



Department for
Business, Energy
& Industrial Strategy

CONSULTATION

**Small Business Commissioner:
Policy for Secondary Legislation**

OCTOBER 2016

Contents

Small Business Commissioner: Policy on Secondary Legislation	3
Ministerial Foreword	4
1. Executive summary	5
2. How to respond	6
3. Confidentiality & Data Protection	7
4. Help with queries	7
5. Background	8
6. The proposals	10
7. Summary of consultation questions	24
8. What happens next?	27
Annex A: Consultation principles	28
Annex B: List of individuals/organisations consulted	28
Annex C: Small Business Commissioner: Policy for Secondary Legislation response form	34

Small Business Commissioner: Policy on Secondary Legislation

The Enterprise Act 2016 established the Small Business Commissioner.

The Commissioner's role will be to support small businesses to resolve payment disputes, and avoid future issues by encouraging a culture change in how businesses deal with each other.

This consultation is seeking views on the policy which will underpin the Commissioner's complaint scheme. The answers received will help government to prepare Regulations.

This consultation is relevant to businesses of all sizes, business associations, and other interested stakeholders.

Issued: 13 October 2016

Respond by: 7 December 2016 at 11:59pm

Enquiries to:

Tinu Fagbayi

Small Business Commissioner Secondary Legislation
Department for Business, Energy and Industrial Strategy
1 Victoria Street
Westminster
London
SW1H 0ET

Tel: 0207 215 4273

Ministerial Foreword

Small businesses consistently tell government that unfair payment practices - including late payment - hamper their ability to invest and grow. In some cases cash-flow issues caused by poor payment practices threaten small business survival. The government is determined that such a huge number of businesses, responsible for so much employment and prosperity across the UK, should not suffer in this way. That's why we are setting up the Small Business Commissioner, who will provide general advice and information, direct small businesses to existing dispute resolution services such as mediation, and handle complaints about payment issues.



We have already legislated to create the Commissioner. This is the next step in implementation. I am seeking your views on the detail of the Commissioner's complaints handling role. I would encourage businesses of all sizes to respond. Your responses will be read carefully and with interest, and used to produce secondary legislation.

A handwritten signature in black ink that reads "Margot James".

MARGOT JAMES MP

Minister for Small Business, Consumers and Corporate Responsibility

1. Executive summary

- 1.1 This consultation is on the policy which will underpin the complaints scheme of the Small Business Commissioner.
- 1.2 The Commissioner will provide and publish general advice and information; direct small businesses to existing dispute resolution services and handle complaints by small business suppliers about payment issues with larger businesses. This consultation focuses on policy questions to help government set the parameters within which the Commissioner will operate the complaints scheme.
- 1.3 We are seeking input on these policy questions from businesses of all sizes – small businesses which may use the Commissioner’s services and also larger businesses which may be subject to complaints – to ensure transparency and that the Commissioner achieves fairness in pursuit of its ultimate aim of culture change.
- 1.4 The consultation sets out proposals and a series of questions on the following key areas:
 - Small businesses in scope of the Commissioner’s services
 - Parameters for making complaints under the Commissioner’s complaints scheme
 - How the Commissioner will consider and determine complaints and make recommendations – specifically, matters for the Commissioner to take into account in determining whether an act or omission complained of was fair and reasonable.
 - Publishing reports and recommendations on complaints – specifically, factors for the Commissioner to take into account when deciding whether to name the respondent in a published report.
- 1.5 The Commissioner’s remit extends across England, Wales, Scotland and Northern Ireland. The government welcomes evidence and contributions from businesses and business associations, and other interested stakeholders in England, Wales, Scotland and Northern Ireland.
- 1.6 We recognise that small businesses may not have the time and resources to provide answers to all the consultation questions. Therefore, we would ask small businesses to particularly focus on providing answers to questions **1** (paragraphs 6.1-6.8), **11** (6.26-6.29), **12** (6.30-6.37), **16** (6.39-6.40) and **19** (6.42- 6.45). These questions cover: the definition of businesses eligible for the service, how the Commissioner determines complaints and how the Commissioner decides to name respondents to complaints. These are marked (*) in the text.

