

BIS | Department for Business
Innovation & Skills

**REMOVING RED TAPE FOR
CHALLENGER BUSINESSES**

SEPTEMBER 2012

Ministerial Foreword

This Challenger Businesses Red Tape Challenge is about furthering the UK's position as a global leader in the development of new markets and new ways of doing business. It is about nascent, innovative business models that involve doing things differently, often enabled by new technologies, falling foul of regulations which were intended for another age or for another purpose entirely.

Throughout this challenge you have made it clear that outdated regulation and processes can clash with advances in technology, make it difficult to enter new markets and limit your ambition. These issues and many more have been amplified by your lively discussions on our public channels and business forums, including LinkedIn, which has set up its own community dedicated to this Challenger Businesses Red Tape Challenge. We have also been fortunate to have the support of Mark Littlewood, Director General of the Institute of Economic Affairs, who has acted as Sector Champion for this theme providing insight and an additional layer of challenge.

We are extremely grateful to everyone who has given their time and expertise to this Red Tape Challenge. This is by no means the end of the track – we will continue to examine the rules and regulations that are holding back our most innovative entrepreneurs. We will need your continued valued support and advice to achieve this.

Thank you.



Rt Hon Michael Fallon MP

Minister of State for Business & Enterprise



Contents

Ministerial Foreword	2
Contents	3
Introduction	4
Executive Summary	5
SECTION 1	8
Home Buying and Selling.....	8
Peer-to-Peer Lending and Equity Platforms.....	11
Finance for Knowledge-Based Businesses.....	15
Intellectual Property – Patents	19
Intellectual Property – Trade Marks	21
Distance Selling Regulations	23
SECTION 2	25
Wider Business Issues.....	25
Regulatory Enforcement	25
Employment Regulations	27
Public Procurement.....	28
Data Protection	28

Introduction

Reducing the burden of regulation on business is essential to economic growth. Good regulation plays a vital role in protecting businesses, consumers, employees and the environment, but unnecessary, overcomplicated regulation strangles business and growth.

That is why last year the Government launched the Red Tape Challenge process putting whole stocks of rules and regulations on probation from the outset. The starting point is that regulation should go, unless there is a strong justification for it to stay, and even here we are finding ways to reduce burdens in its implementation. The Red Tape Challenge is driven by the autonomous views of businesses and members of the public. Over 247,000 visitors to the website have made just over 29,000 comments and sent in over 1000 private email submissions, suggesting which regulations should be scrapped, improved or kept. Some 6,500 substantive regulations are being examined through the Red Tape Challenge and the Government is now committing to abolishing or substantially reducing at least 3,000 of these.

As modern technology and ideas continue to change the way we do business, so must the way we view regulation. This is especially important for challenger businesses. They are the pioneers. The businesses and enterprises that put new products on our shelves innovate our services and harness technology to create new markets and become our businesses of tomorrow. Through this Red Tape Challenge we have moved to tackle the barriers you said are preventing this. Many of the issues raised through our public channels and online business networks concerned processes rather than regulation, affecting both traditional as well as challenger businesses. So we have widened the scope of this Red Tape Challenge so we can respond to the range and diversity of the concerns you put to us. Departing from the way previous Red Tape Challenges have worked, instead of focusing on one specific regulatory area such as Health & Safety, we started with a blank page, and invited you to decide the content.

Executive Summary

Your direct input has helped us to better understand the issues innovative new businesses as well as more traditional ones can face, and together we have identified six areas which we reviewed through this Red Tape Challenge. These are:

- Home Buying & Selling
- Peer to Peer Lending & Equity Platforms
- Finance for Knowledge-Based Businesses
- Intellectual Property – Patents
- Intellectual Property – Trade Marks
- Distance Selling Regulations

Mark Littlewood, as this Red Tape Challenge's Sector Champion, has also made a number of recommendations to improve the regulatory framework and how it is implemented. He has looked at how current rules and processes may be stifling today's challenger businesses as well as the steps which could be taken to prevent new regulations hampering the challenger businesses of the future. Mark's recommendations have focused on a number of key areas including alternative finance models: peer to peer lending platforms and crowd sourcing platforms. He has also looked at aspects of employment law, the intellectual property process, and cross cutting areas such as regulatory enforcement practices and alternatives to regulation. Some of this is covered in Section 2 of this report. Mark's recommendations have been at the forefront of our policy development as we have taken forward this Red Tape Challenge on challenger businesses.

This report, produced in collaboration with policy specialists from across Government, introduces the problems reported to us, suggests new ideas for change and improvement, and presents the proposals for implementation.

As well as the key areas listed above, action and reflections have been made in four additional areas - aspects of which you and the Sector Champion raised as causing you concern.

- Regulatory Enforcement which includes the creation of a new independent function to champion deregulation when it hinders innovative businesses.
- Employment Law
- Public Procurement
- Data Protection

Home buying and selling

Stripped-down business models, offering competitive prices to home buyers and sellers in exchange for limited, online services are caught by current legislation which applies a broad definition to 'estate agency work.' Once legally categorised in this way, these innovative businesses are tied to regulation which can be disproportionate to the range of services they offer, and which may be inhibiting the growth of this alternative method of house buying and selling.

To reduce the burdens on businesses and facilitate new entrants to the market, the Government will:

- Amend the Estate Agents Act (1979), subject to Parliamentary agreement, to exempt the facilitation of communication between sellers and buyers;
- Repeal the Property Misdescriptions Act (1991) as the Consumer Protection from Unfair Trading Regulations (2008) provides similar protections for consumers.

