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## **The EU Regulation on Consumer Protection Co-operation (the CPC) – on-site inspection powers**

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### **Introduction**

This note is to accompany the Department for Trade and Industry (DTI) consultation on a draft Statutory Instrument (SI) further to the CPC.<sup>1</sup> The SI expands the inspection powers of 'Competent Authorities' (CAs) which includes the OFT. This note briefly explains the background to this development and gives initial guidance on how the OFT expects to use its new inspection powers as one option for gathering information

### **Background**

The CPC was formally adopted by the European Parliament and Council in October 2004 with the aim of improving and formalising co-operation between Member States on cross-border infringements of EU consumer law. The CPC creates a network of public, and other, enforcement bodies (CPC Enforcers) across the Union which are responsible for the enforcement of consumer protection legislation in Member States (MSs). Members of the network can call upon members in other MSs to take action against a trader in their jurisdiction whose acts/omissions may be causing detriment to the consumers in another MS in breach of EU consumer protection law.<sup>2</sup> Enforcement bodies receiving such a request (referred to in the CPC as 'requested authorities') effectively have to address and act upon the alleged breaches in the same way they would if they were dealing with a purely domestic case. Accordingly, the CPC creates a

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<sup>1</sup> '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' URN 06/1361 Published by the DTI June 2006.

<sup>2</sup> See Annexe for the list of Directives and Regulations covered by Article 3(a).

series of duties and obligations on the enforcement bodies in the network in order to deliver an effective EU wide enforcement system.

The CPC has to be implemented in two stages. Chapters I, IV & V, which relate to the creation of public enforcers and how they will operate, came into force on 29 December 2005. Chapters II & III, which deal with the mutual assistance provisions and set out in some detail how enforcers must work together, will come into force on 29 December 2006.

The operation of the network involves the setting up and designation of various enforcement bodies, namely:

**Single Liaison Offices.** This is the public authority in each MS which has ultimate responsibility for applying the CPC in their country. In the UK, the OFT will be the SLO.

**Competent Authorities.** These are the public authorities (whether at national, regional or local level) which have specific responsibilities to enforce the laws which protect consumers' interests. There is no limit on their number in each MS. For the UK, Competent Authorities will include the OFT, the Civil Aviation Authority (CAA), Ministry of Trade and Industry (Gibraltar) and the Medicines and Health Regulation Authority (MHRA).

**Article 8(3) bodies.** These are other enforcement bodies which can be designated under Article 4(2) of the CPC as having a legitimate interest in the cessation of consumer law breaches in their jurisdiction. Under Article 8(3) Competent Authorities can effectively sub-contract the enforcement of cross-border cases to such a body, though ultimate responsibility for ensuring the case is dealt with remains with the Competent Authority in question. In the UK, ICSTIS has been designated as an Article 8(3) body and others may be added to the list.

## **Enforcement powers**

There is a range of enforcement action which will normally be considered in respect of acts or omissions which are in breach of relevant EU consumer protection laws and which harm, or are likely to harm, the collective interests of consumers. As required by the CPC, the OFT will seek to achieve the cessation or prohibition of the infringement in a proportionate, efficient and effective way. Any CPC Enforcer may make an application for an enforcement order in respect of a Community infringement.

A key element of the CPC is the delineation of minimum powers that all Competent Authorities must possess in order to carry out their functions effectively, and thus deliver a viable EU wide network. In order to meet this requirement, the DTI has issued

a Statutory Instrument which amends sections of Part 8 of the Enterprise Act 2002 (Enterprise Act (Amendment) Regulations 2006). The main change to existing implementation relates to a new power to make necessary on-site inspections<sup>3</sup> which, with the exception of the provisions of s162 Consumer Credit Act 1974 and s11 Estate Agents Act 1979, is not otherwise available to the OFT in relation to its role in enforcing consumer law, although the OFT has significant experience of exercising comparable powers under the Competition Act 1998 (CA98).

It is of note that the SI gives the inspection powers required under the CPC not only in respect of infringements across borders but also infringements of the relevant Directives by UK traders which harm UK consumers (i.e. even where no referral from another Member State is necessary or received)

### **Principles for use of the powers granted by the CPC**

Our primary purpose at this stage is to draw out some key principles to assist in analysis of the DTI proposals for an SI to introduce the CPC on-site inspection powers published in June 06. We have experience of using our powers for on-site inspections under the Competition Act 1998. We envisage that enforcement action using the powers to be given further to the CPC will take a similar approach, that is, it will be proportionate and in line with the principles set out in the Cabinet Office Enforcement Concordat. The OFT will produce detailed guidance and consult formally on this later in the year with all interested parties.

These principles seek to clarify that we will use the powers appropriately, proportionately, effectively and transparently as a new additional part of our tool kit of investigation powers.

The OFT may obtain information about individuals, businesses, agreements and markets at any time through informal enquiries. Such enquiries, which may be made at a meeting, by correspondence, in a telephone conversation or during the course of a voluntary interview may be made in addition to, or instead of, using the formal investigation powers set out in the Enterprise Act. The OFT cannot compel any individual or business to respond to an informal enquiry which is not backed by statutory powers.

The OFT can exercise its on-site inspection powers under Part 8 the Enterprise Act if there is a 'reasonable suspicion' that a breach of one of the Directives covered has been committed or is likely to be committed. It can also exercise these powers to ascertain whether a person has complied with, or is complying with, an enforcement order or an interim enforcement order which has already been made or an undertaking already

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<sup>3</sup> Article 4(6)(c).

given. The OFT's on-site inspection powers under Part 8 of the Enterprise Act cannot be used unless this requirement is met.

There must be reasonable grounds for believing that alternative means of obtaining the information will not be effective for example where there may be a risk that documents would be concealed, removed, tampered with or destroyed. It will not, for example, generally be proportionate to use the powers when the business(es) in question has (have) a record of truthful and comprehensive responses to requests or legal demands for information.

When undertaking an on-site visit using these powers, we will be transparent as to our authority, the issues under investigation, the extent of our powers and the obligations upon those being visited (including the consequences of failure to comply with legitimate requests).

We will respect and make clear all limitations on our powers, for example in relation to privileged information or self incrimination.

We will allow reasonable access to legal advice when undertaking an on-site inspection, though not to the extent that this is used to delay or frustrate our inspection.

We will respect fully the limitations on the use and disclosure of information gained on an inspection visit.

## ANNEXE

### Directives and Regulations covered by Article 3(a) (1)

1. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250, 19.9.1984, p.17). Directive as last amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p.18).
2. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p.31).
3. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p.48). Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p.17).
4. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23). Directive as last amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p.60).
5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p.59).
6. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). Directive as amended by Commission Decision 2002/995/EC (OJ L 353, 30.12.2002, p.1).
7. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p 83).
8. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p.19). Directive as amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p.16).

9. 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.

10. Directive 98/6/EC 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 (OJ L 80, 18.3.1998, p.27).

11. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p.12).

12. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p.1).

13. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67). Directive as last amended by Directive 2004/27/EC (OJ L 136, 30.4.2004, p.34).

14. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

15. Regulation (EC) No 261/2004 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 (OJ L 46, 17.2.2004, p.1).

(1) Directives Nos 1, 6, 8 and 13 contain specific provisions.