

# Consultation on Regulation on Consumer Protection Co-operation

## Government Response

The Department issued a consultation paper on a proposal for an EC Regulation on Consumer Protection Co-operation on 19<sup>th</sup> September 2003. We received 12 responses from organisations representing regulators, consumers, trading standards authorities, retailers, the legal profession and businesses.

All respondents fully supported the principles of better enforcement and co-operation behind the proposed Regulation. All respondents thought that this was an area that needed improvement as opportunities for cross-border scams increase. Beyond general support, views were largely split between those (largely business groups) that thought the scope was too wide and that the Regulation went too far in the obligations it imposes upon enforcers, and the enforcement powers it requires consumer protection bodies to be given. Others (including consumer groups) thought the Regulation could go further in these areas.

The DTI is very grateful for all of the responses to this consultation and has considered all of the comments and suggestions made. We are particularly grateful to the FSA, BRC and CA, who provided detailed comments on the text and suggested amendments. Many of these points have been taken up in our negotiating position.

### Government objectives

The Government views this Regulation as a necessary and important measure, which will make a material difference to how we tackle cross-border scams and fraud. It will form the centrepiece of our strategy for better cross-border enforcement across the world, which includes continuing to build up effective mutual assistance arrangements with countries beyond Europe. Our overall negotiating position is therefore to support the measure and our main negotiating objectives are set out below.

- At the centre of the Regulation is the requirement for every Member State to have a public consumer protection enforcement body (see definition c in Article 3). We consider that contact between public enforcers across borders is essential if information is to be shared safely, and the right enforcement measures taken. Therefore, ensuring the Regulation delivers this objective is the main priority for

the UK. We are willing to consider some arrangement where private bodies also play a role in the network, but this must be in addition to, not instead of, a public authority.

- We will be seeking to ensure that the Regulation creates an effective forum for Member States to work together to raise the quality and consistency of consumer protection throughout the EU. We will also be seeking to ensure that we can maintain our ability to make other mutual assistance agreements where we think they are appropriate. For example, in 2003 we signed enforcement co-operation agreements with Canada, Australia and New Zealand.
- Many consultees wanted assurance that the draft would clarify that this Regulation is not meant to replace existing co-operation. Therefore, we will seek to ensure that the mutual assistance network fits comfortably around the variety of successful co-operation mechanisms that already exist, such as those in the area of financial services and advertising standards. This also fully respects the principle that the infringement will be dealt with by the body that is best placed to act.
- We will continue to make the point that any information disclosed across borders must be adequately safeguarded. This reflects concerns expressed by many consultees.
- The Regulation requires that competent authorities have a minimum level of enforcement powers. We will be seeking to ensure that there is a clear justification for these powers and they are used with proportionality, reflecting concerns from many consultees.
- We will seek to ensure that this Regulation does not create a layer of unwanted and unnecessary bureaucracy.

### **Other issues raised in the consultation**

Several consultees raised the question of resources. It is crucial that the competent authorities have the necessary resources to fulfil the obligations in this Regulation. We have begun to consider this issue as part of the partial Regulatory Impact Assessment, but we will turn our attention to it fully when we have a clearer idea of how the Regulation will be implemented in the UK.

We plan to designate the Office of Fair Trading as a "competent authority", and are still considering whether other bodies should also be designated. We will be following this up with the individual bodies in the next few months.

# Summary Of Responses To Consultation Paper

## Introduction

The Department issued a consultation paper on a proposal for an EC Regulation on Consumer Protection Co-operation on 19<sup>th</sup> September 2003. We received 12 responses from organisations representing regulators, consumers, trading standards authorities, retailers, the legal profession and businesses. The respondents are listed in Annex A.

## Question 1: Do you agree with the scope of the Regulation?

1. There was general agreement that the proposed scope of the Regulation should be restricted to intra-Community infringements of measures that protect consumers' interests. The Air Transport Users' Council particularly welcomed the inclusion of Regulation 259/91 (on denied boarding compensation).
2. LACORS, however, are concerned that the Council Regulation on nutrition and health claims made on food is included: this is because separate, and effective, arrangements (under which LACORS are the UK's designated Single Liaison Body in this area) have existed for some 4-5 years, and LACORS see no merit in changing those arrangements.
3. The Financial Services Authority cautiously welcomed the Regulation for what it can offer to the Single Market as a whole. But it made the general comment that Articles 2 and 3 are ambiguous in terms of the Regulation's potential scope: on a narrow reading, an overseas enforcement body would be obliged to enforce against a supplier only its own national legislation (implementing Community obligations); but a wider – and in the FSA's view less desirable - reading would be that the overseas body would be obliged to enforce against a supplier in its country of origin for an infringement of laws either in that country of origin or in the country which requested the enforcement action.
4. More specifically, the FSA emphasised that the Regulation needs to avoid creating confusion and "overkill" in circumstances where the European financial services sector already has detailed and well-established arrangements for achieving cross-border co-operation between relevant regulators, including obligations set out in the various financial service Single Market directives. Further, the FSA believes the Regulation should at least avoid imposing additional unnecessary obligations on financial services regulators.
5. The FSA also noted that the drafting of the Regulation leaves it uncertain as to whether consumers derive rights directly from the

Regulation. It recommends that it should be made clear that a competent authority cannot be held liable in damages to consumers for failing to discharge obligations under the Regulation.