Peer-to-Peer Lending & Equity Platforms

We also looked at the exciting new industry of peer-to-peer lending platforms and crowd funding/equity platforms. These platforms bring together savers with varying levels of funds to potentially invest, and individuals looking for loans or Small and Medium sized Enterprises (SMEs) looking for finance to grow their business. The industry has undergone impressive growth in the past five years. At present it is not subject to a tailored regulatory code, although equity platforms are subject to the Financial Services and Markets Act (FSMA) (2000). Core industry players are calling for regulation in the interests of consumer trust and brand reputation. We agree with our Sector Champion that it is too early to introduce a new regulatory framework for peer-to-peer platforms at this stage and doing so could risk stifling innovation in this fast growing sector.

The Government proposes to:

- Encourage the industry to self-regulate by asking the Peer-to-Peer Finance Association to:
 1. increase membership; and,
 2. continue to build on their current code to increase consumer protections in line with the requirements in the Consumer Credit Act without creating a barrier to entry for new entrants to the market;
- Form a working group with representatives from the Office of Fair Trading, the Department for Business, Innovation and Skills, Her Majesty's Treasury, the Financial Services Authority and Cabinet Office to monitor the appropriateness of the current regulatory regime for peer-to-peer platforms amongst other issues concerning the sector, and take a lead role in engaging with the sector.

Finance for Knowledge-Based Businesses

Knowledge-intensive, cash-poor businesses can struggle to access adequate financing, however much their concept/product may have viable commercial potential. This value problem is contrary to patterns in internal spending amongst both SMEs *and* corporations. Government grants, tax credits and loan guarantee schemes are ample, yet the private sector remains disengaged from investment in some knowledge-based businesses.

The Government proposes to:

- Work with banking and accountancy experts to improve existing guidance including raising awareness of the Government schemes which can help them secure appropriate finance.

- Consider whether there are ways knowledge-based businesses access finance in other countries that UK businesses could learn from, including approaches to reporting on intangible assets within the context of the UK reporting framework.

Business can access Finance Finder now in order to identify different types of finance and where to get it: <http://improve.businesslink.gov.uk/resources/business-finance-finder>

Intellectual Property - Patents

Businesses complained that while the UK's patent system compared favourably to international standards, there was still room for improvement in the cost and speed of patent processing and associated legal expenses. These outlays can be particularly punishing for SMEs and stand in the way of market innovation.

The Government proposes to (further proposals are included in main section):

- Explore the operation of the US "small entity" regime in relation to SME patent fees.
- Raise awareness of the current options provided by the Intellectual Property Office (IPO) for businesses to accelerate processing of their patent applications.

Intellectual Property - Trade Marks

The UK Trade Mark system is also well viewed, however the business community highlighted the need to offer further assistance to SMEs at all stages of the application and defence process with the latter being viewed as unfairly weighted in favour of larger businesses.

The Government proposes to (further proposals are included in main section):

- Explore making cheaper and simpler the process by which companies and individuals can object to new registration of new trade marks that might be confused with their own, or lead to infringement of their rights.

Distance Selling Regulations

The UK's Distance Selling Regulations offer important protections and enhance consumer confidence when buying remotely. However, provisions such as the requirement on traders to refund, irrespective of whether goods have been returned, can place significant burdens on business, limiting the potential of smaller, innovative business models to enter the online trading market.

The Government proposes to:

- Implement the provisions of a new Consumer Rights Directive (CRD) in June 2014, which will address concerns raised by online retailers. The CRD will be implemented through secondary legislation (s2.2 of the European Communities Act).

SECTION 1

Home Buying and Selling

The Government will:

- **Amend the Estate Agents Act (1979) to take out of scope intermediaries such as private sales portals which merely enable private sellers to advertise their properties and provide a means for sellers and buyers to contact and communicate with one another.**
- **Repeal the Property Misdescriptions Act (1991).**

Summary

The Office of Fair Trading (OFT) in their 2010 market study¹ identified that the definition of estate agency activity in the current legislation – dating back over thirty years – may be hindering the development of new business models and should be updated. Removing barriers to innovation in this sector could have a positive impact on the cost of home buying and selling.

The Issues Raised

Definition of estate agency work

Section (1) of the Estate Agents Act 1979 establishes the legislative definition of precisely *what* estate agency work is. The remit of the definition is broad and responses to the consultation show that there are different views about what it covers which supports the market studies view that: 'even if you don't call yourself an estate agent you may be seen to be one in law when you do certain things'.² The OFT's website states that businesses will be legally considered to be engaging in estate agency work if, 'In the course of business and acting on instructions from a third party (your client) who wishes to either buy or sell property (an interest in land), you do either (or both) of the following:

- Things for the purpose of, or with a view to, effecting the introduction to your client, of someone who either wishes to buy or sell property;
- Things after such an introduction have been made by you to secure the sale or purchase of the property'.

¹ <http://www.offt.gov.uk/OFTwork/markets-work/buyingandselling>

² <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/estate-agents-act/retailers#named1>

In effect this means that companies who may only wish to offer a very limited service to introduce buyers and sellers, but end up going beyond simply publishing or disseminating information (e.g. by passing on messages or providing a message board service or a physical 'for sale' board) may fall within the definition and are caught by the legislation. Our consultation sought evidence about the burden that being caught by the Act places on such businesses and has sought to discern whether or not this deters new business models from developing.

There has been innovation in the development of internet search property portals in recent years and some growth in small online estate agents, but there is a lack of significant penetration by alternative business models. The market consists predominantly of traditional high street estate agents, whose business practices and charging structures have remained unchanged over the years. Innovation in this sector could have a positive impact on the cost of buying and selling homes, in particular through online services. The OFT reported that in the US alternative brokerage models had grown to represent approximately 15 per cent of transactions in 2006.³

In its report *Home buying and Selling: a Market Study*, the OFT recommended updating the legislation as it may be hindering the development of new business models. In the Government response last year we agreed to undertake a limited review of estate agents legislation on the basis that it is sensible for activities that do not pose a risk to consumers to be outside the scope of the Estate Agents Act.⁴

Taking the consultation responses into account, the Government believes that a limited deregulation of the EAA would bring benefits to consumers and to the industry without reducing consumer protection. It should provide confidence to existing private sales intermediary businesses and potential new entrants, thereby stimulating competition and innovation leading to more consumer choice and better standards of service. The Government recognises that property sales are significant and occasional transactions for consumers with a risk of consumer detriment if businesses which influence or are directly involved transactions are not regulated but Government believes that the limited nature of the proposal in legislation combined with guidance will provide clarity and draws the appropriate balance between the interests of businesses and consumers.