2. How to respond

- 2.1 The consultation will begin on 13 October 2016, and will run for 8 weeks, closing on 7 December 2016.
- 2.2 When responding please state whether you are responding as an individual or presenting the views of an organisation. If you are responding on behalf of an organisation, please make it clear which organisation you are representing by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.
- 2.3 You can reply to this consultation online at:
<https://beisgovuk.citizenspace.com/ccp/small-business-commissioner>
- 2.4 You can also email your submission of evidence to: SBCPolicy@beis.gov.uk clearly marked as a response to the '**Small Business Commissioner Policy for Secondary Legislation Consultation**'. This mail box will be monitored on a daily basis. If further information or clarification is required, we will make contact as appropriate.
- 2.5 The consultation response form is available electronically on the consultation page: www.gov.uk/government/consultations/small-business-commissioner-process-for-handling-complaints (until the consultation closes).

You can also send a response to:

Tinu Fagbayi

Small Business Commissioner Secondary Legislation
Department for Business, Energy and Industrial Strategy
1 Victoria Street
Westminster
London
SW1H 0ET

Tel: 0207 215 4273

- 2.6 A list of those organisations to be consulted is in [Annex B](#).

3. Confidentiality & Data Protection

- 3.1 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.
- 3.2 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.

4. Help with queries

- 4.1 If you have questions about the policy issues raised in this document, please use the contact details above ([paragraph 2.5](#)).

The consultation principles are in [Annex A](#).

5. Background

The Small Business Commissioner

- 5.1 The Small Business Commissioner was established by the Enterprise Act 2016 (the Act). The Commissioner's role is to support small businesses to resolve payment disputes and avoid future issues by encouraging a culture change in how businesses deal with each other.
- 5.2 The Commissioner's main functions will be:
- To publish and provide general advice and information to small businesses, for example, related to dispute resolution and contract principles, including options for resolving disputes;
 - To direct small businesses to appropriate services, such as relevant sector ombudsmen or regulators, existing independent advice services, or, for business-to-business disputes, to approved alternative dispute resolution providers;
 - To provide an in-house complaints handling function, in respect of payment issues between a small business supplier and a larger business.

Why are we running this consultation?

- 5.3 The Act says that further detail of the Commissioner's complaint handling functions will be set out in Regulations. Taken together, the Regulations and the Act will provide the parameters within which the Commissioner's complaints scheme will operate. This will ensure there is transparency around key processes for businesses – both small businesses which will use the Commissioner's services and larger businesses which may be the subject of a complaint. In this consultation we are seeking views on key areas which will underpin how the complaints scheme will operate.
- 5.4 The Regulations will also include some detail of the definition of a small business for the purposes of the Commissioner's services. The Commissioner's services (both advice and information, and complaints handling) will be available to businesses with 0-49 staff. The Regulations will set out the detail of how the staff headcount should be calculated, and this consultation also seeks views on this.

The Commissioner's complaints handling scheme

- 5.5 The complaints scheme will cover complaints from a small business supplier, about payment issues with a larger business with which the small business has a previous, current or potential supply relationship. The Commissioner will consider complaints about payment in a broad sense: a complaint need not relate to the act of paying (or failing to pay), and can include acts or omissions in respect of payment. Examples could be requesting a new fee, seeking to alter the price or fees agreed, or requesting payment of a fee which is included in the contract but

has not previously been relied on. A small business may also raise a complaint if a larger business seeks to prevent it from complaining to the Commissioner.

- 5.6 Certain complaints are excluded. Where relevant, the Commissioner may direct a small business with a concern about these issues to other services that can help the small business resolve the matter. Complaints about the following matters are out of scope:
- disputes about prices for goods and services,
 - matters going through legal or adjudication proceedings,
 - matters which are within the remit of an ombudsman, regulator or adjudicator or public body, or for which the complainant has a statutory right to adjudication,
 - acts or omissions that occurred before the start of the complaint scheme,
 - acts or omissions allowed by a contract term which was agreed before the Commissioner's complaint scheme starts, if the term has not been varied after the start date of the scheme.
- 5.7 Once a small business has made a complaint, the Commissioner will seek representations from the respondent before reaching a view. The Commissioner can ask, but not require, either party to provide information. Determinations made under the complaints scheme will not be legally binding. The parties are therefore not under a legal obligation to follow any of the Commissioner's recommendations, but the Commissioner's determination and any recommendations should enable the parties to resolve the issue.
- 5.8 When the Commissioner determines a complaint, the determination may result in recommendations or it may not. The determination may be that it is not possible to reach a view. Once a complaint is determined the Commissioner must prepare a written statement which sets out the reasons for the determination, any recommendations and in the absence of recommendations, the reasons why no recommendations have been given. The statement must be given to the complainant and respondent. The Commissioner may also publish a report of the enquiry into, consideration and determination of a complaint made under the complaints scheme. The report may be anonymous or may name the respondent.

