



Department
for Business
Innovation & Skills

**SMALL BUSINESS APPEALS
CHAMPIONS AND NON-ECONOMIC
REGULATORS**

Consultation

MARCH 2014

Contents

Contents	2
Small Business Appeals Champions and Non-Economic Regulators	3
Ministerial Foreword by Michael Fallon	4
Executive Summary	5
3. How to respond	6
4. Additional copies	6
5. Confidentiality & Data Protection	6
6. Help with queries	6
7. The proposals.....	7
8. What happens next?	22
Annex A: Consultation principles	23
Annex B – National Regulators in scope of the new Regulators Code	24
Annex C: Impact Assessment.....	28
Annex D: The Appointment of Small Businesses Appeals Champions (SBACs) response form	29

Small Business Appeals Champions and Non-Economic Regulators

In *Small Business: Great Ambition*¹, published in December 2013, the Government announced its intention to consult on the proposal to create in law and appoint for each non-economic regulator an independent Small Business Appeals Champion. To ensure the needs of businesses - and particularly small businesses - are taken into account and for them to have confidence in the Champion, such Champions would need to be independent.

This consultation seeks the views of anyone with an interest in the remit and work of the national non-economic regulators on the creation of the proposed Small Business Appeals Champions. It asks for views on the relative merits of both legislative and non-legislative approaches, their possible range of powers and duties and on the scope of bodies to be included.

The consultation will run for four weeks, ending on 22 April 2014

Issued: 25 March 2014

Respond by: 23 April 2014

Enquiries to: Lenroy Wallace
Better Regulation Executive
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 3110

This consultation is relevant to businesses and civil society organisations subject to regulation by the national non-economic regulators

¹ www.gov.uk/government/publications/small-business-commitment/small-business-great-ambition

Ministerial Foreword by Michael Fallon



The Government's priority is returning the economy to sustainable growth. We have an ambitious programme of reforms to free Britain's businesses to drive that recovery - innovating, opening markets and creating jobs.

Key amongst these reforms are the changes we are making to the way Government and its agencies regulate. National regulators, in particular, are very often the front line of business interaction with Government, and the actions they take can have a direct impact on the ability of firms to succeed and grow. Through our series of Focus on Enforcement reviews businesses have helped us identify and address areas where regulatory enforcement is holding them back. New measures such as the Growth Duty and the updated Regulators Code underline the Government's firm commitment to making sure

that regulators should work with - not against - the grain of businesses as they help return the economy to growth.

Regulators play an important role: protecting the environment and consumers, and ensuring markets function properly. In turn, businesses should be confident that where they believe the Regulator has got it wrong, they have access to a clear opportunity to challenge them. Evidence suggests that this is not always the case. This can mean that poor decisions are left to stand because businesses do not know how to challenge them, or because challenging them is simply too expensive or time-consuming. This consultation asks for views on our proposal to address this by creating and appointing a series of Small Business Appeals Champions to: scrutinise the way appeals and complaints are handled by national regulators; consider whether they are adequate, and make recommendations for improvements.

We propose that Government, including individual regulators and Ministers, should either comply with any recommendations made, or explain - publicly - why not. This should give business confidence in a robust, transparent system of continuous improvement, allowing Regulators to build on what already works well, and remedying parts of the system that do not. The outcome should be a powerful champion to drive reforms that give businesses - and particularly small businesses - access to understandable and effective appeals and complaints processes, freeing them up to grow, while reducing cost and confusion for both businesses and regulators.

Executive Summary

The Autumn Statement 2012 announced a package of 5 measures to drive greater efficiency, accountability and transparency in the interaction between regulators and those they regulate, as part of the Government's strategy to make the UK the best place to start, finance and grow a business.

The package addresses a set of five specific issues identified through Focus on Enforcement Reviews. These are: *The Regulators' Code* - a statutory code of practice; a '*Growth Duty*' in primary legislation requiring regulators to factor economic growth into their decision-making; *Accountability for Regulator Impact*, - an initiative to support better advance engagement with customers about proposed changes to regulators' policies and practices; work to address the shortcomings in regulators' *appeals* mechanisms identified in Focus on Enforcement reviews; and changes to the financial operating framework controlling regulators *fees and charges*, to drive regulator efficiency and remove perverse incentives.

This consultation takes forward the fourth of these interventions. It seeks the views of businesses, trade associations, individuals and others on a proposal **to appoint an independent Small Business Appeals Champions for each national non-economic regulator – to scrutinise appeals and complaints processes, make recommendations, and report**. Departments and Regulators would be expected to consider any recommendations to improve processes made, and either implement them or explain, publicly, why they had decided not to do so.

Small Business Appeals Champions would have no role in intervening in individual cases, and would have no power to do so.

The Government proposes that these Champions should be senior part-time appointments, and anticipates that in many cases they would be Non-Executive Directors (NEDs) or equivalent of the Regulator. To ensure the needs of businesses - and particularly small businesses - are taken into account and for them to have confidence in the Champion, such Champions would need to be independent. To be effective, the Government considers that they would also be likely to need legal powers. The consultation seeks views on this proposal.

This consultation document sets out the basic policy and guiding principles concerning the appointment of Champions for non-economic regulators, and seeks views and how such appointments could work in practice.

The consultation closes on 22 April 2014. Information on how to respond can be found at Section 3. A summary of questions is provided at Annex D. A consultation-stage Impact Assessment has been prepared and is published alongside this consultation document.

How to respond

A response form is attached to this consultation at Annex D. It is also being published separately alongside this document.