The Government has therefore decided to amend the EAA to take out of scope intermediaries such as private sale portals which merely enable private sellers to advertise their properties and provide a means for sellers and buyers to contact and communicate with one another. The Government recognises this is a limited amendment: many respondents have commented that the choice for consumers to sell property privately already exists, but the Government is concerned by the uncertainty and range of views as to the legal position of private sales portals.

This proposal would allow for both traditional models (offering a full service to clients) and other business models to operate with appropriate regulation in place. Potential risks to consumers would be properly addressed. It would provide lighter touch regulation for

³ *ibid*

⁴ <http://www.bis.gov.uk/policies/business-law/competition/market-studies/office-of-fair-trading-market-study-on-home-buying-and-selling>

businesses only wanting to put buyers and sellers in touch but not wanting to enter into negotiations or give direct advice.

The next step will be for the proposed amendment to be subjected to Parliamentary scrutiny and the Government intends to bring forward the amendment as soon as the Parliamentary timetable allows.

Property Misdescriptions Act (PMA) 1991

The PMA made it an offence for an estate agency or property development business to make false or misleading statements about property offered for sale.

More recently the Consumer Protection from Unfair Trading Regulations (2008), which implements the EU Unfair Commercial Practices Directive in the UK, was introduced, which provides similar protections for consumers in a wider range of sectors. This means that consumers are protected by two broadly equivalent pieces of legislation. This duplication may be unnecessary; putting additional burdens on business, without providing additional protection for consumers. Taking the responses to the consultation in 2012 into account, the Government will lay before Parliament an Order to repeal the PMA. The current intention is that this will come into force not before October 2013. The next step is that the Secretary of State for Business, Innovation and Skills will lay an order under the European Communities Act 1972 to repeal the PMA.

Peer-to-Peer Lending and Equity Platforms

The Government proposes to:

- **Encourage the industry to self-regulate by asking the Peer-to-Peer Finance Association to:**
 1. **increase membership; and,**
 2. **continue to build on their current code to increase consumer protections in line with the requirements in the Consumer Credit Act, without creating a barrier to entry for new entrants to the market.**
- **Potentially support business-focused peer-to-peer lending platforms through the use of funds from the Business Finance Partnership.**
- **Form a working group with representatives from the Office of Fair Trading (OFT), Department for Business, Innovation and Skills, HM Treasury, Financial Services Authority and Cabinet Office to monitor the appropriateness of the current regulatory regime for peer-to-peer platforms amongst other issues concerning the sector, and take a lead role in engaging with the sector.**
- **Consider the scope for additional OFT guidance around whether and to what extent peer-to-peer lenders/investors may need to be licensed under the Consumer Credit Act (CCA) and/or subject to Financial Services and Markets regulation.**
- **Ask Her Majesty's Revenue and Customs (HMRC) to review their public information including exploring the need to provide guidance for people lending through peer-to-peer platforms.**

Summary

Leading players in this sector are seeking the introduction of new regulation to support the sustainable growth of the sector by making it a more attractive environment for investors and consumers. We share the view of the Sector Champion for this Red Tape Challenge that it is too early to introduce a new regulatory framework for peer-to-peer platforms at this stage and doing so could risk stifling innovation in this fast growing sector.

The Issues Raised

Regulation

Some from the industry have argued that the introduction of regulation would help build trust in this form of lending and support the sustainable growth of the industry. Regulatory proposals include the creation of a new regulated activity or regulation of the platform – rather than the loans – via the Financial Services and Markets Act (FSMA).

All Peer-to-Peer (P2P) platforms are currently covered by general fair trading and fraud legislation. Apart from this, the regulatory environments for P2P equity investment and P2P lending are very different:

- Equity investment is covered by the existing Financial Services and Markets Act (FMSA). This means that, depending on the business model they choose to adopt, P2P platforms offering equity investment opportunities in businesses need to seek authorisation from the FSA or seek advice on how their activities fit within existing exemptions. Equity investment platforms include Crowdcube and Seedrs.
- P2P lending platforms facilitate lending to individuals and businesses and are not regulated by the FSA. The platforms do not lend directly but act as intermediaries. As such they generally need to be licensed under the Consumer Credit Act 1974 (CCA) for ancillary credit businesses. Most P2P lending to individuals are regulated consumer credit agreements under the CCA, but are considered 'non-commercial' and are therefore not subject to most CCA requirements. P2P lenders are not protected by any regulation. Lending platforms include Zopa and Funding Circle.

The concern of the main industry players is that if regulatory requirements on the platforms are not increased, less viable firms may enter the market and fail. Accordingly they have established their own set of operating principles which they regard as a blueprint for the industry. In summary, this advocates minimum capital requirements based on operating costs with a minimum of £100,000; segregation of participants' funds; and appropriate credit assessment and anti-fraud measures including CIFAS membership.⁵

We share the view of our Sector Champion that it is too early to introduce a new regulatory framework for P2P platforms at this stage and doing so could risk stifling innovation in this fast growing sector. Premature adoption of regulatory measures could constrain the development and introduction of new business models which may enhance the industry. It could also limit competition; for example a minimum capital requirement could deter small scale new entrants. It is also important to note that, as pointed out previously, equity and debt driven platforms are not captured by the same regulatory measures; for example, Seedrs (as an equity platform) have sought and successfully received authorisation from the FSA.

