

**EXPLANATORY MEMORANDUM TO
THE ENTERPRISE ACT 2002 (DISCLOSURE OF INFORMATION FOR
CIVIL PROCEEDINGS etc.) ORDER 2007**

2007 No. 2193

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This instrument allows the disclosure of information for civil proceedings which is otherwise restricted by Part 9 of the Enterprise Act 2002. It enables the disclosure of information to consumers and intellectual property right holders whilst protecting information relating to competition matters.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The Enterprise Act 2002 (EA02) received Royal Assent on 7 November 2002. Part 9 came into force on 20 June 2003.

4.2 Part 9 brought together a number of statutory regimes for the protection of information obtained by public bodies under specified legislation in their dealings with individuals and businesses. It protects such information from misuse. Part 9 balances that protection with functions and considerations, which allow the use of the information for other public purposes.

4.3 The information is restricted if it is obtained under identified legislation and relates to the affairs of an individual or a business. The information may be disclosed by one public authority to another for the purposes of the other's functions, but not to consumers or intellectual property rights holders.

4.4 In the Consumer Protection Act 1987 (which was replaced by Part 9) there was a power for public authorities to release information to any person for use in a civil proceeding, but this only covered consumer information subject to that Act.

4.5 The Enterprise Act 2002 was amended (using the Companies Act 2006) by the insertion of section 241A to allow disclosure for civil proceedings and closely related purposes. The kind of information which may be disclosed and the definition of the types of civil proceedings for which disclosure is permitted are set out in this statutory instrument.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

Policy

7.1 Part 9 of the Enterprise Act reflects the Government strategy of widening and harmonising the gateways through which information can be disclosed in the UK and overseas and at the same time introduces appropriate safeguards in respect of permitted disclosures of information.

7.2 The Trading Standards Service highlighted the difficulty of being unable to disclose for civil proceedings after Part 9 came into effect in June 2003.

7.3 Intellectual property (IP) rights holders were concerned that enforcers were unable to release information to rights holders so they could take action against counterfeiters in the civil courts.

Consultation

7.4 The DTI consulted in August 2005 on whether to amend Part 9 to allow information to be released for civil proceedings. The majority of responses from enforcers and regulators, consumer's organisations, business (including intellectual property rights holders) law firms, societies and associations, were supportive of amending the Act.

7.5 There were 90 responses to the DTI consultation on amending the Act. These came from regulators, consumer's organisations, IP rights holders and law firms.

7.6 During the consultation period an opportunity arose to amend Part 9 via the Bill which became the companies Act 2006. An amendment to open a civil proceedings gateway whilst ensuring competition information could not be disclosed was included.

7.7 The kind of information which may be disclosed and the types of civil proceedings for which disclosure is permissible were left for secondary legislation.

7.8 The DTI consulted in December 2006 on a draft Order. Following the consultation the draft order was significantly redrawn. Further measures were added to address stakeholders concerns including; the exemption from disclosure of competition information gathered by OFT and other regulators.

7.9 There were 32 responses to the consultation on the draft statutory instrument.

7.10 The Government response to these consultations will be published on 1 August 2007.

Guidance

7.11 In due course the OFT will produce guidance on the disclosure of Part 9 specified information to consumers and IP rights holders. In the interim BERR will produce and publish guidance before the Order comes into effect on 1 October.

8. Impact

8.1 A Regulatory Impact Assessment has been prepared for this instrument.

8.2 The changes will not impose cost for business and will benefit IP rights holders. BERR expect an increase in demand for information from IP rights holders aware that these changes are in the pipeline. However, this will be offset by greater co-operation and assistance from them.

9. Contact

Peter Monday at the Department for Business, Enterprise and Regulatory Reform Tel: 020 7215 3010 or e-mail: peter.monday@berr.gsi.gov.uk can answer any queries regarding the instrument.

1. Title of proposal

1.1 Part 9 Enterprise Act 2002 disclosure of information for civil proceedings.

2. Purpose

2.1 This RIA examines the implications of allowing the disclosure of information restricted from disclosure under Part 9 of the Enterprise Act 2002 (EA02) for civil proceedings and closely related purposes.

Objective

2.2 The objective of reviewing Part 9 of the EA02 was to consider allowing information to be released to intellectual property rights holders and consumers for civil proceedings.