Please return completed forms to:

Lenroy Wallace
Better Regulation Executive
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
email: betterregulation@bis.gsi.gov.uk

Additional copies

This consultation document is being issued in electronic format only.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

Questions about the policy issues raised in the document can be addressed to:

Lenroy Wallace
Better Regulation Executive
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
email: betterregulation@bis.gsi.gov.uk

The consultation principles are in Annex A.

The proposals

Introduction

1. Autumn Statement 2012 announced a package of 5 measures to drive greater efficiency, accountability and transparency in the interaction between regulators and those they regulate. The package addresses a set of specific issues identified through a series of Focus on Enforcement Reviews and consultations such as that on the Regulators' Code. The package also builds upon the Transforming Regulatory Enforcement strategy published in 2011, with a renewed emphasis on regulators being accountable and contributing to growth as part of the Government strategy to make the UK the best place to start, finance and grow a business.
2. The Autumn Statement package comprises five policy interventions in order to achieve sustained change in regulators' behaviour:
 - The **Regulators' Code**, a statutory code of practice;
 - A '**Growth Duty**' in primary legislation requiring regulators to factor economic growth into their decision-making;
 - **Accountability for Regulator Impact**, an initiative to support better advance engagement with customers about proposed changes to regulators' policies and practices;
 - Work to address the shortcomings in regulators' **appeals** mechanisms identified in Focus on Enforcement reviews;
 - Changes to the financial operating framework controlling regulators **fees and charges**, to drive regulator efficiency and remove perverse incentives.
3. This consultation document takes forward the fourth of these interventions and seeks the views of businesses, trade associations, individuals and others on a proposal to appoint independent Small Business Appeals Champions – to scrutinise process, make recommendations, and report - for each regulator.
4. The Government **does not propose to give Appeals Champions any powers in respect of individual decisions made by regulators**. To do so would be to depart from the objective of the policy – the improvement of overall processes and policies – and would be very likely to run into significant legal complexity. Champions will therefore not have powers to overrule or in any other way intervene in individual cases.
5. Businesses - and in particular small businesses - need to be confident that they can ask for an explanation of or challenge to a regulator's decision, outcome, advice or behaviour without fear, disproportionate cost or long delays. Evidence gathered under the Focus on Enforcement programme² shows that this is not always the case.

² <http://discuss.bis.gov.uk/focusonenforcement>

6. The new Regulators' Code³, which will take effect in April 2014, will set out Government's expectations for regulators' treatment of appeals and complaints by non-economic regulators. The Government believes that this needs to be accompanied by a new form of assurance that regulators are delivering against these expectations. The objectives of this measure are:
 - a. to create the conditions for auditing and improvement of regulators' appeals and complaints processes and policies, and
 - b. to ensure that regulators are accountable to those they regulate for those processes and policies, and improvements to them.
7. However, the Government recognises that there is a varied and broad range of statutory remits, enforcement regimes, and types of intervention against which a business may wish to appeal or complain. For that reason, it believes that the most efficient means of improving businesses' experience of appeals and complaints is to ensure that each regulator arrangements for audit and scrutiny are established within each regulator, rather than being centrally organised.
8. For this reason, the Government announced in December 2013, in Small Business: GREAT Ambition⁴, its intention to consult on the proposal to **create in law and appoint for each non-economic regulator an independent Small Business Appeals Champion**. Broadly, the intention is that Small Business Appeals Champions should be appointed in respect of the national non-economic regulators currently in scope of the new Regulators' Code (see Annex B). However, given the range of different statutory arrangements and practices among these regulators the Government will need to give individual consideration to the application of the policy to each regulator before the policy is implemented.
9. To ensure the needs of businesses - and particularly small businesses - are taken into account and for them to have confidence in the Champion, such Champions would need to be independent of the regulator. And to be effective they would also be likely to need legal powers and duties to:
 - **scrutinise** the transparency, operation and effectiveness of regulators' appeals and complaints processes;
 - **engage with business** representatives (e.g. Trade Associations) often through fora already run by regulators;
 - seek and **obtain data** and information from regulators;
 - **publicly report** on their findings; and make recommendations for changes and improvements, also in public, describing any concerns of business relating to the regulator's policies and processes for appeals and complaints and how they are operating in practice.

³ <https://www.gov.uk/government/publications/regulators-code>

⁴ <https://www.gov.uk/government/publications/small-business-commitment>

10. The Government proposes that a Champion's report should be laid before Parliament by the Secretary of State within three months of receipt. This will allow observations of the Secretary of State and the Regulator to be published at the same time.
11. The Government expects Regulators to have to **comply with such recommendations for improvements to their processes, or explain why not.**

Question 1:

Do you agree that the creation of Small Business Appeals Champions for non-economic regulators will lead to improvements in businesses' access to, and experience of, effective appeals and complaints mechanisms?

12. The Government's view is that in order to be effective and have (and be seen to have) the necessary level of independence, statutory powers are likely to be necessary to appoint Champions, and to set out their powers and duties. However, the Government also wishes to consider non-legislative alternatives. There is an opportunity to comment in more detail on each of the proposed powers in this consultation document.

Question 2:

Do you agree that legislation is necessary to establish Small Business Appeals Champions, and to set out their basic powers and duties?

The Regulators' Code

13. The Government has announced plans to replace the former Regulators' Compliance Code with a new Regulators' Code. It is shorter, easier to follow, and provides a framework for how regulators, ranging from national organisations to local authorities, should engage with those they regulate.
14. The new Code is a flexible, principles-based framework for regulatory delivery that leaves regulators free to develop their own service standards and enforcement policies in response, and also as a means to explain these principles to businesses. It is expected to come into force in April 2014, and among the new goals set for regulators are:
- a clear and impartial route to appeal a regulatory decision;
 - that individual officers of the regulator who took the decision or action against which the appeal is being made should not be involved in considering the appeal.
 - that businesses should be given a timely explanation in writing of any right to representation or appeal and include practical information on the process involved;
 - a clearly explained complaints procedure which would allow someone easily to make a complaint about the regulators' conduct; and
 - regular publication of details of each regulator's performance against service standards, including data relating to complaints about them and appeals against their decisions.