**Question 2: Do you have any comments regarding the competent bodies and minimum powers that are being proposed?**

6. There was general agreement that the OFT should be the lead competent body in the UK. CBI and BRC doubted whether trading standards and other public bodies should be designated as competent bodies as such, but suggested that they might work as agents of the OFT instead. LACORS said they would expect local trading standards authorities to be nominated, and also proposed that they (LACORS) should be the lead competent body for the Council Regulation on nutrition and health claims (for which they are already responsible). Similarly, the Air Transport Users Council proposed that the Civil Aviation Authority should be the competent body for air transport. The ASA asked how competent bodies would be designated in the future.

7. The FSA commented that it already had many, but not all, of the minimum powers proposed in the Regulation, but would have concerns about itself being nominated as a competent body based on the current draft of the Regulation.

8. On the proposed powers, views were split between consumer organisations and enforcement bodies, which are content, and business organisations, which are not. In the former contingent, the Consumers Association, for example, thought that the powers should be further enhanced, e.g. fast-track access to courts where assets are to be seized in order to ensure that they are not moved out of the reach of the courts. At the other end of the scale, the CBI commented that the proposed powers extend well beyond what would be justified for the purpose of the Regulation, and strongly opposed the freezing or seizure of assets. It stressed the need for powers to be limited to what is reasonable and, in terms of the production of documents, relevant. The British Retail Consortium made similar comments.

9. The Bar Council made the general comment that some of the proposed powers are so widely drawn that they might well be challenged under the European Convention on Human Rights, and that a safeguard against this would be to make such powers subject to court orders.

**Question 3: If introduced, do you agree that it is sensible to introduce the powers in respect of both cross-border and domestic enforcement? Would you support enforcement bodies having more powers to gain redress on behalf of harmed consumers?**

10. There was a broad split on these questions, on the lines described in paragraph 8. Consumer organisations and enforcement bodies generally supported the powers being made available domestically, but the CBI and the BRC strongly opposed this, commenting that if additional powers were necessary, they would have been introduced in the Enterprise Act 2002.

11. On powers of restitution/redress, the trading standards community made the point that any civil powers should be in addition to, rather than instead of, the current suite of criminal legislation available. The FSA commented that it already has powers of financial restitution for use in serious breaches involving large numbers of consumers or significant losses. The CBI argued that the principal form of relief should be injunctive (under the Injunctions Directive), which would be in the collective interest of consumers, rather than individuals. By contrast, the consumer organisations were very much in favour of enforcement bodies having the power to re-distribute monies/assets seized, if not to individual consumers (on practicability grounds), then for the benefit of consumers generally. The CA also thought that enforcement bodies should be given powers to make restitution orders in order to restore consumers to the *status quo ante*.

**Question 4: Do you have any comments about the mutual assistance arrangements?**

12. There was little comment on this question, and most respondents were content. The NCC emphasised the need for full information to be provided quickly in order to limit any damage to consumers. The FSA however commented that the proposed arrangements are unnecessarily and disproportionately prescriptive about the nature of the assistance that must be provided in response to a request, arguing that competent bodies should have much greater discretion to use non-formal methods to address an issue. The BRC pointed to the need to avoid “fishing expeditions”, i.e. competent bodies requesting information without reasonable suspicion that an offence is being committed.

**Question 5: Do you have any comments on the information exchange provisions in this Regulation?**

13. Comments on this question were largely about the need for confidential, or commercially sensitive, information to remain so. The CBI, for example, argued for strict safeguards to ensure its protection because companies would have little incentive to comply with requests for such information if they thought it would be passed on to another country, whether to another Member State or (perhaps even especially) outside the EU. The Consumers Association understood the need for confidentiality, but said it was opposed to unnecessary obstacles being

placed in the way of public early warnings to consumers about unfair marketing practices.

14. The trading standards community commented that HMG needed to clarify that the provisions of the Regulation comply with the Data Protection Act; and that, as well as access to the database supplied to the Commission, there would be a need for a pro-active message system to notify competent bodies of matters under investigation.