6. The proposals

A. Small businesses in scope of the Commissioner's services

Calculating a business's staff headcount, to determine whether they are a 'small business' which can use the Commissioner's services

- 6.1 The Commissioner's services will be available to small businesses. The Act defines a small business for these purposes as any person carrying on one or more businesses, which has a headcount of fewer than 50 staff, their registered office or principal place of business in the UK, and which is not a public authority. The Regulations will provide details of what the staff headcount figure covers and how it is to be calculated, so that it is clear which businesses can use the Commissioner's services.
- 6.2 We propose the staff headcount figure should refer to the number of individual staff rather than requiring a calculation of full time equivalents.
- 6.3 The Commissioner's services will be available to a range of businesses, including companies, unincorporated associations, and partnerships. To reflect this, we propose that this staff headcount figure should include employees, but also: staff such as secondees or agency workers, who are provided by a third party, if their terms are decided by the business or third party; partners in a partnership (but not limited partners of a limited partnership, who choose not to take a positive role in the organisation's operation in exchange for receiving limited liability); members of a limited liability partnership; members of an unincorporated association; and directors or other office holders. We do not propose to cover self-employed individuals or apprentices.
- 6.4 The headcount of a business will naturally vary over time. The Regulations must be clear on when business can, and cannot, raise a complaint with the Commissioner. We propose that this will differ slightly for businesses using the Commissioner's advice and information services and those making complaints, as follows.
- 6.5. Businesses seeking to use the Commissioner's advice and information services should:
- meet the headcount criterion on the day the business makes contact with the Commissioner; or
 - have had an average headcount of fewer than 50 staff over the previous financial year; or
 - have had an average headcount of fewer than 50 staff in the current financial year if it is more than six months into that year. This will capture businesses that may have downsized in the previous financial year when they may have more than 50 staff but no longer do so and businesses that have not been established for a full financial year but have been established for more than six months in the current financial year.

- If the business has been established for six months or less, the average should be calculated pro- rata.

6.6 Businesses seeking to make a complaint should either:

- Fall within any of the circumstances above or,
- Meet the headcount criterion at the point the complainant first became aware of the issue which forms the basis of their complaint.

6.7 This flexibility should enable different businesses to assess easily whether they are eligible for the Commissioner's services, and would mean that businesses that have only recently expanded or which take on additional staff for short periods would not necessarily be excluded.

6.8 Our rationale for these proposals is to keep the definition as simple as possible. We are focused on doing this so that small businesses are not discouraged from using the Commissioner's services and the Commissioner's resources are not spent on complex checks of eligibility rather than providing valuable services. The staff headcount threshold is also intended to be broadly consistent with the equivalent threshold in the definition of small businesses under the Small Business, Enterprise and Employment Act 2015 (which will set standard definitions for use in secondary legislation), whilst recognising that some more complex details will not be appropriate for establishing eligibility to use the Commissioner's services.

Question 1*: Do you agree with the proposals set out in paragraphs 6.2 - 6.7 for how and when to calculate a business's staff headcount to determine whether they are a 'small business' which can use the Commissioner's services?

6.9 A small business could be part of a larger group, for example where a company with fewer than 50 staff is owned by a larger company. In the interest of simplicity, we do not propose excluding businesses that are part of a larger group. The Act enables additional financial thresholds to be applied as part of the definition, related to turnover and value of balance sheet. We do not propose including these additional criteria in the Regulations, but the government could revisit this if it became clear in future that there are a significant number of businesses using the service with low staff numbers but high financial worth that could be expected to have ample resources to protect their interests without needing the Commissioner's assistance.

B. Making complaints under the Small Business Commissioner complaints scheme

6.10 The Regulations will set important details, in addition to the framework in the Act, for the Commissioner's complaints scheme. The Commissioner will establish, maintain and administer a complaints scheme for payment disputes between small and larger businesses, in line with these Regulations. Establishing parameters in the Regulations will enable the Commissioner to focus time and resources effectively on addressing the right complaints and having the most impact towards achieving cultural change in payment practices. It will also help ensure that the process of making a complaint is straightforward, transparent and fair for all businesses, complainants and respondents.