The Champions' Objective

15. The Government's intention is that the objective of a Small Business Appeals Champion should be to encourage the regulator to improve the impact on business of its policies, processes and approach for appeals and complaints. The Government wishes to set the parameters of assessing impact widely: for example, it could include volumes of appeals / complaints heard and resolved, ease of access to processes, and the appropriateness of those processes when viewed from the perspective of a small business. In this context "business" should include both regulated businesses and others – such as their customers or suppliers - which could be affected by the regulator's decisions. Champions should have regard to the Regulators' Code, the Better Regulation Principles⁵ and the duty on regulators to consider economic growth⁶. This objective would be set out in statute.
16. Regulators do not all adopt a standard approach to their use of the terms "appeal" and "complaint". In this document:
- 'Appeal' is used to mean a challenge that is made to a regulator's decision, advice or actions, with the purpose of changing the decision, advice or action. For example, where an officer identifies non-compliance, and advises the business to take a particular course of action to remedy the non-compliance, the business may wish to challenge the advice on the basis that an alternative course of action could also achieve compliance. Rights to appeal could be through very prescriptive processes, such as statutory rights to appeal against specific enforcement actions, or they could be less formal and may be dealt with using the same processes as complaints.
 - 'Complaint' is used to mean an expression of dissatisfaction with the way that a service has been provided, or is being provided. For example, a business might complain that an officer visiting the business lacked courtesy, or that there was an unreasonable delay in dealing with a licence application.
17. In the light of the evidence set out in Annex A, the Government intends that guidance should invite the Champions to focus on six areas. The first four of these are identified in the Regulators' Code
- (i) whether there is a clear and impartial route to appeal or complain;
 - (ii) whether those who consider appeals or complaints have sufficient operational independence;
 - (iii) whether options for appeal or complaint are explained clearly to businesses;
 - (iv) whether the regulator publishes adequate data on appeals and complaints

⁵ Proportionality, accountability, consistency, transparency and targeting

⁶ www.gov.uk/government/uploads/system/uploads/attachment_data/file/263264/13-684-growth-consultation.pdf

18. The remaining two areas are:

- (v) whether there is, or should be, an opportunity for businesses to ask the regulator for a “second opinion” before considering whether to make a formal appeal or complaint, where there is more than one route to appeal or complain, whether they are all necessary and whether in combination they are sufficiently simple to understand and use. This was not appropriate for inclusion in the Code.
- (vi) whether terminology distinguishing appeals and complaints is comprehensible. This was not something that could be prescribed in the Code, because it requires coordination across regulators and may involve changes to legislation: both actions are outwith the powers of an individual regulator.

19. The Government also wants to hear views on the overall scope of the scrutiny role – ie whether there are types of appeal or complaint that they should not be able to scrutinise.

Question 3:

Is the proposed statutory objective appropriate? If not, how should it be modified?

Question 4:

Is the range of areas described at points (i) to (vi) above adequate? If not, what do you think should be added or not included?

The Champions’ duties

20. The Government proposes that a Champion’s key duty should be to produce an annual report:

- a. describing any concerns of business relating to the regulator’s policies and processes for appeals and complaints and how they are operating in practice;
- b. setting out any recommendations for improvements to policies or practices, including changes in primary or secondary legislation.

21. Champions’ recommendations should not consider or influence individual decisions.

22. Champions’ reports should be driven by the evidence of their regulators’ impact on businesses. Some of that evidence (about regulators in general, and sometimes about the Champion’s own regulator) will come from Government – for example the evidence at Annex A. The Government would expect Champions to augment this with other sources of information relevant to their own regulators, notably engagement with relevant businesses and their representatives (eg Trade Associations). The Government does not believe that statutory provisions are necessary to require the Champion to seek such evidence. It does propose that regulators should be under a duty to provide evidence requested by a Champion relevant to his scope.

23. The Government recognises that recommendations on matters outside the Regulator’s control (for example, to amend the law) should be made to Ministers. Other recommendations should be made to the Regulator itself. The Government therefore

proposes that the Champion's report should be addressed both to the relevant Secretary of State and to the Regulator. The duty to report to the Regulator cannot be reflected in law if the Regulator is not already recognised in statute: in such circumstances, the obligation to report to the regulator will be reflected in guidance.

24. The Government believes that a public explanation should be provided in the event that a Champion's recommendations are not implemented. However, the Government is not persuaded that such a requirement is necessary in law. It intends to include it in guidance. The Government proposes that a Champion's report should be laid before Parliament by the Secretary of State within three months of receipt. This will allow observations of the Secretary of State and the Regulator to be published at the same time.

Question 5:

Do you agree with the proposals in respect of the Champion's report?

Question 6:

Do you consider it necessary to enshrine the duty to report in law?

Question 7:

Do you agree that regulators should be under a duty to provide relevant information when requested by a Champion?

Question 8:

Do you anticipate any potential conflict of this requirement with any statutory restrictions on disclosing this information or other obligations of confidence? Are these avoided altogether by the fact that the Champion is appointed for the regulator?

Question 9:

Do you agree that this "comply or explain" approach is appropriate, and that it should be set out in guidance rather than legislation?

