, with the inspection powers outlined in this option, makes it easier to tackle and deter bad practices. As a result there will be less consumer detriment and a potential benefit also for those companies who lose customers to companies engaged in rogue practices. The precise reduction in consumer

detriment will depend on the effectiveness of enforcement and on consumer awareness of their rights.

34. With any new power however, there is a potential cost to businesses that are the subject, in this case of an investigation. For example, staff may be taken off their normal duties to assist inspection officers for what may be a day or more. It also takes staff time for the enforcers. Enforcers therefore need to consider the costs to both business and themselves and will issue clear guidance on when and how the power would be used and train their officials accordingly, this will be based on the Cabinet Office Enforcement Concordat and will involve a risk based proportionate approach to regulation in accordance with Hampton principles.

35. This option is likely to create an effective inspection power and thereby meet the objectives of the proposal in terms of strengthening the internal market and also in reducing harm to consumers.

Option 4: New powers modeled on equivalent provisions in competition and consumer laws and applying them to domestic and cross border breaches of the laws covered by this Regulation.

36. This option would share the costs and benefits of option 3, but have the further benefit of ensuring that a level playing field exists for infringements of the laws under this Regulation, whether they are domestic or cross border. This is likely to increase the effectiveness of domestic enforcement too and will therefore have positive effects in reducing domestic consumer detriment, estimated by OFT in 2000 as costing £8.3 billion, as well as that suffered by those buying products or services in other Member States.

3. Summary of Costs and Benefits

Option	Benefits	Costs
No action	No benefit	Infraction proceedings, possible (substantial) fines and reputational harm.
Designation of competent authorities		
Option 1: No designated authorities Options 2 & 3: Designation of the OFT only and designation of the OFT and other enforcement authorities on a voluntary basis	No benefit Enables OFT to continue in its role as the primary authority on cross border enforcement action. Improves the ability of the OFT and other designated enforcement agencies to deal with cross-border cases through mutual assistance. Offer higher levels of protection	Infraction proceedings, possible (substantial) fines and reputational harm. Distortions to competition which result from rogue traders continuing to act unlawfully without enforcement action being taken against them. Most costs are administrative on enforcement agencies in order to effectively act under this Regulation. Includes resource to provide training and guidance for enforcement officials and

	<p>for consumers by establishing an effective enforcement cooperation network. This also benefits business as it will help close the net around wrongdoers.</p> <p>Option 3 has the additional benefit of enabling some authorities with a specific interest in a sector or Directive to be directly involved in the network.</p>	<p>participate in a range of enforcement cooperation activities. OFT estimate 6-12 FTE staff required. Greater costs for business offset against reduction of anti-competitive effects of wrongdoers' activities.</p>
Option 4: Designation of all relevant public enforcement agencies		<p>Could result in new resource commitments and enforcement responsibilities for authorities that do not necessarily need to be directly involved in these cases. It also risks unnecessarily complicating the cooperation network.</p>
New inspection powers		
Option 1: No action	No benefit	<p>Serious costs as it would involve renegeing to some degree on our Community commitments. Distortions to competition which result from rogue traders continuing to act unlawfully without enforcement action being taken against them</p>
Option 2: Minimum inspection powers	<p>This option would have the advantage of requiring minimal resource and training for enforcement authorities and minimal costs to business who are subject to investigation.</p>	<p>Serious risk of creating a power that would be ineffectual for enforcers when tackling wrongdoers who are likely to change locations and guises to evade detection.</p>
Option 3: New powers modelled on equivalent provisions in competition and consumer law.	<p>Advantage of being able to benefit from existing experience of an inspection power in civil cases (i.e. under the Competition Act 1998). Its exact parameters however would be the subject of a further public consultation.</p>	<p>With any new power however, there is a potential cost to businesses that are the subject, in this case of an investigation. For example staff may be taken from their normal duties to assist inspection officers for what may be a day or more. Enforcers therefore need to consider the costs to both business and themselves and issue clear guidance on when and how the power would be used and train its officials accordingly.</p>
Option 4: New powers modelled on equivalent provisions in competition and consumer laws and applying them to domestic and cross border breaches of the laws covered by this Regulation.	<p>This option would share the costs and benefits of option 3, but have the further benefit of ensuring that a level playing field exists for infringements of the laws under this regulation, whether they are domestic or cross border.</p>	<p>No additional costs even though powers could be used more widely i.e. in relation to domestic and cross border infringements. Additional costs for business can potentially be offset to some degree against reduction of anti-competitive effects of wrongdoers.</p>

Declaration

I have read the regulatory impact assessment on the implementation of the Consumer Protection Cooperation Regulation and I am satisfied that the benefits justify the costs.