Circumstances in which a small business should be able to complain to the Commissioner without raising the issue with the respondent first

6.11 The Regulations will provide that, except in specified circumstances, the Commissioner will not deal with a complaint (or part of a complaint) if he or she considers that the complainant has not previously communicated the substance of the complaint to the respondent, and given them a reasonable opportunity to address it. This is intended to focus the Commissioner on complaints where there is a genuine dispute that parties have been unable to resolve independently. It reflects a key objective of the Commissioner, to encourage and enable businesses to resolve disputes between themselves. However, we recognise that sometimes small businesses may legitimately fear the impact on their commercial relationship if they complain to a larger business customer. Raising a concern with a larger business can be the very issue with which a small business needs support. It is therefore crucial that the Regulations enable the small business to go directly to the Commissioner in such cases. To address this, we propose that the specified circumstances should be:

- when the Commissioner is satisfied that communicating the substance of the complaint to the respondent would be significantly detrimental to the complainant's business

Question 2: Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?

Time limit and circumstances in which the Commissioner can extend this

6.12 The Regulations will set a time limit for making complaints to the Commissioner. A prospective complainant will have to submit their complaint within the time limit, or lose the opportunity to have their complaint considered by the Commissioner. The Commissioner may however extend the time limit in specified circumstances. We are seeking views on whether the time limit should be set at six, 12 months or another limit. In either case we propose the time would begin from when the complainant first became aware of the issue which forms the basis of their complaint.

- 6.13 We have considered time limits for raising matters with some existing services such as ombudsmen, which vary from three to 12 months after a response from the respondent, with backstop periods of up to six years from the event complained of. However, for complaints to the Commissioner we consider a single time limit is appropriate, as the scheme is intended to be user-friendly and simple to use, and it differs from some existing ombudsmen services in that the Commissioner's determinations are not legally binding. We think 12 months may be needed because small businesses may not be immediately aware of the opportunity to take complaints to the Commissioner: a large business respondent may not necessarily have a complaints procedure and is not obliged to inform the small business of the Commissioner's scheme. We consider 12 months would also provide a reasonable period for the parties to have attempted to resolve the issue. We want to make sure that complaints are progressed swiftly as this will increase the likelihood of a positive resolution: for this reason we consider a longer period would be inappropriate.
- 6.14 However, 12 months could be considered too long for people to recall events clearly and assemble appropriate evidence. A 12 month limit may also delay small businesses in coming forward, potentially with detrimental consequences. We therefore welcome views as to whether six months would be a more appropriate period.
- 6.15 The Regulations will specify circumstances in which the time limit may be extended. Whilst complaints need to be raised promptly, to encourage swift and positive resolution, it is important that this does not constrain the Commissioner in cases where the time limit is not workable. We propose that the specified circumstances when the Commissioner can extend the time period should be:
- where the complainant was incapacitated during the period when they should otherwise have complained,
 - where the larger business agrees to the Commissioner considering the complaint(s) made against them beyond the time limit,
 - where the subject matter of the complaint was subject to legal proceedings which are not being pursued further,
 - where a solution had been agreed between the parties within the time limit but this agreement has not been delivered,
 - where the responding business acted in such a way as to deliberately exceed the time limit.

We propose it would be for the Commissioner to decide whether these circumstances are met.

Question 3: What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?

Requirements as to the form of complaints

6.16 We propose that, in the main, the form and content of complaints should be for the Commissioner to decide. This will enable the Commissioner to ensure that he or she is obtaining the correct type and level of information to handle a complaint and the flexibility to revise this with the benefit of experience of real cases. However, we think some high level parameters should be set out in the Regulations. We propose to stipulate in the Regulations that complaints must:

- Be made to the Commissioner in writing. This is important so the Commissioner has a clear record of the complaint, directly from the complainant. It would not be appropriate for the Commissioner to receive complaints on the telephone for example. It will be for the Commissioner to decide in further detail how these written complaints will be received, but we expect that this will generally happen online.
- Include the date(s) of the matter complained of. This will enable the Commissioner to check that the complaint is within scope of the scheme.
- Include a confirmation by the complainant that they have previously communicated the substance of the complaint to the respondent and given the respondent a reasonable opportunity to deal with it. Or where they have not, the complainant should provide their reasons. This will enable the Commissioner to consider whether the complaint can be dealt with.
- If the complainant wishes the Commissioner to extend the time limit for submitting a complaint, give reasons for this.

