

**DEPARTMENT FOR BUSINESS
ENTERPRISE & REGULATORY REFORM**

**PART 9 OF THE
ENTERPRISE ACT 2002**

Government Response to a
consultation on a draft
Statutory Instrument
enabling disclosure of
information for civil
proceedings under the
Enterprise Act 2002

August 2007

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PART 9 OF THE ENTERPRISE ACT 2002

A consultation on a draft Statutory Instrument enabling disclosure of information for civil proceedings under the Enterprise Act 2002

GOVERNMENT RESPONSE

INTRODUCTION AND BACKGROUND

The DTI issued a consultation paper on 11 December 2006 seeking views on a draft Statutory Instrument (SI) enabling disclosure of information for civil proceedings under the Enterprise Act 2002 (EA02).

The Department sent the consultation to over a hundred organisations and individuals including regulators, enforcers, business and legal professionals interested in consumer and intellectual property rights matters.

The consultation paper included a draft order intended to enable disclosure of information for civil proceedings under the Enterprise Act 2002.

DTI held discussions with key stakeholders before beginning the formal consultation, which helped shape the proposals as they appeared in the consultation document. In addition to this we continued the discussion process throughout and after the consultation had ended.

The consultation included a partial Regulatory Impact Assessment. This was an evolution of an earlier version published in August 2005 with a consultation on whether to amend Part 9 of the Enterprise Act 2002. The 2005 consultation, partial RIA and Government response are available at www.berr.gov.uk/consultations

This document sets out the Government's formal response to the replies to the 11 December consultation. It records the key issues raised by the consultation responses and sets out the changes in how the Government defines access to specified information for consumers and IP rights holders.

The Department is very grateful for all the constructive responses to this consultation and has considered all of the comments and suggestions. The consideration of them has informed our view of how the order should be drafted.

Respondents also raised a number of additional matters, which were outside of the scope of the consultation and are not covered by this response. We are discussing these matters separately with stakeholders.

RESPONSES RECEIVED

A total of 32 responses to the consultation paper were received (see Annex A for details of respondents).

The majority were supportive of the proposals. However, there was a considerable amount of valuable comment about the detail of the SI.

There was significant concern about the protection of competition information as well as comment on whether the draft order provided a well defined gateway for Intellectual Property right holders.

There was also overwhelming support for guidance to accompany the amendment.

Responses by Question

Question 1: Does the subject list in article 3(a)-(h) sufficiently cover those areas for which we would want to disclose information?

There were 23 responses to this question. There was a small majority that said article 3(a)-(h) did sufficiently cover those areas for which they would want to disclose information. However, there were also numerous suggestions and proposals for redrafting article 3. The main issues identified are summarised below.

Several responses concerned defining and clarifying intellectual property rights as drafted. For example whether cases of passing off would come within the definition in article 3.

The Anti-Counterfeiting Group (ACG) suggested that the term intellectual property rights should be specifically linked to Article 1(2) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Trading Standards South East (TSSE) pointed out, and we accept, that the titles of articles 2 and 3 should be Prescribed information and Prescribed proceedings not Specified information and Specified proceedings. This is because they “prescribe” information and proceedings as required by s.241A EA02.

Two respondents believed the list would provide greater access to information than the Department intended. They also suggested that it was not necessary to include the sale and supply of goods and services because remedies were already available under the Sale of Goods Directive. It was suggested that many of the information requests are likely to be for the name and address of a trader, and that there is already the legal obligation to display the name and address on the premises of limited companies and other traders.

The Confederation of British Industry (CBI) supported a gateway for IP rights holders but do not consider there is justification for opening up the Part 9 gateways as widely as proposed in the draft Regulation.

Trading Standards East Midlands (TSEM) suggested simply replacing much of article 3 with a generic wording e.g. consumer protection legislation. LACORS suggested the addition to article 3 of “*other consumer protection legislation*” or the replacement of article 3(a)-(g) with “*proceedings in respect of a consumer transaction.*”

Four respondents (three representing trading standards/one business) sought clarification on whether the order would relate to business as well as consumers, believing there was a need in some cases for business to obtain this information. They and others were also concerned that none of the categories in article 3 easily allowed the disclosure of information about prize draws and scams.

Others were concerned how information could be given to business without opening the possibility of becoming involved in contractual disputes between businesses.

Two respondents suggested that article 3 needed to take account of the Unfair Commercial Practices Directive.