Guidance and coordination of Champions

25. As noted above, the reviews which led to this proposal identified a number of issues which applied to a wide range of regulators. Equally, the Champions will face a number of common issues and challenges in deciding how to go about their roles. The recommendations which they devise may well provide useful inspiration to other Champions and regulators. And their experience should be used to drive development of their future role.
26. The Government therefore believes that there would be benefit in coordination between Champions. It proposes that the Better Regulation Executive (BRE) within BIS should:
- prepare guidance to Champions, largely on points identified elsewhere in this paper;
 - facilitate networking amongst them; and

- monitor and report to Ministers on the success of the policy and the overall performance of Champions and their impact.

Seniority and Credentials

27. The Government believes that the Champion should be of sufficient seniority to attract the confidence of business and of the regulator's leadership team, and should where possible have a business background in the relevant sector.
28. The regulators affected by this proposal have a variety of governance arrangements. The role will typically be equivalent to that of a Non-Executive Director (NED) of the regulator. The actual status of the role will need to be considered on a case-by-case basis.

Question 10:

Do you agree that to do the job effectively the Champion should normally be at the equivalent of Board level?

Question 11:

Do you agree that the Champion should have a background in the type of business predominantly regulated?

Resources

29. The regulators affected by this provision will vary from very small organisations regulating relatively few businesses to regulators with thousands of customers and staff. A Champion's time commitment will need to reflect the number of appeals and complaints mechanisms already in place, volumes of cases considered, and other relevant information such as the views of businesses.
30. The Government does not propose to legislate in respect of the time commitment expected of Champions: again, this needs to be considered case by case. But the Government would expect all Champions' roles to be part-time.
31. The creation of the role of Champion need not mean the creation of a new post. The default should be that the Champion's duties are undertaken as part of an existing post. In some cases the role can to be undertaken by one of the NEDs already provided for in a regulator's statute. If an existing NED's term of appointment is expiring an appropriately-qualified replacement might be sought. Alternatively if there was an existing NED with an appropriate background that person might be asked to take on the Champion's role.
32. As explained above, aside from preparing an annual report the main task of a Champion will be to gather evidence. This might involve:
- a. Reviewing published material – eg. the regulator's guidance on making appeals and statistics about their outcomes, or the guidance to Champions to be issued by the Better Regulation Executive (BRE) of BIS;
 - b. Asking the regulator's staff to provide internal documentation, for instance guidance on handling appeals;

- c. Discussing relevant issues with business representatives – whether in fora already run by the regulator or separately;
 - d. Seeking comments from the regulator’s senior staff on emerging issues;
 - e. Sharing learning with fellow Champions through a network which BRE will facilitate.
33. The support required by a Champion to undertake such tasks will be limited, and in many cases similar to the support which an NED would expect to receive from a Board Secretariat. The Government therefore expects the resource implications of its proposals to be small, even for the larger regulators.
34. The Government recognises that in some cases it may be more effective for one Champion to cover more than one regulator. This might be because two or more regulators’ regimes are closely related, often raising the same issues. It may also be helpful for smaller regulators. One option the Government wishes to consider is whether the option of sharing a Champion between smaller regulators is feasible or desirable.

Question 12:

Do you agree that Champions will be able to operate effectively as part-time appointments?

Question 13:

Do you agree that the support which Champions are likely to require from regulators’ staff will be limited?

Question 14:

Do you agree that in some cases it would be sensible for one Champion to cover more than one regulator? Do you know of any groups of regulators where this approach might be worth considering?

Question 15:

Are there any cases where sharing regulators would be inappropriate? Why?

Champions’ appointment

35. Champions will need to be, and to be seen to be, independent of their regulators. It should therefore be for the person who appoints the regulator – typically the relevant Secretary of State - to appoint a Champion.
36. The term “regulator” encompasses a very wide range of bodies. Some are recognised in law as legal entities in their own right, some are not. The means by which senior appointments are made to them vary considerably. This variety requires an approach that allows for flexibility to reflect individual circumstances, but which conforms to the overall policy intention that appointments should be made to each body.

37. As noted above, the Government envisages that in many cases the role of Champion may be grafted on to an existing post. To make this possible the Government proposes that Champions' contracts should be based on existing legal arrangements – for instance, those for the appointment of NEDs. Terms and conditions – including remuneration, hours of work and arrangements for resignation or dismissal – would be set in that context.
38. The Commissioner for Public Appointments is the guardian of the process used by Ministers to make senior appointments based on merit. Most appointments to regulators are already governed by the Commissioners' arrangements.

Question 16:

Do you agree that in order to ensure genuine independence, appointments should normally be made by whoever appoints the regulator (typically the relevant Secretary of State)?

Question 17:

Do you agree that the role should normally be added to an existing office-holder or employee's responsibilities?

Question 18:

Do you agree that Champions' contracts should normally be based on existing arrangements for appointments in respect of a particular regulator? Are there any regulators for which this will not be possible?

Question 19:

Are you aware of any non-economic regulators where the appointment of a Champion would not be legally or practically possible? If so, what alternatives do you suggest?

39. The creation of Small Business Appeals Champions is essentially a new internal procedure within regulators. As such the appointment itself (as distinct from reforms that ensue as a result of their work) should not require businesses to familiarise themselves with each Champion's role, or the details of their appointment. However the Government would be grateful for any evidence of likely familiarisation or other costs associated with such appointment.

Question 20:

Do you agree that any familiarisation costs for business associated with the appointment of Small Business Appeals Champions are likely to be very low?

Question 21:

Can you suggest how much time a typical business might need for such familiarisation?