Regulation would effectively be a 'kite mark' to enhance confidence. However, all new models need to win public confidence – it is debatable whether this need should be met at the cost of the business and sector as a whole, or at cost to the state through the establishment of a legal framework.

Business Finance Partnership

BIS has provided support for Tim Breedon's non-bank lending taskforce, whose Report recommended the use of the Business Finance Partnership (BFP), and funding from it, to stimulate innovative and sustainable forms of debt finance such as P2P lending. At Budget 2012, the Government allocated £100m of the BFP to invest in innovative channels to

⁵ Rules and Operating Principles of the P2P Finance Association, <http://www.p2pfinanceassociation.org.uk/rules-and-operating-principles>

reach smaller businesses. The channels mentioned included the likes of P2P lending and online receivables exchanges, and Government is happy to receive submissions for BFP allocations from P2P lenders. Of course, any such contribution from the BFP is subject to the demand from P2P platforms and the quality of their bids.

Enterprise Finance Guarantee

Submissions from lending platforms have also suggested the accreditation of companies seeking finance, rather than credit providers, under the Enterprise Finance Guarantee (EFG); also raised was the matter of applying the Guarantee to individual investors in a loan via a P2P funding platform.

As it is currently configured the Enterprise Finance Guarantee was created to facilitate lending to viable businesses lacking adequate security or track record for a commercial loan. Over 18,000 SMEs have been offered EFG backed loans, to a total value of £1.8billion. EFG is only considered after a commercial loan has been considered. As such EFG produces a high level of additionality. For every £1 spent by Government around £20 of lending is unlocked. In the last Budget Government increased the maximum allowable default cap for accredited lenders from 13% to 20%.

As a guarantee of a percentage of a bank's exposure to SME lending, EFG is not currently calibrated for other purposes. However, the Government is content to consider creative solutions with regard to the application of EFG; though any amendments to EFG will of course need to protect taxpayers' interests and not distort competition.

Requests for Tax Exemptions

Most people who lend through P2P platforms will have their lending classified as investment activity. This means that there is no tax relief available for bad debt. In contrast, relief for bad debts is available when loans are made in the course of business. There have been calls from Peer-to-Peer Finance Association members to make bad debt relief available to P2P lenders.

HM Treasury believes that there is not a strong enough case for this, as creating an exception would add complexity to the tax system and is difficult to justify when other forms of investment do not qualify for bad debt relief. Moreover, the current tax treatment of P2P investors is not necessarily a barrier to further expansion, as witnessed by the impressive growth in the industry in recent years.

The Peer-to-Peer Finance Association has also called for peer-to-peer loans to be included in the ISA wrapper. HM Treasury does not believe that P2P loans are suitable for inclusion in ISAs. The risk profile of P2P lending is too high, and it is unlikely that the platform can satisfy some of the features essential to the operation of ISAs.

Consumers tend to view ISAs as a relatively safe and simple investment vehicle. ISA investments are thought of as relatively low-risk, and consumers should be able to get access to their funds whenever they wish. This is less likely to be the case with P2P lending than with existing ISA Qualifying Investments.

Similarly, existing Regulations require ISAs to be operated through an ISA Manager, who invests through persons or firms who are authorised by the FSA, and thus have access to the FSCS. As far as we are aware, current P2P lending platforms are not conducive to the ISA Manager role, are not regulated by the FSA, and do not offer Financial Services Compensation Scheme (FSCS) protection.

Finally, in order to be included in an ISA, P2P loans will require to be listed as a Qualifying Investment. Qualifying Investments are identified generically. It would be extremely difficult to restrict a generic description such as “loan” only to loans made via P2P lending platforms. Exclusion from the ISA wrapper does not make this type of lending exceptional; rather, it puts it on the same footing as investment in stocks and shares issued by unlisted companies.

Finance for Knowledge-Based Businesses

The Government proposes to:

- **Work with the Technology Strategy Board (TSB), banking and accountancy experts and the Intellectual Property Office (IPO), to review and improve existing guidance aimed at intangibles-rich businesses, and raise awareness of the support available to them to help them access funding.**
- **Consider whether there are ways knowledge-based businesses access finance in other countries that UK businesses could learn from, including approaches to reporting on intangible assets within the context of the UK reporting framework.**

Summary

Knowledge-based businesses which tend to be rich in intangible assets face some specific barriers to debt finance, but can potentially access a wide range of other sources of finance. However, small businesses often lack awareness and understanding of funding options. The Government has already improved information available via Business Link to guide firms through the various sources of finance available. For example, Finance Finder helps businesses identify different types of finance and where to get it:

<http://improve.businesslink.gov.uk/resources/business-finance-finder>. However, the specific nature of the finance issues faced by knowledge-based businesses suggests that there may be a case for dedicated advice and guidance to cover:

- Debt finance, including options for capitalising intangible assets – and the role of the Enterprise Finance Guarantee
- Equity finance, including how to raise investment from Angels using the new tax incentives
- Support for innovation, including R&D tax credits and grant support that might be available from the TSB

As an immediate next step BIS will, with the TSB, banking and accountancy experts and the IPO, review existing guidance to consider how it could be updated and improved. We will also engage suppliers of finance (especially debt finance) to educate them about the barriers reported by knowledge-based businesses, and discuss how they might be overcome. As part of this work we will consider whether there are ways knowledge-based businesses access finance in other countries that UK businesses could learn from, including approaches to reporting on intangible assets within the context of the UK reporting framework.