6.17 We considered whether a complainant should be required to confirm within a complaint that they meet the criteria to be considered a small business. We do not propose to include this in the Regulations, as we consider it more appropriate for the Commissioner to decide how best to address complainants' eligibility in practice.

Question 4: Do you agree that complaints to the Commissioner should meet the requirements in paragraph 6.16? Please list any other requirements that should be considered.

What factors should enable the Commissioner to dismiss a complaint

6.18 It is important that the Commissioner has scope to dismiss complaints – that is, to decide not to consider a complaint at all, or not to continue with a complaint that he or she has started to consider. This is important to ensure the time and resources of the Commissioner are focussed effectively and efficiently. We propose that the Commissioner should be able to choose (but not be obliged) to dismiss a complaint or part of a complaint, if he or she considers that:

- the complaint is frivolous or vexatious,
- the matter is more appropriately dealt with in another way, for example through the legal system, an ombudsman or regulator

- the matter has not caused the complainant to suffer any financial loss, material distress, material inconvenience or other material adverse effect, and is not likely to do so
- the complaint has been remedied,
- the complainant is seeking an outcome that the Commissioner does not have the power to provide (e.g. something other than a recommendation),
- the matter has been subject to legal proceedings or adjudication proceedings or becomes subject to legal or adjudication proceedings,
- the matter has been previously considered under the Commissioner's complaints scheme or by another complaints-handling body, ombudsman or regulator. Where a matter has already been considered, either by a court or adjudicator (as above) or another body, there may be little merit in the Commissioner considering it again especially as his or her determination is not legally binding. However, there may be cases where the small business still wants some practical recommendations, so it is appropriate for the Commissioner to have discretion as to whether to dismiss here;
- there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the Commissioner's complaints scheme.

Question 5: Do you agree that the Commissioner should be able to dismiss a complaint in these instances? Please list any other circumstances where the Commissioner should be able to dismiss a complaint.

- 6.19 As well as setting out factors that enable the Commissioner to dismiss a complaint in general (as above), the Regulations can set out factors that would enable the Commissioner to dismiss complaints in specified circumstances. We propose not to specify any such circumstances in the Regulations. We have not identified factors which should be limited to particular circumstances, but consider the general factors described above to be sufficient.

Question 6: Do you think that there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed above?

Whether to allow the Commissioner to fix and extend time limits for any aspect of the proceedings

- 6.20 We propose that the Regulations should allow the Commissioner to fix - and extend - time limits for any aspect of the complaints handling process. The Regulations would not stipulate what these aspects should be: instead, the Commissioner should consider any appropriate time limits when establishing and operating the complaints scheme. This ability may be useful to the Commissioner to manage the complaints process and ensure swift resolution to complaints. For example, the Commissioner could choose to set a time limit for a party to provide information, if the Commissioner requests information. This may help to prevent a party from

delaying the Commissioner's determination of a complaint to their own benefit by delaying the provision of information.

Question 7: Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?

Whether the Commissioner should be required to notify the person who makes a complaint if it is not a relevant complaint or is dismissed

6.21 We propose that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or the Commissioner decides not to consider it, and explain the reasons why it will not be considered. This will provide clarity for the complainant and assist them in finding an alternative resolution to their issues.

Question 8: Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?

Whether to authorise or require the Commissioner to notify the person against whom a complaint is made if it is not in scope or is dismissed

6.22 We propose that the Regulations should allow the Commissioner to notify the respondent in these circumstances, but not require him or her to do so. There may be instances in which the Commissioner has commenced consideration of a complaint prior to dismissing it and where it will make sense to inform a respondent. There will be many cases, however, where complaint is dismissed before the Commissioner contacts the respondent and in these cases the Commissioner should have flexibility to consider whether it is appropriate or there is a benefit in informing the respondent.

Question 9: When a complaint is not relevant, or dismissed, should the Commissioner be allowed, but not required, to notify the person against whom a complaint is made?