Summary of evidence

1. The Government's Focus on Enforcement programme has, since 2012, reviewed businesses' experiences of the delivery and enforcement of regulation in various sectors by national and local regulators⁷. The full range of regulatory interventions applied by all these bodies is enormous. They range from advice on how to comply with the law (where failure to follow the advice may result in a sanction of some kind), licensing decisions, imposition of monetary fines, orders to take specified action, or to stop specified action, and prosecution.
2. During the course of these reviews, some issues were raised by business that appeared to be common to many regulators, and across sectors of the economy. One of these was concerns expressed about the effectiveness of complaints and appeals systems.
3. The Government therefore undertook a separate review of complaints and appeals in order to draw out the principal concerns, pick up further evidence not gathered during the sectoral reviews, and undertook some new survey work to establish quantitative data alongside the qualitative evidence. This exercise considered opportunities for both appeals (including opportunities for informal resolution, such as seeking second opinions outside formal procedures) and complaints.
4. This work has found some very good examples of regulatory practice, as well as areas for improvement. In summary, issues relating to complaints and appeals fall into the following broad categories:
 - **The explanation or advertising of procedures.** Businesses have expressed concerns about lack of knowledge and understanding on their part as to how to go about querying, complaining about, or appealing against action taken by a regulator.
 - **Opportunity for problems to be resolved informally** before prohibitively costly formal processes are triggered; and
 - **The operational independence** of the person considering the complaint or appeal.
 - **The publication and collection of data** on complaints and appeals that would allow third-party scrutiny of a regulator's performance.

Appeals, complaints and second opinions

5. There is no consistency of use of the terms between regulators, but for the purposes of this consultation document an "appeal" is taken to mean a challenge against a decision (which could range from compliance advice through to a formal sanction against a business) made by a regulator, regardless of whether the mechanism was formal or informal. References to a "complaint" in this paper is taken to mean a challenge against the way in which an officer of a regulatory body has behaved, rather than the decision they have made.

⁷ <http://discuss.bis.gov.uk/focusonenforcement>

6. There is a clear view from businesses that rather than appealing formally against enforcement action, often the need is for a “safe space” in which to query the intervention of a regulator or ask for a second opinion from elsewhere in the organisation – for example in respect of compliance advice given.

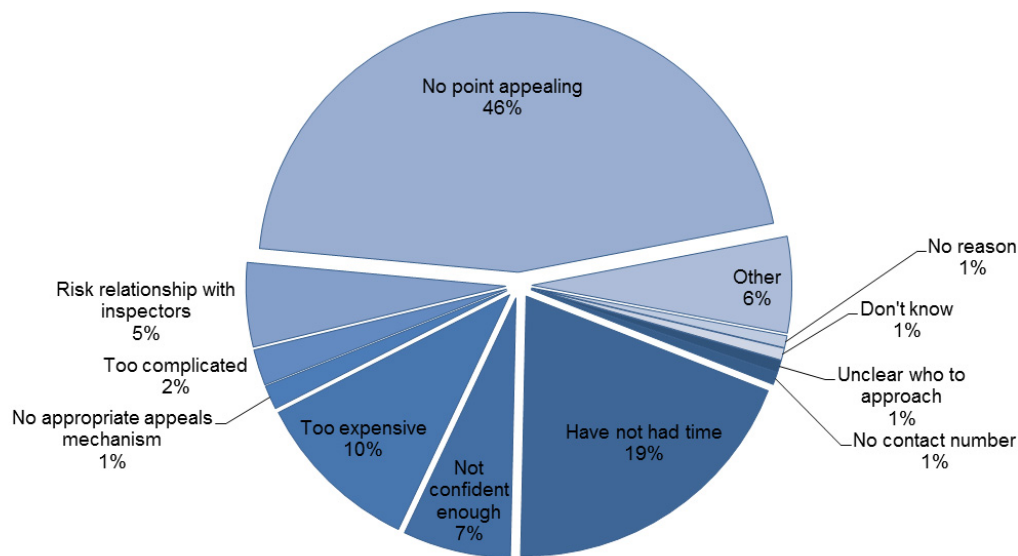
Research findings

7. ICF GHK, in collaboration with BMG Research (BMG), carried out a survey of micro, small and medium-sized businesses for the Department for Business, Innovation and Skills (BIS) in 2013. The purpose of the research was to provide further evidence of the impact of regulator activity on business and to aid understanding of how and where regulators can support growth in how they go about their activities. The survey provides some further quantitative evidence in relation to appeals.
8. Headline findings included the following:
- Sixty-three per cent of businesses surveyed who have at some point disagreed with a regulator’s decision have never appealed.
 - Of those businesses that did not appeal against decisions, the most common reasons given were that there was ‘no point appealing’ (66 per cent) or that they ‘have not had enough time’ (19 per cent) as their main reasons. A further 10 per cent thought the process was too expensive.
 - Proportionately, micro and small businesses are less likely to appeal than medium-sized enterprises. (28 and 36 percent respectively, as against 51 per cent).
 - The findings also support evidence from Focus on Enforcement reviews that regulated business report not wanting to upset their relationship with their regulator.

“Presently, we have no idea whatsoever about our legal standing when it comes to filing complaints, appealing to an unfair outcome or bringing suit in court. We prefer to avoid legal actions against regulators that could backfire in the future. However, if we are assured that no such thing can happen, then we might consider appealing against certain regulatory decisions if need be”

Owner: Hair and beauty salon, Central London, with 8 employees in operation 13 years⁸.