The Issues Raised

Businesses have complained that, despite the high potential for commercialisation which their ideas and products have, they are often unable to attract funding. Lacking a firm track record and/or the requisite collateral, these businesses have experienced inhibitive valuation problems which prevent their products from getting onto the marketplace. Inflexible and relatively high due diligence costs mean that some small enterprises and

their ideas are more likely to be overlooked by investors, and as such the commercial opportunity gained from third party valuation is missed.

Accounting standards and the legislative framework around them seek to ensure that financial statements properly present a true and fair view of a company's financial position. The majority of intangible assets have no obvious exchange value themselves even though they may have the potential to generate real value for a business. Intangible assets are broadly grouped in three categories: computerised information (e.g. software, databases); innovative property (e.g. scientific R&D, non-scientific R&D, Design); and economic competencies (e.g. brand equity, organisational capital).

Further detail on the different funding sources available to small businesses is included in this section. Going forward, BIS will work with the TSB, banking and accountancy experts and the IPO to review and improve guidance on sources of funding to raise awareness and understanding of these options.

Debt finance

For any business seeking debt finance, lenders will generally require evidence of a financial track record and collateral as security before agreeing to a loan. Intangibles-rich businesses can find it particularly difficult to access debt finance because:

- Difficulties in valuing intangible assets make it extremely hard for a lender to distinguish between high and low risk businesses of this type without incurring significant costs.
- If their assets are largely intangible, these are unlikely to be suitable to serve as collateral (which generally refers to physical assets such as property).

One way around this lack of track record would be to **capitalise intangible assets** - making them tangible. They could then, in theory, be provided as security. It remains doubtful – even with capitalisation – whether banks would perceive this as appropriate security. Capitalising a business's intangible assets can create tax liabilities which may in fact constitute an unwelcome and unwarranted burden.

In the UK, the **Enterprise Finance Guarantee** exists to support lending to businesses that would otherwise lack the security needed to secure a loan. The Government has recently incentivised lenders to lend more to smaller businesses under the EFG by raising the level of lenders' EFG portfolios to which the Government guarantee applies from 13% to 20% for 2012/13. Lending, however, under the EFG remains at the discretion of the banks, and though available to businesses in most business sectors is probably less suitable for knowledge-based, pre-revenue businesses.

These factors suggest that alternative sources of finance, including equity (see below), may be more appropriate for intangibles-rich businesses looking to grow.

Equity finance

Equity finance can be a way for businesses without collateral and tangible securities to raise finance to grow. The UK has the largest private equity market in Europe (31% of the

market), and performance is broadly comparable to the rest of Europe, though both the scale and performance of funds lag behind the US.

There is a market failure generally referred to as the ‘equity gap’, meaning that businesses seeking equity investments at least up to £2m, and perhaps as high as £10m, can struggle to attract investment. This gap arises as the transaction costs of assessing proposal quality do not vary with the size of investment, which leads to investors favouring larger and later-stage investments. Action has been taken to address the ‘equity gap’:

- The Government’s **Enterprise Capital Funds (ECFs)** are a direct response to the equity gap, using public funding to leverage private investment into funds that make investments of up to £2m in individual SMEs;
- The **UK Innovation Investment Fund** invests specifically in venture capital funds that support technology-based businesses with high-growth potential; and,
- The **Business Growth Fund (BGF)**, a £2.5bn fund established by the major banks, makes investments at the £2m-£10m level.

There are also a range of **tax incentives** to encourage individual investors to make equity investments in SMEs – particularly relevant is the new **Seed Enterprise Investment Scheme** which offers income tax relief of 50% of the value of investments of up to £100,000 in qualifying start-ups. The **Business Angel CoFund** is another new initiative, providing match-funding for investments by syndicates of Angels in SMEs in less affluent parts of the country.

Other support for innovative businesses

As the UK’s innovation agency, the **Technology Strategy Board** targets support on those innovative businesses which have the greatest potential for growth. Support includes:

- **Smart** - available to SMEs only. Smart offers funding to businesses to engage in R&D projects from which successful new products, processes and services could emerge. Three types of grant are available: proof of market (up to £25k grant), proof of concept (up to £100k grant), and development of prototype (up to £250k grant).
- **Collaborative R&D**. This brings together businesses (from large corporate to micro companies) and academic partners to undertake R&D projects from which successful new products, processes and services could emerge. Projects range in value from £10k to over £100m.
- **Knowledge Transfer Partnerships**. These are available to businesses of all sizes. Knowledge Transfer Partnerships provides funding for collaborative projects between business and academic partners.

In addition the Technology Strategy Board administers the **Small Business Research Initiative (SBRI)** for BIS. SBRI is a programme for using public procurement to support and grow innovative and technology based companies through sourcing new solutions to public sector challenges.

The Design Council delivers **Designing Demand**, a Government funded mentoring programme to build greater capability and understanding among SMEs. The resulting design projects often deliver new or improved products, services, systems and brands.

R&D Tax Credits are the single largest Government support for business investment in R&D. Claims total £1 billion annually, supporting investment of about £10 billion. The relief was increased to 225% in April 2012.

Intellectual Property – Patents

The Government proposes to:

- Explore the operation of the US “small entity” regime in relation to SME patent fees.
- Explore further how legal costs – including those incurred through the high court – of applying for and defending patents can be reduced in the light of experience of current changes to the Patents County Court.
- Raise awareness of the current options provided by the Intellectual Property Office for businesses to accelerate processing of their patent applications .
- Consider Professor Hargreaves’s suggestion of international investigation of increasing renewal fees as a way of thinning patent thickets and so easing the commercialisation of new technologies.
- Review the provision of affordable specialist advice to make it easier and cheaper for SMEs to access the intellectual property system.
- Continue negotiations to deliver the right European unitary patent and court package for UK businesses.
- Survey British businesses to gauge the depth of the problem of delays before the European Patent Office (EPO), and to provide evidence with which to confront the EPO.
- Continue work with other governments and patent offices, taking advantage of the IPO’s excellent relationship with its counterparts, especially in the US, to reduce global patent backlogs, and speed the international patenting process for businesses.