C. The Commissioner's consideration and determination of complaints

6.23 When a complaint is considered by the Commissioner, the Commissioner must decide the complaint by reference to what he or she considers to be fair and reasonable in the circumstances of that case. The Commissioner can ask either party for information, and must give the respondent a chance to make representations. The Regulations will specify matters which the Commissioner must take into account in determining whether an act or omission by the respondent was fair and reasonable. This consideration will be fundamental to the Commissioner making a determination about a complaint. Any factors listed in the Regulations must always be taken into account. The fact that a matter is listed, however, doesn't mean that it will be a definitive criterion of fairness and reasonableness, only that the Commissioner must consider it. The Commissioner may consider some factors and decide that they have no bearing on the issue raised in the complaint.

6.24 Furthermore, the list of factors will be non-exhaustive, so will not limit what the Commissioner can take into account in determining what is fair and reasonable. The Commissioner is not intended to proscribe particular practices as unfair or unreasonable in all circumstances. The role of the Commissioner is to provide non-binding views and recommendations to enable parties to resolve their issues. In this way, the Commissioner is intended to effect a culture change in payment practice. The section below discusses the factors that the Regulations could include for the Commissioner to take into account when deciding what is fair and reasonable. The Act provides that relevant law must be a matter that is taken into account. We intend the Commissioner to consider what law is relevant on a case by case basis.

Proposed Factor 1: The relevant facts

6.25 Our view is that the Commissioner must seek to establish the facts of the complaint and must consider these before deciding whether a matter is fair and reasonable in the circumstances. This is perhaps self-evident, but setting this out in the Regulations will make it clear that the Commissioner will be expected to do this and therefore to act justly. We also believe this will encourage parties to give information and underline that the Commissioner will be an impartial broker. We propose that the Commissioner should decide in each particular case what facts to pursue.

Proposed Factor 2: The conduct, behaviour and practice of the parties

6.26 Some respondents to the previous consultation on establishing the Commissioner¹ suggested that the Commissioner should consider the conduct, behaviour and practice of the parties when determining what is fair and reasonable. We think that these will be relevant factors.

6.27 There are two approaches we could take:

- (a) We could simply state in the Regulations that the Commissioner should take into account the conduct, behaviour and practice of the parties and leave it to his or her discretion what to include in this consideration. The Commissioner could (if they considered this would be useful) subsequently provide further detail of the standards of behaviour and conduct which the Commissioner may consider and expect by issuing guidance, benefiting from the experience of determining actual complaints.
- (b) The alternative would be to set out specific indicators of behaviour, conduct and practice in the Regulations, and for the Commissioner to assess compliance with these. The Commissioner should still be considering the same factors under either approach, but this would ensure that the Commissioner always considered certain behaviours and that businesses had a clear list. However, it may prove too limited or prescriptive, and by being in legislation it would be difficult to add to later. This approach could therefore encourage businesses to take an overly limited view of what the Commissioner might consider.

¹www.gov.uk/government/consultations/small-business-commissioner-role

- 6.28 The Commissioner could also consider compliance with codes of conduct or usual practice for the relevant industry, or general good practice. However, we think this would set the Commissioner an impossible task as there is not necessarily a single, agreed standard in all sectors and it would not be beneficial for the Commissioner to apply every potentially relevant piece of guidance. Instead we think it preferable to take a subjective approach of considering the actual conduct of the parties. This will not prevent the Commissioner from considering how the conduct compares with industry codes where these exist.
- 6.29 We propose that the Commissioner should consider the conduct, behaviour and practice of the parties but that the Regulations should not specify what this might cover as the Commissioner should consider the aspects of conduct, behaviour and practice relevant to each case (that is, the approach set out in paragraph 6.27(a)).

Question 10*: Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?

If you answered “yes”, please ignore the boxed text below.

- 6.30 It would be helpful to understand, if respondents disagree with this proposed approach, what specific behaviour, conduct and practice respondents consider should be identified. If we were to take the second approach (as per paragraph 6.27(b)) of listing specific indicators, we think these could include: respondents' reports on their payment practices and performance; whether parties have acted in a transparent, honest and open manner; accessibility of the respondent; any evidence and information provided by the parties in agreed timescales; the willingness of the respondent to negotiate; reasons given by the respondent for the payment matter arising. As explained above, these factors would be covered under either approach; but under the proposed approach we would not set them out explicitly in legislation. These factors are set out in more detail in the box below:

Indicators of conduct, behaviour and practice

- (i) *The respondent's report on payment practices*

- 6.31 The government will make Regulations to implement the duty for large businesses to publish reports on their payment practices and performance, under the Small Business, Enterprise and Employment Act 2015. The reports published by a large business might be considered in deciding whether that business's behaviour is fair and reasonable. This could be either where the report shows that the larger businesses habitually engages in unfavourable payment practices, or if it shows the larger business generally pays promptly, but has failed to do so in this particular case. However, these reports will not be available in all circumstances as only large businesses will be subject to the duty to report. Medium-sized businesses, which could also be the subject of a complaint to the Commissioner, will not.