Background

2.3 The Enterprise Act 2002 received Royal Assent on 7 November 2002. Part 9 came into force on 20 June 2003.

2.4 Part 9 restricts the disclosure of specified consumer and competition information. It contains a general restriction on disclosure unless it is within permitted gateways or the information has previously been made public. This is done to protect information about an individual or a company's business from disclosure that might harm the individual or damage the company's competitiveness.

2.5 It allows the release of information for specific reasons by and to public authorities for performing their functions under specified legislation.

2.6 In the Consumer Protection Act 1987 (which was replaced by Part 9) there was a power for public authorities to release information to any person for use in a civil proceeding, but this only covered consumer information subject to that Act.

2.7 In August 2005 the DTI began a consultation on whether to amend Part 9 to allow information to be released more easily for civil court proceedings.

2.8 During the consultation period, an opportunity arose to amend Part 9 via the Bill which became the Companies Act 2006. An amendment to open a civil proceedings gateway whilst ensuring competition information could not be disclosed was included. The definition of the kinds of civil proceedings for which disclosure might be made and the types of information which might be disclosed were left for secondary legislation. Stakeholders were informed in

November 2005 of this change and were advised that we would consult with them on the draft secondary legislation.

2.9 A government response to the consultation was published in April 2006. The response is available from www.berr.gov.uk/consultations. The majority of responses were supportive of the need to amend Part 9.

2.10 In December 2006 the DTI conducted a consultation on a draft Statutory Instrument. The consultation was sent to over a hundred organisations and individuals including regulators, enforcers, business and legal professionals interested in consumer and intellectual property rights matters. The consultation is available from www.berr.gov.uk/consultations. The majority of respondents were supportive of the proposals, but there was considerable concern that the draft did not offer sufficient protection for competition information. There was also a significant call for guidance on how the gateway should work from respondents.

2.11 These concerns were acknowledged, the SI underwent considerable redrafting and the categories of competition, customs and tax information which could not be disclosed were extended and refined. BERR will produce and publish interim guidance on the new disclosure gateway before the new regulations come into effect. OFT will produce guidance that replaces BERR's in due course.

Rationale for Government Intervention

2.12 Enforcers had highlighted that they were unable to release specified information to individual consumers who wish to pursue a civil proceeding against a trader e.g. where the consumer has been the victim of a scam or injured due to an unsafe product. As a result consumers were unable to get information to support a compensation claim and traders faced a weaker deterrent effect than they might.

2.13 Consumers may also be referred to the Trading Standards Service (TSS) when they are having difficulty getting information from the local press about their advertisers. The press pass on the details to the Trading Standards but they do not disclose this information to consumers.

2.14 Trading Standards Authorities suggested that there are hundreds of cases every year where consumers are requesting information to pursue cases, which trading standards cannot disclose. Information on these requests is not systematically recorded but a number of TSS Departments which responded to the consultation estimated the frequency of these requests. For example, Trading Standards South East (TSSE) estimates that they deal with around 200 cases per year requesting information to pursue personal claims, including injury. Furthermore, they estimate around 800 basic requests for information are made that cannot be fulfilled due to Part 9.

2.15 Intellectual property (IP) rights holders were concerned that enforcers were unable to release information to rights holders so they could take action

against counterfeiters in the civil courts. TSSE estimated that Part 9 prevented disclosure in more than 100 cases relating to intellectual property every year.

2.16 Counterfeiting and piracy is an illegal activity. Whilst it is inevitably difficult to know the precise scale of the problem, recent studies carried out by the Organisation for Economic Co-operation and Development (OECD) reported that counterfeits accounted for 2% of world trade worth approximately 200 billion dollars in 2005; and was responsible for the loss of 200,000 jobs in Europe.

2.17 The National Criminal Intelligence Service Baseline Threat Assessment (Annual Enforcement Report 2004, published by the Patent Office)¹ identified there is an inherent risk of harm to consumers from counterfeit goods because they do not undergo safety checks to meet British or other quality standards.

2.18 It is difficult for business to estimate the volume of counterfeit goods seized by enforcers as this information cannot be released to them if they are not pursuing a criminal prosecution. In the course of the August 2005 consultation to determine whether Part 9 should be amended, one famous luxury brand owner estimated that between June 2003 and March 2004 there were 310 seizures by Trading Standards officials where the retail value of the goods came to £2.3 million, for that company's goods alone. It is estimated that the criminal economy might be up to around £1 billion in the UK.