Four respondents propose a redraft of article 3(b) considering it to be too narrow, if focussed solely on the Property Misdescriptions Act 1991.

SWERCOTS suggest that claims under the law of tort should be included e.g. liability for unsafe and defective products. The Office of Fair Trading (OFT) thought that restrictions in the order should relate only to the types of information that can be disclosed, rather than to the specific types of civil redress for which it is required.

LACORS considers a wide interpretation of article 3(e) makes (a), (c) or (g) unnecessary and that arguably there is no need for (d) or (f). They make similar points about Sale of Goods Act and Supply of Goods and Services Act as the respondent below.

OFT shared the view that a broad interpretation of article 3(e) (sale and supply of goods and services to consumers), would render other provisions unnecessary. And that the inclusion of the other provisions may lead the courts to conclude only disclosure under specific Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 legislation is intended.

Government response

Article 3 of the draft order was intended to provide broad functional categories of civil proceedings for which information could be disclosed. However, the Government acknowledges that the draft may be open to wider interpretation than we intend. We are proposing as a result of the consultation that the order should prescribe the proceedings by reference to broad categories: either,

- proceedings relating to or arising out of a legal right or obligation of a consumer or,
- proceedings relating to or arising out of the infringement of an intellectual property right which includes a patent, copyright, and analogous or related right, database right, registered or unregistered design right, registered trade mark, topography right, supplementary protection certificate, plant variety right, protected designation of origin or a protected geographical indication.

We accept that article 3 should be headed Prescribed proceedings (and Article 2 Prescribed information).

Article 3 of the final order contains a definition of consumer and enables information to be disclosed for proceedings for passing off, or the misuse of a trade secret.

Question 2: Do you support the approach we have taken in the drafting of the order? If not how would you rather see the proceedings defined for which information might be disclosed?

There were 21 responses to this question.

14 were supportive of the approach taken in drafting the order; three were not.

British Retail Consortium (BRC) and British Telecom (BT) considered the gateway too wide and that sensitive commercial information was not sufficiently protected.

The Confederation of British Industry (CBI) supported the approach taken in drafting the order in respect of intellectual property rights. They do not support the category approach taken in the draft order in as far as it relates to consumer issues.

CBI prefer to restrict the order to specific legislative measures which would make clear the exact scope of the new provision. They do not believe that it would be a problem in respect of overseas proceedings (as suggested in the consultation document) as there could be reference to matters covered by the UK legislation.

Trading Standards East Midlands (TSEM) considered the order should clarify that the gateway is opened for all stages prior to instigating civil proceedings e.g. in order for the consumer to write to the trader to find a satisfactory resolution to a problem without the need to embark on civil proceedings.

Two respondents are concerned that alternative dispute resolutions (ADR) are not included in the scope of civil proceedings.

TSEM suggested the order would be more effective if it included a public interest test.

TSEM proposed that it would help if the order could provide a detailed outline on what information could be disclosed to any person. This would protect information such as that obtained through home authority relationships.

Government response

The Government notes the general support for the approach. However, we accept that the order needs to go further in article 2 to protect competition and investigation information and give business confidence in their co-operative relationships with regulators.

The order prescribes proceedings for the purposes of s.241A of the EA02 and must be read with that section in order to know for what purposes information can be disclosed in connection with those prescribed proceedings. That section allows disclosure of prescribed information for proceedings, for prospective proceedings, for obtaining legal advice in respect of proceedings and prospective proceedings, and otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings. Hence reading s.241A with the order it will be possible to disclose for the purposes of ADR for example.

Section 244 EA02 sets out the considerations to which a public authority must have regard when considering disclosing information. This requires it to exclude from disclosure any information the authority thinks it is contrary to the public interest to disclose. It is not necessary (or legally possible) to repeat this requirement in the order. However the application of these provisions to proposed disclosure under the order will be highlighted in guidance. We do not believe it possible to detail in the order what information could be disclosed without the risk of omitting information that might assist consumers or IP rights holders.

Question 3: If you would prefer to see a list of specific legislation what would you include and why?

There were 20 responses to this question.

Three respondents would prefer a list of specific legislation. However, 17 are content with the approach taken in the draft order of referring to legislation in a generic way by subject matter.

BRC dispute the argument that a list of specific legislation creates difficulties in overseas cases, claiming the position would be that if it were lawful to disclose the information under UK law, it would be lawful to disclose it for overseas purposes.

CBI would prefer a list of legislation. Although they approve of using a widely drawn IP rights category.