Summary

For smaller firms time and costs spent on applying for and registering a patent can be barrier. This was raised as a particular concern for those firms just starting out and eager to commercialise quickly. While the UK’s patent system compares favourably to international standards, it must support businesses of all size and make sure that smaller businesses are not disadvantaged. The issues of cost and speed of processing patent applications were also raised by our Sector Champion who proposed a menu of differently priced options in order to provide more choice and more flexibility for those seeking to register intellectual property rights.

The Issues Raised

The business community highlighted two broad areas of the patent regime which they felt left room for improvement. They raised concerns about the excessive time and cost spent on applying for and registering a patent was creating barriers to effective business and

growth, especially for smaller firms just starting out and eager to commercialise quickly. Complaints also included that the associated legal costs were particularly crippling.

Currently, processing of any stage of a patent application by the Intellectual Property Office (IPO) can be accelerated at the applicant's request as long as a reason (e.g. securing investment or suing an infringer) for wanting acceleration is provided. In particular, inventions with environmental benefit can be accelerated through the IPO's "Green Channel". Acceleration options are also provided by the Patent Prosecution Highway and PCT (UK) Fast Track, each of which allows the IPO to make use of work already conducted on related applications in other countries. In addition, if the applicant wishes, a full examination will be conducted at the outset rather than waiting for a later stage in the process, without the need for any reason to be given. There is no additional charge for any of these acceleration options. For further information and how to accelerate a patent application please visit: www.ipo.gov.uk/p-accelerated.htm.

Intellectual Property – Trade Marks

The Government proposes to:

- Explore making cheaper and simpler the process by which companies and individuals can object to new registration of new trade marks that might be confused with their own, or lead to infringement of their rights.
- Make further improvements in the case management of all the cases in the Tribunal to constrain time and cost taken by rights holders to ‘oppose’ new marks whatever the legal grounds for doing so.
- Consider introducing an appeal fee that will deter frivolous appeals.
- Make further improvements in the information provided to ‘litigants in person’ (i.e. those who choose to represent themselves), thereby making it easier for SMEs to use the Tribunal.
- Make the mediation services offered by the IPO more attractive to disputing parties.
- Argue for the reforms in the Community Trade Mark regime, in particular the rules governing genuine use of a trade mark and actions to reduce cluttering of trade mark registries.
- Hold a round table event with SMEs to determine if any further support can be offered and/or improvements to the process within the existing legislative framework.
- Overall the IPO will be looking at how they can more clearly publicise the actions and timings arising from the Hargreaves Review, including the IPO more attractive to disputing parties.

Summary

In 2007 the IPO moved from rejecting applications for new trade marks if clashes with earlier marks (on either UK or OHIM registers) were detected, to one where such clashes were notified to both parties, leaving it to them to determine whether they could co-exist, or would need to resolve the dispute legally through the office’s Tribunal. This change was necessary for a number of policy, practical and legal reasons. Overall, the change has had a positive effect: the overwhelming majority of applicants for trade marks now receive speedier registration with no greater risk of legal dispute.

Despite this, concerns were raised that the process by which existing businesses can oppose the registration of a new mark (on the grounds that it conflicted with an earlier registered right) was unfairly weighted in favour of new applicants. There was a perception that this process was particularly burdensome to SMEs having to “defend” their trade marks while still beginning the process of growing their brands.

The Issues Raised

The IPO agrees that there is merit in continuing to investigate whether the burden can be reduced. All businesses already have an initial period after registration of their trade marks during which others cannot seek to challenge it on the grounds of non-use. This provides businesses, (including SME trade mark owners who constitute the majority of applicants for trade marks at the IPO) with space to develop their brands, especially when they are new start-ups and potentially pre-revenue. It was proposed that the IPO could in addition introduce a tick-box process by which businesses holding trade marks in their infancy could object to the registration of later marks. While possible, this approach has limitations in that it would deprive new applicants of a chance to be heard and may create a safety first culture from existing mark holders – objecting to any potentially clashing new mark as a default. Both these run counter to economic growth. Currently, there are very few applications from large businesses that conflict with SMEs' existing rights, while conversely there is plenty of evidence to suggest that in most cases involving potentially overlapping trade marks, both parties are content to co-exist or resolve the dispute without litigation.

The IPO, however, will still investigate how to make the opposition system cheaper and faster for holders of existing trade marks to oppose potentially infringing UK applications on relative grounds. Encouraging both parties in an opposition to opt for a fast track system, and avoid where possible dragging out proceedings - in addition to the five year grace period during which other business cannot seek revocation from non-use – will enhance the system for SMEs.

Distance Selling Regulations

The Government proposes to:

- **Implement the provisions of a new Consumer Rights Directive (CRD) in June 2014, which will address concerns raised by online retailers. The CRD will be implemented through secondary legislation (s2.2 of European Communities Act)**

Summary

Businesses complained that the current distance selling regulations were outdated and not conducive to online selling. The points raised had already been accepted by the Government and informed its negotiation of the new EU Consumer Rights Directive, which achieves the desired balance and will come into force in June 2014. The Red Tape Challenge confirmed the validity of the Government's policy and the new regime will be welcomed by business.

The Issues Raised

The main complaint centred on the area of returns and refunds in that, for example, the current regulation requires a supplier to refund the consumer before they had received the goods back. Whilst this was manageable for large firms, it was not practical for innovative smaller firms seeking to enter the market, and was therefore limiting the potential of online business models. Businesses called for a better balance between the rights of consumers and those of traders.