2.19 Representatives from brand owner's trade associations have argued that until they are aware of the size and types of goods seized by Trading Standards they are unable to decide which course of action they should take. Civil redress, notably the preliminary step of issuing cease and desist notices, is a speedier option and therefore more cost effective to the brand owner than pursuing a private criminal prosecution. The civil procedure could enable the brand owner to gather intelligence about the infringer and those included in the supply chain. This intelligence could then be used either to pursue a civil action and stop the source higher up the supply chain, or to prepare an effective case to refer back to the authorities for prosecution.

2.20 The table at Annex (i) was submitted to the UK IP Office (the Patent Office as it then was) on behalf of industry in April 2004. It tries to estimate the scale of the problem from samples received from brand owners. These give examples of the proportion of cases that were not pursued from June 2003 to March 2004. However it underestimates the true situation, as not all seizures are reported to IP rights holders. For example, if a trader accepts straightaway that seized goods are counterfeit and the case is suitable for a caution, there is no need to ask IP rights holders for statements confirming the goods to be counterfeit. The quantity of goods seized is often not disclosed by the Trading Standards Service. The estimated retail value of seized goods from June 2003 to March 2004 was £5.9 million plus the software values, which (as

¹ <http://www.patent.gov.uk/about/enforcement/annreport04.pdf>

explained in a note to the chart) were very difficult to estimate, and were put at between £6m and £20m per annum. For the August 2005 consultation, the Anti Counterfeiting Group (ACG) suggested that the overall estimate of retail values involved had increased to at least £25 million - just for those few companies - and might have been as much as £40 million, in the UK alone. With the continuing growth in the sale of fakes in the UK, and increasing problems on the Internet, it is suggested that this figure can now be doubled again, as an attempted estimate of the impact of closing the civil gateway, for the period June 2003 to June 2007 - i.e. between £50 million and £80 million - for those seven companies shown in Annex (i).

2.21 These figures do not correspond directly to losses to affected companies. The detriment to these companies is in potential sales lost to counterfeiters and damage to the reputation of the brand. A brand's value may be damaged by the presence of fakes as these are often of inferior quality. A customer mistakenly purchasing a fake may be put off purchasing the product again, further damaging sales of the genuine brands. These effects are difficult to quantify but the combination of factors is likely to amount to millions of pounds.

2.22 Amending Part 9 pleased some business interests; it is a cause of concern to others. The wider business community were concerned about making it easier for public authorities to release information for civil cases. This is because it could allow information which was previously confidential, from mergers or market investigations, to be released to their competitors. Although introducing a civil gateway would, in relation to certain consumer information, simply restore the pre-EA02 position, it may mean an increase in the cases taken against businesses by consumers because of the wider scope of the information to which Part 9 applies. Some of these cases would likely be against businesses that had acted lawfully.

3. Consultation

Within government

3.1 Government Departments were consulted before the public consultation. They were: HM Treasury, Department for Culture, Media and Sport, Department for Constitutional Affairs, Department for Enterprise Trade and Investment, Scottish Executive, National Assembly of Wales, Office of the Deputy Prime Minister, Department for Environment, Food and Rural Affairs, Department for Transport, Department of Health, Cabinet Office, HM Revenue and Customs and the Home Office.

Public consultation – to amend Part 9 of the Enterprise Act 2002

3.2 There were 90 responses to the DTI consultation on amending the Act issued in August 2005: these included a total of 16 responses from enforcement or regulatory organisations, 43 responses from industry including representative organisations, 1 response from a consumer organisation, 5 responses from organisations representing intellectual property (IP) rights

holders, 13 responses from law firms/societies/associations, 2 responses from private individuals and 10 responses from a mixture of the above organisations who provided general comments on the consultation.

3.3 The consultation offered four options for consideration.

3.4 The preferred option (number (iv) in the consultation) was to amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only. Whilst keeping the gateway narrow to reassure business that sensitive commercial information will not be released. In the consultation DTI suggested that the simplest way of achieving this would be to limit disclosure by identifying the legislation under which information could be released. For example, if the Trade Marks Act 1994 to be specified, then IP right holders would be able to get information from enforcers to pursue civil cases against counterfeiters.