Ofcom ask if article 3(h) 'intellectual property rights' refers solely to proceedings under the Copyright, Designs and Patents Act 1988.

Government response

The Government notes the preference for not tying disclosure to named specific legislation. We consider the revised article 3 will allow disclosure for civil proceedings brought by intellectual property rights holders and consumers in the UK and overseas. It will also have the flexibility to accommodate changes in legislation without continuous amendment.

The order will allow disclosure of specified information. That is, information gathered by public authorities under Part 1, 3, 4, 6, 7 or 8 of EA02, any Act listed in Schedule 14 or subordinate legislation specified by order of the Secretary of State, except those specifically excluded by section 241A(2) and article 2 of the order.

Question 4: Is the order, as described, likely to lead to unintended disclosure of information?

There were 23 responses to this question.

Nine respondents do not believe the order will result in inappropriate disclosure. However, a significant number, seven, do believe inappropriate disclosure possible.

Two respondents are concerned that not only will the order lead to inappropriate disclosure but will allow companies to fish for information about competitors.

BRC questioned the penalties for improper use of disclosed information. They also suggest that a business should be notified that a request has been made and be given an opportunity to review the material that is proposed be disclosed and make representations where it believes it may be commercially sensitive.

TSEM suggests that guidance is provided within the order on when Local Authorities may disclose information. They also express concern that s.241A permits disclosure to 'any person' in connection with prescribed civil proceedings. This would appear to allow a trader who is being sued by another party to obtain information, held by an Authority, about the other party.

BT believes unintended disclosure is possible and that the order should contain some safeguards such as a proportionality test similar to the test stated in s. 242(3) or 243(6)(a) EA or an appeals mechanism in case the parties object to such a disclosure.

Government response

The Government acknowledges that more needs to be done in article 2 to protect sensitive competition information and to protect the co-operative relationships OFT form with business. It is accepted that information should not be disclosed so that it would undermine competition whether the information has been gathered under statute or provided voluntarily.

The offences and penalties for wrongful disclosure are set out s.245 EA02. They are that offences are committed if information is disclosed in contravention of sections 237(2) and 243(4). It is also an offence if someone uses information disclosed under Part 9 for a purpose not permitted under Part 9. Penalties include a fine and imprisonment of up to two years.

Guidance will be provided on how to apply the new rules. However, it will not form part of the order.

The Government accepts that the draft order could have led to disclosing information for disputes between traders and will limit disclosure in the revised order to disclosure for proceedings by consumers and intellectual property rights holders only.

The Government believes that the general restriction in s.237, the safeguards in sections 241A and 244 of EA02 combined with those in article 2 of the order are sufficient to protect information that merits protection. The processes of consultation and appeal proposed are bureaucratic and may offer rogue traders the opportunity to avoid civil proceedings. Furthermore the powers in the Act only enable the order to prescribe information and proceedings and not to lay down new procedures.

Question 5: Is article 2(a) as drafted sufficient to exclude information volunteered to OFT from disclosure? Please give your reasons.

There were 15 responses to this question. Four respondents considered the article sufficient to exclude information volunteered to OFT from disclosure.

However, nine had substantial comments, which are summarised as follows;

OFT suggested that information collected under s.5(1) EA02 for the purposes of functions under sections 6, 7 and 8 should not be limited by reference to “market studies”. In addition, they suggest the use of information collected under s.5(1) for the purposes of carrying out obligations to respond to super-complaints under s.11 should also be excluded. (Two other responses, one of which is covered in more detail below supported this view).

OFT also suggested information gathered in relation to the enforcement of undertakings and orders under Schedule 24 EA02, and the monitoring and review of undertakings under the Fair Trading Act 1973 (preserved under the transitional provisions in Schedule 24) should be excluded. Also the exercise of a duty under s.162 EA02 to monitor and review undertakings and orders does not appear to be covered by s.241A(2)(c) since it is restricted to “investigations” under Part 4.

Freshfield Bruckhaus Deringer (FBD) while welcoming the protection afforded by article 2(1) of the draft SI was concerned at the limitation of the s.5(1) exemption to “information which comes to the OFT ... in relation to market studies” only. They suggest that article 2(1)(a) should be amended to read *“in relation to market studies and any other competition studies or investigations”* They also propose a new sub-paragraph (b) or (c) should be added to article 2(1) which would exclude from being prescribed: [(b)][(c)] *“information which comes to the OFT in connection with the exercise of its functions under s.11 of the Act (Super-complaints)”*.