⁸ ICF GHK Regulatory Enforcement Business Survey January 2014 – Case Study



9

Explanation or advertising of procedures

Publicly available information on regulator web sites - appeals

9. In order to supplement the evidence gathered during meetings and written submissions from businesses and regulators, in Spring 2013 the review team undertook user-testing of 57 national regulator websites. The exercise found that:
- 6 national regulators had no easily-found guidance about how to lodge an informal appeal / seek a second opinion;
 - 7 national regulators did not appear to have any easily-found information on how to make a complaint;
 - 19 national regulators did not appear to have any easily-found information about their formal appeals mechanisms.
10. Recognising that this exercise provides a “snapshot” in time this suggests that appeals and complaints procedures are less than open or transparent. Several Regulators have pointed out that when enforcement action is taken against a business, their procedures require them to explain rights of appeal, and that it is only at that point that it becomes necessary to understand the process. For example, the Vehicle Operator and Servicers Agency (VOSA) includes full details of the statutory appeals process on the forms issued when an infraction occurs. Larger regulators also pointed out that given the range and complexity of their enforcement regimes there was no single process for appealing. Additionally, if procedures are complex, the regulated business may well not understand them properly which is of course a problem in itself.

⁹ “Regulatory Enforcement Business Survey” - final report submitted to BIS January 2014 by ICF GHK; not yet published at the time of preparation of this Consultation document

11. The Government's view, however, is that this should not mean that information is not made available in public.

Understanding of Complaints Procedures

12. The 2012 Business Perceptions Survey¹⁰, which explores businesses' views on the extent of the burden of regulation, asked businesses whether they had an appropriate channel for complaint. Only a quarter of businesses that responded said they felt there was an appropriate channel through which to complain about the way regulation was enforced. Large businesses were more likely to say there was an appropriate channel for complaints. Businesses which agreed that regulation was easy to comply with were more likely to say there was an appropriate channel for complaints.
13. Sampling of the websites of both regulators and local authorities has suggested that in most cases there is more information on how to complain about an inspector's behaviour than on how to appeal against a decision. Complaints procedures were often easy to find and clearly set out. In some cases, separate teams were in place to handle the complaint, minimising the perception that the complaint might not be given fair and due regard.

Inconsistent terminology and contradictory signposting and advice

14. The terms "appeals" and "complaints" can sometimes be used interchangeably within and across regulatory bodies leading to confusion about which route to take, particularly where businesses are subject to regulation by more than one body.
15. For example, to appeal against an Ofsted rating following an inspection of a childcare provider such as a childminder or nursery, the business uses a "complaints" procedure. The same mechanism is also used for complaints about the conduct of an inspector. However a challenge to a registration decision taken by the regulator has a separate process which is termed "appeal".
16. Even where appeals routes clearly exist, confusion about how to access them leads to costly delays which could potentially damage a business (and give advantage to competitors) in the meantime, with companies second guessing what to do rather than being able to challenge the decision.
17. Businesses in the chemicals sector subject to "COMAH" (Control of Major Accident Hazards) regulations reported several different ways of appealing an enforcement decision by the Competent Authority (jointly the Environment Agency and Health and Safety Executive), and low levels of awareness of the differences between them, or how they operate.

Lack of clarity over appeals against local enforcement decisions

18. Although the proposals in this consultation relate to the national non-economic regulators only, Focus on Enforcement has uncovered considerable evidence of concerns relating to local authority appeals and complaints. For example, during the appeals review several local authority regulatory services cited the Local Government Ombudsman (LGO) as the backstop authority to whom businesses could take appeals should they not be satisfied with the response of the relevant local authority. However, the LGO when consulted explained that complaints from businesses to the LGO about regulatory delivery are at a low level and

¹⁰ NAO/LBRO/BRE (2012) Business Perceptions Survey 2012

that the LGO has traditionally seen its role as hearing complaints from citizens. The LGO has subsequently expressed the view that there has not been an appropriate framework for assessing complaints from businesses in the area of local regulation. Similarly, during the Focus on Enforcement review of small businesses in food manufacturing, some environmental health officers suggested that ultimately complaints and appeals could be referred to the Food Standards Agency (FSA) for adjudication.

19. There is a statutory mechanism that already exists for complaints against local authorities and fire authorities to be progressed to the Local Government Ombudsman. It is well-established and fully supported by the LGA and DCLG. While it is clear that businesses do not feel this mechanism is accessible and available to them, there is a willingness on behalf of local government and the LGO to use the framework provided by the Regulators' Code to address this.

Collection and Publication of Data

20. Government policy on transparency and use of public data is clear. As the Cabinet Office guidance¹¹ sets out, there are many reasons why Government data is useful: it introduces transparency; in a democracy it sheds light on what the Government and its agencies are doing. In addition, data about public services' performance is a good way of measuring the effectiveness of the Government's policies.
21. The Focus on Enforcement programme conducts an annual survey of the non-economic regulators. In 2012/13 the survey included a question on appeals and complaints.
22. There are examples of good practice. For example, the Marine Management Organisation (MMO) conducts an annual customer satisfaction survey, the results of which are published on its website. It also publishes quarterly data on the number of complaints received and responded to.
23. The data provided suggests that something of the order of 401,358¹² separate enforcement actions (not including advice provision) were taken in the last year for which records were available. 41,168¹³ appeals, requests for determinations, and complaints were addressed to the same group of regulators. Clearly not all of these will have been related to the regulatory interventions (e.g. a complaint may have been made about a competitor's activity, or by a member of the public about a business), and more than one appeal or complaint may have been made in respect of a given intervention, so caution should be exercised in correlating the two sets of figures. However, they demonstrate the overall volume both of activity undertaken by regulators, and of their need to respond to dissatisfaction from those they regulate (or wider society) about their performance.
24. The Focus on Enforcement Regulators' Questionnaire data showed that for the 57 regulators responding, in the most recent year for which data was available:
 - Three regulators said they did not collate the data so have a lack of management information about how many complaints or appeals are being lodged against them;

¹¹ www.gov.uk/government/topics/government-efficiency-transparency-and-accountability

¹² Focus on Enforcement Regulators' Questionnaire 2012/13, Better Regulation Executive, BIS

¹³ Focus on Enforcement Regulators' Questionnaire 2012/13, Better Regulation Executive, BIS

- 20 regulators stated that they had not received any appeals or complaints and 50% of those regulators had issued sanctions of one form or another in the year being reported upon;
- 3 regulators that operate through Local Authorities reported that they did not collate complaints or appeals data centrally and that the Local Authorities did not have that information either.