3.5 70 of the 90 responses were in favour of this option including IP Groups, Citizens Advice, OFT, Federation of Small Businesses, Financial Services Authority, law firms and private individuals.

Benefits

3.6 This option could contribute towards tackling counterfeiting and reducing criminal activity. It would allow IP rights holders to obtain information to pursue counterfeiters using civil proceedings. This may act as a deterrent to counterfeiting activities, because they could face a higher risk of penalties as a result of their actions. It may also benefit legitimate business through a reduction in unfair competition. Consumers will be able to pursue rogue traders and have a similar deterrent effect.

3.7 An increase of deterrence could lead to potential savings to local authority budgets. If it did, it could serve to reduce the level of counterfeit trading or incidents of personal injury from faulty goods, through privately pursued cases, rather than at the expense of public enforcers.

Costs

3.8 This approach does not impose administrative and policy costs on legitimate business and by limiting the type of information disclosed the risk of releasing sensitive information is small.

3.9 Compensatory simplification: We do not anticipate additional costs for legitimate business but there is still a small risk of releasing sensitive information. Any additional costs in terms of legal advice or adaptation will be offset by guidance to help public authorities use gateways effectively and consistently.

The Other Options

3.10 The three other options on which DTI consulted were:

3.11 Option (i): Do nothing. Part 9 would remain unchanged. This would have meant that public authorities would continue to be unable to disclose information to consumers and business. The costs and benefits are all dealt with in the rationale for Government intervention.

3.12 Option (ii): Proposed Part 9 would remain unchanged but the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways would be explored.

Benefits

3.13 Business commented that there are variations in how Part 9 is applied around the United Kingdom. It is clear that some public authorities are more cautious than others about using the permitted information gateways under Part 9. Examples of best practice would allow public authorities to use Part 9 gateways effectively.

3.14 Consistent application of Part 9 across the country would mean an increase in business and consumer confidence as they would have a better understanding of what information could and could not be obtained from enforcers.

3.15 Like option (i) there would not be the possibility of competitors gaining access to commercially sensitive information.

Costs

3.16 This option did not address the majority of cases of consumers and IP rights holders not being able to access information to pursue civil cases outlined in the “Rationale for Government intervention” section.

3.17 There would be no additional costs to consumers or business for the guidance option. However, all consumer detriment costs as highlighted in the first option would remain.

3.18 There would be a small cost to enforcers to provide resources to train staff and improve their understanding of Part 9; this is not expected to be significant. The increase in knowledge of Part 9 gateways, would allow enforcers to save time as they become more efficient when dealing with related queries.

3.19 There would also be a small cost to Government in issuing new guidance and ensuring its effective distribution.

3.20 Compensatory simplification: this option simplifies by making guidance clearer on how and when to use Part 9 and does not impose additional costs on business.

3.21 Option (iii): To amend Part 9 to allow the release of information for the purposes of civil proceedings for all cases where restrictions on disclosure of the information are not restricted by Community law². This would have created a wider gateway than the previous civil gateway under the Consumer Protection Act 1987 because Part 9 applies more extensively than the 1987 Act. It would have included disclosure of information gathered on competition issues.

Benefits

3.22 IP rights holders would be able to obtain information to pursue civil action when their goods are being counterfeited and the chances of recouping their losses increased. There may over time be an improved deterrent effect as counterfeiters are more likely to face greater financial penalties. Sales of counterfeit goods reduce VAT, so if the change enhanced the deterrent effect, losses to HM Revenue and Customs would be reduced.

3.23 Consumers could benefit as there is an increased possibility of obtaining compensation following injury as a result of a faulty product. In the long term, if such cases are pursued they may send a strong message to businesses acting unlawfully and therefore increase deterrent effect.

3.24 An increased deterrent effect, which is not publicly funded, could have potential savings to local authority budgets. If the option did increase the deterrent effect, it could serve to reduce the level of counterfeit trading or incidents of personal injury from faulty goods or services, through privately pursued cases, rather than at the expense of public enforcers.