15. The Bar Council expressed concerns as to how, despite the requirement that information disclosed may be used only to ensure compliance with laws that protect consumers' interests, information might be used by many different national authorities, whose views of what constitutes consumer protection could be very different, both from each other and from those of the UK. The Bar Council suggested a better approach would be to base the relevant provision on s. 243 of the Enterprise Act.

16. The FSA said that it was permitted to disclose confidential information as the competent UK authority under the financial services Single Market directives. The provisions under these directives are less restrictive than the proposed Regulation, prompting the FSA to suggest that it should be made clear that it could choose to proceed under the relevant Single Market directive. The FSA made similar comments to the CBI about the need for information disclosed to other countries to be properly safeguarded.

**Question 6: Do you agree with the mutual assistance principles and the circumstances where it can be refused?**

17. The FSA said that it already has extensive powers of mutual assistance under the Financial Services and Markets Act, including powers of investigation and response to requests. The FSA believes that the discretion in the Regulation for a competent body to decide whether to respond to a request for assistance is too vague and narrowly drawn, and should to be revised, for example to allow a request to be refused where the requested action might adversely affect the sovereignty, security or public policy of the Member State addressed. Finally, the FSA thought the Regulation offers too much incentive for a competent body to transfer the burden of effort of a particular case elsewhere by requesting assistance; thus, there should be a requirement for competent bodies to exhaust their own options before turning to another Member State.

18. The trading standards community expressed concerns about the resource implications given that the grounds for refusing to comply with a

request for assistance are limited and that competent bodies are, generally, required to act.

19. The business community suggested that the consideration of whether a case was well founded should include whether there was reasonable suspicion that an infringement had occurred.

20. Consumer organisations thought the OFT should have the right not to take action in response to a request for assistance if, for example, there was a lack of evidence. They also thought that the OFT should be able to pursue action in another Member State where the competent body there refuses to take action on grounds of disproportionate burden in relation to the scale of the infringement and consumer detriment. The Consumers Association thought the Regulation should clarify what the Commission could do if it considered a refusal to comply with a request to be unreasonable.

**Question 7: Do you have any comments about the role of the Commission in this Regulation?**

21. There was a strong feeling, particularly among the business community and the FSA, that the Commission's role is far too widely drawn, and that the Regulation should make it very clear that its role is limited to the enforcement of intra-Community, or cross-border, infringements. Article 17 was the focus of particular criticism because it addresses such issues as consumer information, education, advice, access to justice, etc: while these are recognised as important issues, they were widely deemed (including by the Consumers Association) to have no place in a Regulation which is essentially concerned with enforcement co-operation.

22. There was a large measure of agreement with the DTI's comments in our consultation document that Article 18 appears to suggest that the Commission is claiming exclusive competence in the areas covered by the Regulation and, in particular, the exclusive right to make mutual assistance agreements with third countries. Most respondents wanted the UK to be able to continue to make such agreements itself, particularly where for example a "scam" is affecting only the UK.

**Question 8: Do you have any comments about the provisions in Chapter V?**

23. In line with its comments on the wide role envisaged for the Commission, the FSA regretted that the comitology proposed is only

advisory, in contrast to the financial services Single Market directives, which provide for the regulatory comitology to be used (i.e. a stronger role for Member States than simply advisory).

24. There was a divergence of views on whether entities qualified under the Injunctions Directive should be invited to meetings of the Advisory Committee (as provided for in Article 20): the CA welcomed this, but the CBI and BRC disagreed, and suggested that representatives of any organisation should be invited, as necessary. The NCC argued that consumer representatives should be invited to meetings.

25. The CA also suggested that, in addition to Member States producing biennial national reports on the operation of the Regulation (under Article 21), the Commission should produce annual reports giving a summary of cases and an overview.

### **Annex I (List of Directives covered by the Regulation)**

26. The Consumers Association proposed that the list of Directives be extended to cover those dealing with the safety of products, the illegal use of personal data (including “spamming”) and consumer protection in relation to financial services.

### **Regulatory Impact Assessment**

27. LACORS expressed disappointment that no resources have been identified for local authorities in the UK to undertake the additional enforcement work associated with the Regulation. LACORS offered an estimate of the additional resources required per annum for a local authority with a population of 500,000.

## List of respondees

Financial Services Authority

LACORS (Local Authorities Co-ordinators of Regulatory Services)

CBI

National Consumer Council

SETSA (a partnership of South East Trading Standards Authorities)

Advertising Standards Authority/CAP (Committee of Advertising Practice)

Bar Council (Law Reform Committee)

Air Transport Users Council

National Consumer Federation

British Retail Consortium

Consumers Association

Law Society (Civil Litigation Committee)

End

Department of Trade and Industry  
Consumer and Competition Policy Directorate