Opportunity for problems to be resolved informally

25. A theme that has emerged from several Focus on Enforcement reviews has been the desire on the part of businesses – usually small businesses – for a “safe space” in which to discuss, better understand, and possibly challenge, outside a formalised process, a decision. Some suggested this could take the form of a “second opinion” from a different source within the regulator. Several different reasons for not wanting to appeal formally were given. For example, some businesses reported being concerned about the asymmetry in resource and legal clout between themselves and the regulator; others were simply unsure as to whether they had a strong case and wished to discuss it.
26. This problem was also raised by Lord Heseltine in his report “No Stone Unturned¹⁴” which included a recommendation that, “all non-economic regulators should publish policies showing how their customers can ask, without prejudice, for an independent second opinion on a regulatory decision or requirement”.
27. Focus on Enforcement reviews have found many examples of businesses who would have preferred to have been given the opportunity to resolve issues outside formal processes. For example, some childcare providers reported a lack of opportunity to discuss the outcome of an inspection before the verdict was given formally via a report or rating. There was some scope to correct factual inaccuracies in reports but relatively trivial breaches mentioned in the report which remains on the public record could have been put right in discussions between the inspection and report.
28. Companies in the chemicals sector reported that what they perceived to be an inability to seek a second opinion in a non-confrontational manner was a real issue for them. In addition, businesses in that sector observed that a fear exists that if an issue is raised with the Competent Authority and takes some time to resolve, it can result in higher charges under the cost-recovery model. That in itself was cited as a reason not to appeal.
29. Regulators have pointed out that in some cases the expertise of the staff involved is drawn from a very small pool, and that this inevitably limits availability of people other than those who took the original decisions. For example, HSE hazardous chemicals experts take decisions and consider any subsequent appeal. This understandable need for expertise also inevitably limits the field of people who could be called upon to offer a second opinion.

¹⁴ *No Stone Unturned in Pursuit of Growth*, The Rt Hon the Lord Heseltine of Thenford CH, October 2012

Lack of alternative to the Courts

30. Some businesses have raised the issue of there being no apparent alternative to bringing an appeal against a regulator's action via a judicial route. This is often the direct result of legislation that sets out grounds and procedure for appeal.
31. In some cases the Judicial Review process is the only apparent option for appealing a decision. This route can be expensive, unduly confrontational and time consuming.
32. Some appeals against regulatory interventions are prescribed by statute (e.g. recourse to first tier tribunal). Although this would appear to preclude alternative, less formal or purely administrative options, it could be argued that there could be an opportunity for formal resolution as a first stage. There appears to be a lack of suitable opportunities for parties to resolve differences of opinion without having to use more formal or statutory routes.

The operational independence of the person considering the complaint or appeal.

33. Even when a business does feel the need to lodge a formal complaint or appeal, perceptions about the independence of the person who would consider it can be a factor. A (quite possibly unfounded) worry that challenging the decision of a regulator could alter working relationships with inspectors, might result in unfavourable treatment in future, and scepticism about the impartiality of those hearing the complaint or appeal can combine to make the prospect of such a challenge unappealing.
34. Chemicals businesses covered by the COMAH regime suggested that there was a perception that if the business is raising issues within an established line management chain it is presumed unlikely that a team member's judgement will be overturned – In essence, that they would be 'asking the police to police themselves'. There is also a fear of damaging the relationship with the regulator and local inspectors.
35. Until the revised Regulators' Code¹⁵ (see above) comes into force, subject to Parliamentary agreement, in April 2014 no cross-cutting statutory requirement exists for national regulators to ensure that appeals are heard and / or considered by individuals outside the direct management chain of the person who took the original decision.

What happens next?

This consultation will run for four weeks, with a closing date of 22 April. The Government will consider the consultation responses and publish a response in due course, setting out how it intends to proceed in the light of those responses. The Government Response will be published on the BIS pages of GOV.UK

¹⁵ <https://www.gov.uk/government/publications/regulators-code>

Annex A: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone John on 020 7215 6402 or e-mail to: john.conway@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see Section 6).

Annex B – National Regulators in scope of the new Regulators Code

Animal Health and Veterinary Laboratories Agency

Animals in Science Regulation Unit

British Hallmarking Council

Care Quality Commission

Centre for Environment, Fisheries and Aquaculture Science, Fish Health Inspectorate

Charity Commission for England and Wales

Civil Aviation Authority¹⁶

Claims Management Regulation Unit

Coal Authority

Commission for Equality and Human Rights

Commissioners of Irish Lights

Companies House

Disclosure and Barring Service

Drinking Water Inspectorate

¹⁶ other than any regulatory function under

Part 4 of the Airports Act 1986

Part 1 of the Transport Act 2000

[Part 1 of the Civil Aviation Act 2012]

The Airports (Ground Handling) Regulations 1997

The Single European Sky (National Supervisory Authority) Regulations 2004

The Single European Sky (Functions of the National Supervisory Authority) Regulations 2006