Costs

3.25 Businesses were concerned about the release of sensitive information, particularly overseas. This is a risk which if realised could have negative impacts on competition between firms. If sensitive competition information were released, it is likely that parties to competition investigations in the future would be less willing to co-operate in their sharing of data with the competition authorities. At the moment, parties can be confident that information they supply will not be released.

3.26 No administrative costs would be imposed as a result of this option.

3.27 Stakeholders have concerns that in a small number of cases, information released may allow civil proceedings to be taken against legitimate business. However, where information is released and used it will be because it supports the case, therefore there seems to be only a small risk that legitimate business would be affected.

3.28 Compensatory simplification: this option should not impose additional costs on legitimate business.

² For example Article 28 of Regulation 1 of 2003 and Article 17 of Regulation 139 of 2004.

Public consultation – on a Statutory Instrument enabling disclosure of information for civil proceedings

3.29 There were 32 responses to the DTI consultation on a draft statutory instrument enabling disclosure for civil proceedings. These included 14 from enforcement or regulatory organizations, 7 responses from industry including representative organizations, 3 responses from consumer organizations, 3 responses from organizations representing IP rights holders, 4 responses from law firms/societies/associations and 1 from an individual.

3.30 The responses to the consultation provided detailed commentary on the draft order, as well as replying to seven questions. The majority of respondents were supportive of the proposals. But, there was considerable concern that the draft did not offer sufficient protection for competition information.

3.31 There was an overwhelming demand for guidance to accompany the amendment.

3.32 We acknowledge these concerns and have added measures to protect competition information. BERR will produce and publish guidance on the new disclosure gateway before the new regulations come into effect.

4. Small Firms Impact Test

4.1 Allowing the release of specified information may allow civil proceedings to be taken against business acting lawfully. Small business would be particularly affected by the costs of defending themselves in court. However, it was considered that as only a very small proportion of small firms would have to defend themselves in court.

5. Competition Assessment

5.1 We applied the competition filter test to these proposals and did not consider that a detailed competition assessment was necessary.

5.2 The new measures will improve consumers' chances of seeking redress and businesses' chances of taking action in response to counterfeiting activity. They will increase action against counterfeiting and act as a deterrent to dishonest traders which would make it harder for dishonest traders and aid fair competition between legitimate traders.

6. Enforcement Sanctions and Monitoring

6.1 The new measures will not require enforcement activity. They may have the effect of increasing sanctions because IP rights holders and consumers will find it easier to pursue civil claims.

6.2 The release of specified information by public authorities to consumers and IP rights holders should be monitored. It will need to be assessed whether any identified risks were realised.

7. Implementation and Delivery plan

7.1 The Companies Act 2006 received royal assent on 8 November 2006. A statutory instrument enabling disclosure for civil proceedings will come into effect on 1 October 2007.

8. Post implementation review

8.1 A report based on experience, of any new regime, of trading standards, business and the public should be put to the IP crime group about 3 years after changes come into effect. The report should record the effectiveness of the new provisions, the impact on counterfeiting activity and track any impact on consumers pursuing civil proceedings.

9. Summary and recommendation

9.1 The outcome of the consultation in 2005 showed considerable stakeholder support for the changes we made. The DTI consulted widely on the detail of order enabling disclosure for civil proceedings. The order protects competition information. It allows disclosure to consumers seeking to protect their rights and obligations and to IP rights holders protecting those rights against infringement or misuse.

9.2 The creation of a disclosure gateway for IP rights holders and consumers will not introduce new costs for business.

9.3 There will be changes for public authorities, mainly trading standards, in managing requests for specified information.

9.4 Trading standards officers want to be able to release specified information when appropriate. Releasing information to consumers will not create a significantly greater burden than refusing a request and explaining the refusal.

9.5 Intellectual property rights holders know that since June 2003 trading standards officers have been unable to disclose specified information. When the new gateway opens on 1 October an initial rush for information can be expected.

9.6 In the longer term we expect benefits, which local authorities cannot afford or undertake may flow to the trading standards service. Once IP rights holders identify products as being counterfeit; information such as computer forensics, the use of private investigators for surveillance work and enquiries abroad may be available to them.

10. Declaration and publication

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed

Gareth Thomas
Parliamentary under Secretary of State for Trade
and Consumer Affairs.

Date 23rd July 2007

Contact Details

If you have any further questions please contact in the first instance:

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