The current Distance Selling Regulations implement the EU Distance Selling Directive and provide additional rights for consumers buying at a distance as they do not have the opportunity to inspect the goods or services before they buy. A new EU Consumer Rights Directive (CRD), provisions of which will replace the Distance Selling Directive, was agreed in October last year, partly to reflect developments in ecommerce since the original Directive. The CRD must take effect in national law in June 2014.

Benefits of the Consumer Rights Directive

Fairer responsibilities. As now, the trader must refund any outbound delivery costs paid by the consumer in the event of the consumer withdrawing from the contract. However, there are a number of new provisions in the trader's favour:

- Traders are no longer obliged to refund money irrespective of whether goods have been returned to the trader. This is the major complaint from business through this Red Tape Challenge and the CRD addresses this directly.
- Consumers are made explicitly responsible for return (inbound) delivery costs, unless otherwise agreed or the consumer not told of this pre-contract. As part of this issue, complaints were also received in relation to bulky items. Outbound delivery costs, for bulky items, which business will have to absorb, can be significant. Although the CRD does not relieve the trader of outbound delivery costs, responsibilities are balanced by

the fact that consumers will have to take on comparative or greater delivery costs (they are unlikely to benefit from the favourable rates available to traders) in returning such items. Consumers are unlikely to return such items without significant thought.

- Businesses will not be required to refund the supplementary costs if the consumer has expressly chosen a method of delivery that is more expensive than the standard delivery option (e.g. express delivery)
- Consumers are required to return goods within 14 days of cancellation. Under the current DSRs, the consumer must return the goods or make available for collection, but no time limits are stated, leading to considerable uncertainty for the trader. Unlike under the DSRs, the CRD allows the trader to wait for return of goods, or proof of return, before refunding monies paid.
- Traders, unless otherwise agreed at the time of the contract, who fail to deliver within 30 days, and subject to exceptions where goods are required on or by a specific day are generally given a second chance to deliver. Under the current regime, consumers are entitled to their money back after 30 days.

Diminished value

A further new provision is that the consumer will be liable for any diminished value of returned goods which results from the consumer handling the goods in other ways than are necessary to establish the nature, characteristics and functioning of the goods during the withdrawal period.

Reducing burdens for exporters

Maximum harmonisation of information and withdrawal provisions for distance sales will help UK traders who export or would wish to do so. By eliminating the fragmented framework of 27 national transpositions, the Commission estimates that the burden per trader will drop.

Early implementation

Consideration has been given to the early implementation of the CRD in order to introduce the benefits to traders more quickly. However, under the terms of the CRD, the Distance Selling Directive (DSD) will continue in force until 13th June 2014. Repealing the Distance Selling Regulations early would put the UK in breach of our continuing obligations under the DSD. The DSD is a minimum harmonisation instrument and, as such, the Government is not permitted, whilst it is in force, to introduce national provisions which are less favourable to the consumer. Thus, until June 2014, the existing rules must remain in place. Government also wants to make sure that any changes to consumer law are presented to business as clearly as possible. The Government will be introducing a broad package of measures, built around a new Consumer Bill, to clarify and simplify consumer law to the benefit of business and consumers. Our aim is to introduce all these measures together, so that businesses will be subject to only one set of change.

SECTION 2

Wider Business Issues

This final section outlines what Government is doing to address some of the more general but equally important issues raised during the course of the Red Tape Challenge.

Regulatory Enforcement

The Government agrees with the Sector Champion that the way regulation is enforced can be a key hindrance to effective business. One outcome from the Government consultation document *Transforming Regulatory Enforcement* was the launch of the Focus on Enforcement initiative – which is seeking to identify what works well regarding enforcement and what can be improved. To find out more and take part, visit discuss.bis.gov.uk/focusonenforcement/. The Government is also undertaking a review of the Regulators Compliance Code, a statutory Code for regulators that was first introduced in 2008 in order to ensure that it is up to date with the modern business environment.

Challenger Businesses

The Government understands the difficulty which arises when challenger businesses do not fit existing models of regulation. It is clearly desirable that regulatory models should adapt quickly to legitimate new models, so that innovation is not stifled. In the shorter term, regulators should always be willing to work with challenger businesses to find helpful approaches, but there are limits to what they can or should do initially. It will often be beyond the power of regulators to define new approaches to regulating novel businesses, because new regulations – or even a new Act of Parliament – would be required.

Beyond the short term, new legislation is possible – although this can of course take time. Therefore, we believe the best approach to future-proofing is for the Government to regulate only as a last resort with a preference for alternatives to regulation. Where the Government does regulate as a last resort, it is important that that legislation is as flexible as possible so it can adapt swiftly where necessary. One route to flexibility is to make primary legislation outcome based where possible and use secondary legislation to develop the detailed approach. Use of secondary legislation is more flexible and makes the regulation more easily adaptable in future to new business models.

The idea of a 'legal pending' status proposed by the Sector Champion is attractive but, we feel, not possible to enact as it is extremely difficult to frame a legal 'exemption' that safely protects one business and not another (and potentially the regulator) from successful challenge. Rather than trying to create a 'pending' status, the Government believes all Departments should aim to make their regulatory frameworks flexible and quickly adaptable to legitimate new models so rules, regulations and behaviours are not holding back our most forward-thinking entrepreneurs. Government believes it is important that such entrepreneurs have a place to turn with evidence and that it is why we will:

- Create a new independent function to champion deregulation when it hinders innovative businesses. The Regulatory Policy Committee will be asked by Ministers to investigate where challenger businesses, seeking to enter new markets, are being unjustifiably hampered by rules, regulations and behaviours.
- The Committee will report publicly and be accountable for delivery to both the Minister for Business and Enterprise and the Minister for Government Policy.