Two respondents argue the current drafting of article 2(a) is not sufficient to exclude information volunteered to OFT from disclosure. FBD went on that the phrase “in connection with the exercise of its functions” as defined in the Act could include information provided to regulators voluntarily. They suggest that there is reference in proposed article 2(a) to information obtained in the exercise of the specific information gathering powers under the Act.

Linklaters considered the exemptions in the draft order unlikely to go far enough. They commented that without the exemption of sensitive commercial information

from disclosure, business may be deterred from participating in informal reviews. They suggest that article 2(1) of the draft SI be amended to include an exception for information accepted by the OFT on a confidential basis.

Linklaters states the consultation documents main emphasis is on information provided to OFT. However, consideration may need to be given to other regulators' informal processes.

Government response

The Government recognises the concerns of the business community that article 2 does not go far enough to protect information volunteered to OFT. The order has been redrafted to balance the need to protect information which comes to the OFT in connection with their work, but also allow disclosure to support the aim of amending the legislation, to enable IP rights holders and consumers access to information that will allow them defend their rights. We are extremely grateful to respondents for their considered and detailed suggestions to revise article 2.

Question 6: Do you agree with the definition of “market study” in article 2(a)?

There were 17 responses to this question. Several declined to comment suggesting OFT were best placed to respond. Three respondents correctly identified that this question was intended to be about article 2(2) not 2(a). Eight respondents supported the “market study” definition unequivocally.

Six had substantial comments. Several believe the definition too narrow because there may be cases where a market study may be performed outside the scope of EA02 s.5.

BT believe article 2 of the draft order should exclude from disclosure all of s.5 EA02 not just s.5(1). Also that as drafted article 2(2) of the order is too restrictive and should cover all the functions allocated to the OFT to conduct market studies.

Ofcom considers that the SI should define what type of information is prescribed, rather than attempting to include everything within certain limited exceptions. They consider the wording of article 2 should reflect the intentions set out at s.241A(2) EA02 to restrict the type of information that can be disclosed under this gateway.

They suggest that any definition should be wider than applying to information, which comes to regulators in relation to ‘market studies’. For example, it should include the exercise of functions by regulators where appropriate under sections 6, 7 and 8 of the Act that cannot be classed as a market study although it could still be ‘market based’ work (e.g. for the review and monitoring of undertakings). Also, it should cover information collected under s.5(1) of the Act that can be used for the purposes of informing responses to super-complaints under s.11 of the Act.

They consider that there are other competition based functions that should be excluded, such as information collected for the purposes of s.162 (monitoring and

reviews of undertakings and orders made under the EA02) and Schedule 24 of EA02 (the monitoring and reviews of undertakings under the Fair Trading Act 1973).

Linklaters comment that the definition of “market study” in s.2(2) of the draft order does not refer to s.5 EA02, which relates specifically to the acquisition of information by the OFT.

The Law Reform Committee suggested including a requirement of proportionality similar to s.242(3) EA02, for criminal proceedings disclosure and “sufficient seriousness” like s.243(6)(a)EA02, for overseas disclosure. And that the protection offered by s.241A EA02 and the draft order in relation to competition information appeared to be less than European competition law offers in the European context. They suggest that this is difficult to justify, and inconsistent.

They also suggest in relation to the issues above, as regards competition information. That article 2(1) should be amended to read *“information which comes to the OFT in connection with the exercise of any of its functions under or by virtue of [... the relevant statutes ...]”*. They suggest that this should extend at least to the Enterprise Act and the Competition Act 1998 (as amended). That revised wording could then replace the whole of the current draft article 2(1).

Citizens Advice Bureau (CAB) appreciates concerns of making information volunteered to OFT available for disclosure. However, they believe that consumers should have access to such information and excluding it from disclosure may provide a major loophole to rogue traders who use what looks initially like cooperation as a means to avoid consumer redress.

CBI suggest the order should be clear that information already provided informally to OFT should be excluded and information received by OFT on a confidential basis in connection with its regulatory role should also be excluded.

Government response

The Government acknowledges that article 2 needs further safeguards to protect competition information. It confirms that the SI cannot allow the disclosure of information which s.241A EA02 excludes from the scope of disclosure.