(ii) Whether the parties have acted in a transparent, honest and open manner

6.32 This could include considerations such as:

- whether a small business was given little or no advance warning of a particular practice,
- whether a larger business has from the beginning of the relationship been open and upfront about their practice,
- whether the larger business has communicated in clear and intelligible language (e.g. including a disadvantageous payment term in the small print of a contract when it was not covered explicitly in the negotiations), and
- whether the larger business acted dishonestly or withheld essential information.

6.33 We would expect these points to be covered by the Commissioner when considering transparency, honesty and openness. But we would not propose listing them in the Regulations, even if we were to adopt the second option above (of listing aspects of behaviour, conduct and practice in the Regulations) to avoid being too prescriptive and inadvertently limiting the Commissioner's consideration of complaints.

(iii) Accessibility of the respondent including how easy it is for the complainant to contact the respondent

6.34 A small business may waste valuable time and resource seeking to speak to the right person about a payment matter. Specifying this as a factor could help to encourage large businesses to ensure their suppliers can contact them without delay. Alternatively, this could be addressed in guidance if the Commissioner considered it appropriate.

(iv) Evidence and information provided by the parties within any specified timescales

6.35 The Small Business Commissioner will not compel the parties to give any information; but the Commissioner may ask for, and the parties may provide, information. Where information is provided we consider that the Commissioner must consider it in deciding what is fair and reasonable.

(v) Willingness to negotiate with a view to promptly resolving the issue

6.36 Before the Commissioner can consider a complaint, the complainant small business must generally raise it with the respondent larger business. If the respondent has shown a willingness to negotiate and promptly resolve the issue at this stage, this should be relevant to the question of fairness and reasonableness. Similarly, if the respondent has been willing to negotiate early in proceedings it may show that the larger business has acted reasonably. Specifying this as a factor may encourage respondents to try and settle a dispute before it reaches the Commissioner. Alternatively, this could be addressed in guidance if the Commissioner considered it

appropriate. Including “with a view to promptly resolving the issue” would avoid any parties using negotiation as a delaying tactic.

(vi) *Reasons, if any, given by the respondent for the payment matter*

6.37 The Commissioner must give the respondents an opportunity to make representations. Where the respondent has given reasons, this might be an indication they have acted fairly and reasonably. Specifying this might also encourage respondents to provide reasons.

Question 11*: If you answered No to Question 11 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the above, or any other, indicators should be included?

Proposed Factor 3: The relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party

6.38 Several respondents to last year’s consultation suggested that the unfair use of a stronger bargaining position should be considered by the Commissioner when looking at what is fair and reasonable. This would include unfair use of economic power by the stronger party to impose unfavourable terms on the weaker party. The fact of having a stronger bargaining position does not in itself lead to unfairness, which is why we propose that the Commissioner should take into account how it is used.

Question 12: Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?

Proposed Factor 4: The impact of the act or omission

6.39 The Commissioner could be required to take account of the impact of an act or omission, because where an act or omission has a particularly adverse impact on one of the parties then this may be relevant to considering whether it was reasonable. This consideration could cover impacts such as:

- whether the Commissioner considers the actions of the respondent are reasonably necessary to protect their interests,
- the adverse effect of the payment matter on the complainant and the respondent’s knowledge of this adverse effect,
- any impact of the payment matter on third parties, including other parties with which the parties have relationships and the ultimate consumer.

- 6.40 We would expect the Commissioner to consider these three points, among any other relevant impacts. We are considering whether it would be useful to list particular impacts that the Commissioner should take into consideration. We do not propose specifying particular impacts in the Regulations, to avoid being too prescriptive.

Question 13: Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular types of impact should not be listed in the Regulations?

Question 14: If you think particular types of impact should be listed, which should be included in the Regulations?

Question 15*: Are there any other factors that should be included in the Regulations (in addition to the four proposed)?