Signed: Ian McCartney

Date: 14th December 2006

Ian McCartney, Minister of State for Trade, Investment and Foreign Affairs

Contact details

Any comments on the regulatory impact assessment should be addressed to:

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TRANSPOSITION NOTE FOR THE EC CONSUMER PROTECTION COOPERATION REGULATION 2006/2004(CPC)

Introduction

The CPC Regulation requires further implementation (by means of regulations under section 2(2) of the European Communities Act 1972) to give effect to a number of provisions in the Regulation relating to on-site inspection as well as a provision requiring amendments to Member States' data protection legislation.

These Regulations do no more than is necessary to implement the CPC Regulation, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply. In this case the affected Acts are the Enterprise Act 2002 (Part 8), the Data Protection Act 1998 (Part 4) and the Criminal Justice and Police Act 2001 (Part 2).

DTI have consulted twice on this Regulation. The first consultation resolved a number of implementation issues including the nomination of the Single Liaison Office (which will be the Office of Fair Trading and a number of the Competent Authorities (enforcers who will do the investigations). OFT will act as a national contact point through which all requests for assistance are routed. It also raised the question as to whether the enforcement powers in the Regulation should apply to intra UK infringements as well as to cross-border cases. In accordance with the bulk of responses received, the Minister at the time, Gerry Sutcliffe MP, decided that (in accordance with the stated intention of CPC itself – see recital 5) the Regulations would afford UK citizens the same level of protection as those in other Member States and allow consistency of approach from enforcers.

The second consultation contained the text of the draft Regulations required to give effect to a number of the provisions of CPC and sought comments on the scope of the draft entry and inspection powers. The consultation was sent to over fifty interested parties but we received only thirteen responses, of these only eight were substantive. The draft has been amended to reflect comments and concerns of some enforcers, business and Parliamentary Counsel.

A decision was also made to ensure that the powers of Community enforcers under Part 8 of the Enterprise Act 2002 included two directives and one regulation that CPC applies to but Part 8 currently does not. Removing this anomaly ensures consistency of approach between Part 8 of the Enterprise Act and the CPC Regulation and avoids making unnecessarily complex amendments to the Enterprise Act.

Articles	Objectives	Implementation	Responsibility
4(6)(a)	To ensure enforcers have powers they are required to have under CPC to obtain information in any form where there is a reasonable suspicion of an infringement.	Amendment to Part 8 of the Enterprise Act (section 226)	
4(6)(c)	To ensure enforcers have sufficient powers to carry out necessary on-site inspections where there is a reasonable suspicion of an infringement.	Various amendments to Part 8 (and Schedule 13) of the Enterprise Act and the Criminal Justice and Police Act (Part 2)	CPC Enforcers ⁸
4(6)(e)	To ensure enforcers have sufficient powers to publish undertakings where there is reasonable suspicion of an infringement.	Amendment to Part 8 of the Enterprise Act (section 219)	
13(4)	To prevent use of the subject access provisions in data protection legislation from undermining the exchange of relevant information between enforcers.	Amendment to the Data Protection Act (section 31 (data processed for regulatory activities))	CPC Enforcers

⁸ Office of Fair Trading; Civil Aviation Authority; Financial Services Authority; Secretary of State for Health; Department of Health, Social Services and Public Safety in Northern Ireland; Office of Communications, Department of Enterprise, Trade and Investment in Northern Ireland; every local weights and measures authority in Great Britain, and the Independent Committee for the Supervision of Standards of the Telephone Information Services.