The Government will redraft the order so that it will give a greater protection to competition information. It accepts that article 2 should exclude from the possibility of disclosure information obtained under s.11, s.162 and paragraphs 14 to 18 of Schedule 24 of EA02. The exclusion of s.5(1) EA02 studies provision will be clarified. We do not see a justification for excluding from disclosure information that is gathered before the order comes into effect. We are aware that trading standards have information that would be useful to IP rights holders. We want to allow access to that information so that they can better defend their rights.

The Government believe it is easier and more practical to protect specified information, that we do not want disclosed, by excluding it from prescription. That it is unnecessary to refer to all of s.5 EA02 and the objective should be to have a

wide range of specified information available for disclosure with protection where necessary.

Question 7: Would you see any value in providing guidance on how the civil gateway will work?

There were 22 responses to this question in which guidance was described as valuable, welcome, essential and indispensable. Several respondents referred to confusion amongst some authorities when the EA02 criminal gateway was introduced.

CBI considered it essential that stakeholders are fully consulted on the guidance and that it is available before the new provisions come into force.

Government response

Guidance on the new provisions will be produced by BERR to assist consumers, business and public authorities before the provisions come into force.

We have sought assistance from interested parties when drafting the guidance.

CHANGES IN THE LIGHT OF CONSULTATION

Articles 2 and 3 will be titled prescribed information and prescribed proceedings respectively.

Article 2 will be amended so that it will apply to all specified information to which s. 241A applies.

Article 2 will protect information from disclosure which comes to OFT in connection with the exercise of its functions under;

- EA02 section 5(1) (acquisition of information) with a view to exercising its functions under sections 6 (provision of information to the public), 7 (provision of information and advice to Ministers) or 8 (promoting good consumer practice);
- EA02 section 11 (super-complaints to OFT);
- EA02 section 92 (duty of OFT to monitor orders and undertakings related to mergers)
- EA02 section 162 (duty of OFT to monitor certain orders and undertakings);
- EA02 Part 6 (cartel offence);

- EA02 paragraphs 14 to 18 of Schedule 24 (supersession, variation or release of certain undertakings);

Article 2 will also exclude from possible disclosure;

- Information which comes to a regulator in connection with the exercise of its functions under section 11 (super-complaints to OFT) as applied by section 205 (super-complaints to regulators other than OFT); and
- Information which comes to Her Majesty's Revenue and Customs in connection with the exercise of their functions under the Customs & Excise Management Act 1979 and the Value Added Tax Act 1994.

Article 3 will prescribe the following civil proceedings for the purposes of section 241A(1);

- proceedings relating to or arising out of a legal right or obligation of a consumer;
- proceedings relating to or arising out of the infringement of an intellectual property right which includes a patent, copyright, and analogous or related right, database right, registered or unregistered design right, registered trade mark, topography right, supplementary protection certificate, plant variety right, protected designation of origin or a protected geographical indication;
- proceedings relating to or arising out of passing off or the misuse of a trade secret.

A consumer will be defined as is an individual who;

- is acting outside his trade, business or profession; or
- is acting with a view to carrying on a business but not in the course of a business carried on by him.

NEXT STEPS

The order will be made by the Secretary of State and laid before Parliament in August and come into effect on 1 October 2007.

Guidance about how the gateway will operate will be available in September 2007.

The final Regulatory Impact Assessment will be published in August 2007.

RESPONSES TO THE CONSULTATION

Responses to the consultation were received from the following organisations. Please note this list excludes responses made in confidence.

Lord Justice Jacob
Scottish Consumer Council
National Consumer Council
Information Commissioner
Scotch Whisky Association
Cinema Exhibitors' Association Ltd
Trading Standards South East
Glasgow City Council
British Retail Consortium
The Royal Bank of Scotland
Trading Standards East Midlands
Trading Standards in Scotland
Redd Solicitors LLP
Alliance Against IP Theft
Office of the Scottish Information Commissioner
Freshfield Bruckhaus Deringer
British Telecommunications plc
Ofcom (Office of Communications)
Trading Standards Institute
OFT (Office of Fair Trading)
LACORS (Local Authorities Coordinators of Regulatory Services)
East of England Trading Standards Association Ltd
Law Reform Committee
Citizens Advice Bureau
LoTSA (London Trading Standards Authorities)
British Bankers' Association
CBI (Confederation of British Industry)
FAST (Federation Against Software Theft)
ACG (The Anti-Counterfeiting Group)
SWERCOTS (Trading Standards Partnership (South West))
Linklaters
Yorkshire and the Humber Trading Standards Group