The Wider Regulatory Framework

Alternatives to regulation often rely upon behavioural insight and 'nudge' techniques. Alternatives include the provision of information and advice; voluntary self-regulation; earned recognition and other forms of co-regulation; and, economic instruments. The Government is already pursuing effective alternatives in a number of areas, where the desired effect is being delivered or on course to be delivered at minimum cost and disruption to business. This does not always necessarily point to self-regulation as the optimum 'alternative'.

We are working hard to address the long-standing policy making culture in which legislation is the default response to a policy objective. The development of the regulatory framework is about challenging this culture. Broadly this covers:

- The One-In, One-Out rule, which ensures that when a new regulation places a direct, quantifiable burden on business ('In'), a measure of equivalent value must be removed ('Out').
- Last year, Government announced that micro-businesses and start-ups would be exempted from new domestic regulation for three years.
- Micro-businesses are exempted from the enforcement of future EU legislation from January 2012, unless there are compelling reasons to the contrary.
- 'Sunset clauses' are imposed on new regulators (not just regulations) ensuring the need for each regulatory body and each regulation to be regularly reviewed.

We recognise the concerns from business about the need to avoid frequent legislative changes, and giving them as much time as possible to prepare for change. The Government policy is that (unless there are exceptional circumstances such as emergency security requirements or businesses being put at a competitive disadvantage) new legislation that impacts on business will only be introduced on two dates a year. These Common Commencement Dates (in April and October) ensure that changes to policy are made in a coordinated fashion and provide greater clarity and awareness about when changes will be made.

In addition, Business Link is being consolidated into a single Government website and the Government is committed to ensuring there is clear guidance for business on regulations, to improve the customer experience, making it simpler and easier for users.

For more information on the Government's Better Regulation Policy visit:

www.bis.gov.uk/bre

Employment Regulations

You have told us about your fear of getting procedures wrong; how time consuming and costly some processes can be; and how hard it can be to get hold of the right information so you can decide how a particular regulation relates to your business.

The Government is leading a cross-Government review of Employment Law as well as reviewing specific regulations through the employment-related law Red Tape Challenge. The concerns raised on employment law as part of the Challenger Businesses theme, will be considered as part of this wider and ongoing work on employment law. These comments are welcomed and largely mirror those received on the Employment Law Review, and the Employment-related Law Red Tape Challenge.

In response to issues raised, the Government is undertaking a package of measures to reform employment law so that it provides the labour flexibility that business needs without undermining important protections for individuals. We have already increased the qualifying period for unfair dismissal from one year to two, published an Employer's Charter to raise awareness amongst employers about what they can already do to manage their staff effectively.

The Enterprise and Regulatory Reform Bill will deliver a robust package of reforms to the employment tribunal system and build on legislative changes implemented earlier this year. The introduction of early conciliation and measures to facilitate settlement agreements will encourage the earliest possible resolution of disputes and our commitment to develop and consult on options for a new Rapid Resolution scheme will help to deliver a more efficient employment tribunal system for all users. The implementation of this entire package of measures will deliver benefits of more than £40 million per annum to business, generating more confidence amongst employers to take on new staff and support growth.

We are currently consulting on the rules for collective redundancies, and as part of a recently announced package of reforms, we issued a consultation on new measures to further streamline Employment Tribunals, including how judges could dismiss weak cases more easily and reducing the number of preliminary hearings. The Government is also consulting on how settlement agreements would work in detail, including a template letter and guidance. We have committed to consult on reforms to TUPE, and we are working to consolidate National Minimum Wage regulations. Furthermore, the Government will also look at the potential for reducing the compensation cap for unfair dismissal, currently at £72,300 and work with ACAS to make the guidance to their Code of Practice on Discipline and Grievance more accessible, especially for small businesses.

<http://www.redtapechallenge.cabinetoffice.gov.uk/tag/employment>

Our Sector Champion, Mark Littlewood's report suggests that challenger businesses might, in their formative years, be disproportionately affected by certain aspects of employment law. He proposes an exemption from employment legislation for challenger businesses enabling these businesses to treat their staff as self employed, meaning most employment rights would not apply to them. Mark Littlewood's proposals would mean a change to employment status in all of the UK's employment legislation.

Government has considered Mark's proposal fully but does not believe there is sufficient evidence to show that this proposal would be effective at stimulating higher employment levels and will not be taking it forward. However, Government does believe that the report has usefully highlighted a lack of understanding that exists among many businesses of the range of options available to all businesses when taking people on, and as part of the Employment Law Review will bring forward proposals to address this.

Public Procurement

The lack of opportunity for small businesses in public procurement was debated on the LinkedIn site. We put your comments to the team in Cabinet Office who is reforming the Government's public procurement programme. Much has been done to increase opportunity for SMEs in public procurement and the substantial progress includes:

- Radically reforming the procurement process to ensure removal of the institutional barriers that impact SME participation, including abolishing Pre-Qualification Questionnaires (PQQ) in central government for procurements under £100,000 where security is not an issue.
- Tackling poor procurement across the public sector through the Mystery Shopper scheme.
- Addressing the size of contracts, for example by mapping all web hosting contracts to ensure they are no longer than 12 months in duration.
- Increasing the number of authorities who no longer use PQQ for low value contracts

<http://www.cabinetoffice.gov.uk/news/better-deal-smaller-businesses>

Data Protection

Concerns were raised that existing data protection laws are particularly onerous for SMEs, as it can be difficult to know how they apply to international data transfer and storage. Businesses are becoming ever more reliant on some form of data manipulation and/or protections which has legislative implications. The Ministry of Justice are already reviewing the current data protection provisions as part of their Legal Services Red Tape Challenge. Comments raised in this theme have been passed directly to the Ministry of Justice. Further details can be found on:

www.redtapechallenge.cabinetoffice.gov.uk/themehome/legal-services

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. Visit www.nationalarchives.gov.uk/doc/open-government-licence, write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/984 - Removing red tape for challenger businesses