Driver and Vehicle Licensing Authority

Driver and Vehicle Standards Agency

Employment Agency and Standards Directorate

English Heritage

Environment Agency

Financial Conduct Authority

Financial Reporting Council

Food and Environment Research Agency

Food Standards Agency

Forestry Commission

Gambling Commission

Gangmasters Licensing Authority

Groceries Code Adjudicator

Health and Safety Executive

Her Majesty's Revenue and Customs (so far as they relate to functions conferred by the Money Laundering Regulations 2007)

Highways Agency

Homes and Communities Agency

Human Fertilisation and Embryology Authority

Human Tissue Authority

Information Commissioner¹⁷

Insolvency Service including Insolvency Practitioner Unit

Intellectual Property Office

Legal Services Board

¹⁷ other than any regulatory function under the Freedom of Information Act 2000

Marine Management Organisation
Maritime and Coastguard Agency
Medicines and Healthcare Products Regulatory Agency
Monitor
National Counter Terrorism Security Office
National Measurement Office
Natural England
Northern Lighthouse Board
Office for Fair Access
Office for Standards in Education, Children's Services and Skills
Office for Nuclear Regulation¹⁸
Office of the Regulator of Community Interest Companies
Pensions Regulator
Prudential Regulation Authority
Rural Payments Agency
Security Industry Authority
Sports Ground Safety Authority
Traffic Commissioners
Trinity House Lighthouse Services

¹⁸ other than any regulatory function exercised under or by virtue of -

Section 2 of or Schedule 1 to the Nuclear Installations Act 1965

The Import of Goods (Control) Order 1954

The Nuclear Industries Security Regulations 2003

Regulations 4 and 5 of the Uranium Enrichment Technology (Prohibition on Disclosure)

Regulations 2004

Vehicle Certification Agency

Veterinary Medicines Directorate

Annex C: Impact Assessment

A consultation-stage stage Impact Assessment has been prepared and is published alongside this consultation document.



Department for Business, Innovation & Skills

Annex D: The response form

The Appointment of Small Businesses Appeals Champions (SBACs)

The closing date for this consultation is 23 April 2014

Name:

Organisation (if applicable):

Address:

Please return completed forms to:

Lenroy Wallace

Better Regulation Executive

Department for Business, Innovation and Skills

1 Victoria Street

London SW1H 0ET

email: betterregulation@bis.gsi.gov.uk

Please indicate below the type of organisation on behalf of which you are responding, or whether you are responding as an individual.

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

Question 1: Do you agree that the creation of Small Business Appeals Champions for non-economic regulators will lead to improvements in businesses' access to, and experience of, effective appeals and complaints mechanisms?

Yes No Not sure

Comments:

Question 2: Do you agree that legislation is necessary to establish Small Business Appeals Champions, and to set out their basic powers and duties?

Yes No Not sure

Comments:

Question 3: Is the proposed statutory objective appropriate? If not, how should it be modified?

Yes No Not sure

Comments:

Question 4: Is the range of areas described at points (i) to (vi) adequate? If not, what do you think should be added or not included?

Yes No Not sure

Comments:

Question 5: Do you agree with the proposals in respect of the Champion's report?

Yes No Not sure

Comments:

Question 6: Do you consider it necessary to enshrine the duty to report in law?

Yes No Not sure

Comments:

Question 7: Do you agree that regulators should be under a duty to provide relevant information when requested by a Champion?

Yes No Not sure

Comments:

Question 8: Do you anticipate any potential conflict of this requirement with any statutory restrictions on disclosing this information or other obligations of confidence? Are these avoided altogether by the fact that the Champion is appointed for the regulator?

Yes No Not sure

Comments:

Question 9: Do you agree that this “comply or explain” approach is appropriate, and that it should be set out in guidance rather than legislation?

Yes No Not sure

Comments:

Question 10: Do you agree that to do the job effectively the Champion should normally be at the equivalent of Board level?

Yes No Not sure

Comments:

Question 11: Do you agree that the Champion should have a background in the type of business predominantly regulated?

Yes No Not sure

Comments:

Question 12: Do you agree that Champions will be able to operate effectively as part-time appointments?

Yes No Not sure

Comments:

Question 13: Do you agree that the support which Champions are likely to require from regulators' staff will be limited?

Yes No Not sure

Comments:

Question 14: Do you agree that in some cases it would be sensible for one Champion to cover more than one regulator? Do you know of any groups of regulators where this approach might be worth considering?

Yes No Not sure

Comments:

Question 15: Are there any cases where sharing regulators would be inappropriate? Why?

Yes No Not sure

Comments:

Question 16: Do you agree that in order to ensure genuine independence, appointments should normally be made by whoever appoints the regulator (typically the relevant Secretary of State)?

Yes No Not sure

Comments:

Question 17: Do you agree that the role should normally be added to an existing office-holder or employee's responsibilities?

Yes No Not sure

Comments:

Question 18: Do you agree that Champions' contracts should normally be based on existing arrangements for appointments in respect of a particular regulator? Are there any regulators for which this will not be possible?

Yes No Not sure

Comments:

Question 19: Are you aware of any non-economic regulators where the appointment of a Champion would not be legally or practically possible? If so, what alternatives do you suggest?

Yes No Not sure

Comments:

Question 20: Do you agree that any familiarisation costs for business associated with the appointment of Small Business Appeals Champions are likely to be very low?

Yes No Not sure

Comments:

Question 21: Can you suggest how much time a typical business might need for such familiarisation?

Comments:

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

© Crown copyright 2014

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.gov.uk/bis

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.

BIS/14/673