Specific circumstances

- 6.41 As well as setting out matters that the Commissioner must always take into account when considering what is fair and reasonable, (as above), the Regulations may provide for the Commissioner to take some matters into account in specified circumstances only. For example, particular factors about specific payment practices could be identified, so that the Commissioner would have to consider these if a complaint was raised about the relevant practice. We do not propose to specify any such circumstances in the Regulations. The Commissioner is intended to consider complaints about a range of payment issues, and the issues which small businesses raise may change over time as practices evolve. We do not want to risk any specified practices being seen as the only practices covered by the Commissioner. Instead we consider that the general factors described above would enable the Commissioner to deal appropriately with a range of issues.

Question 16: Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?

Question 17: If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances?

D. Publishing reports and recommendations

- 6.42 When the Commissioner has decided a complaint, which may include making recommendations to resolve the matter or prevent similar issues in future, he or she will give the complainant and respondent a statement of the decision (including any recommendations) and reasons for this.
- 6.43 The Commissioner will have the discretion to publish a report on an individual complaint, which may also include recommendations about what could be done to resolve the dispute and how to avoid similar disputes arising in the future.

The Commissioner may also choose, in appropriate cases, to name the respondent in the published report. We consider this will be a powerful incentive for respondents to cooperate with enquires and take the decisions and recommendations of the Commissioner seriously. However, it is not just a potential opportunity to 'name and shame' respondents, but also to 'name and praise' good practice.

- 6.44 Before publishing a report, the Commissioner will allow both complainant and respondent reasonable opportunity to make representations about the proposal to publish. If the Commissioner proposes to name the respondent, he or she must give the respondent an opportunity to make representations about this too. The decision to identify a respondent in a published report will be taken on a case by case basis. The Commissioner will have already considered whether the conduct of the respondent has been fair and reasonable when making a determination, prior to considering whether to publish a report and name the respondent.
- 6.45 The Regulations will set out factors for the Commissioner to take into account when deciding whether to name the respondent in a published report. These factors will not be exhaustive, so the Commissioner will be able to consider factors which are not expressly set out in the Regulations. We list below the factors we propose to include. We seek your views on these and on whether there is additional information you think the Commissioner should take into account.
- Any representations made by the respondent or the complainant as to whether the respondent should be named
 - Any information or evidence that the respondent knowingly or deliberately misled the complainant.
 - Any information or evidence that the respondent knowingly or deliberately misled the Commissioner.
 - Any information or evidence that the respondent used undue influence or pressure or intimidation tactics.
 - Any information or evidence as to risk of personal harm to any staff of the respondent.
 - Any information or evidence as to the seriousness of any harm caused to the small business by the respondent.
 - Any information or evidence as to the respondent's knowledge of any harm caused to the complainant.
 - Whether naming the respondent is likely to deter similar acts or omissions in the future.
 - Whether naming the respondent is likely to encourage more businesses to follow good practice of a respondent
 - Whether naming the respondent is likely to have adverse consequences for the supplier.

- Whether the respondent has helpfully engaged with the Commissioner's complaints process.

Question 18*: Which factors (including but not confined to those above) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?

6.46 As well as setting out factors for the Commissioner to take into account generally when considering whether to publish the name of a respondent (as above), the Regulations may set out factors to be taken into account in specified circumstances. We propose not to set out in the Regulations any specified circumstances on the basis that we do not want to limit the Commissioner. We consider the general factors would enable the Commissioner to deal appropriately with a range of issues.

Question: 19: If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name the respondent, what should these circumstances be and what factors should the Commissioner consider?

Question 20: Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?

7. Summary of consultation questions

Paragraph 6.2 - 6.8

Question 1*: Do you agree with the proposals set out in paragraphs 6.2 – 6.7 for how and when to calculate a business’s staff headcount to determine whether they are a ‘small business’ which can use the Commissioner’s services?

Paragraph 6.10 - 6.11

Question 2: Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?

Paragraph 6.12 - 6.15

Question 3: What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?

Paragraph 6.16 - 6.17

Question 4: Do you agree that the complaints to the Commissioner should meet the requirements in paragraph 6.16? Please list any other requirements that should be considered.

Paragraph 6.18

Question 5: Do you agree that the Commissioner should be able to dismiss a complaint in these instances? Please list any other circumstances where the Commissioner where the Commissioner should be able to dismiss a complaint.

Paragraph 6.19

Question 6: Do you think that there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed above?

Paragraph 6.20

Question 7: Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?

Paragraph 6.21

Question 8: Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?

Paragraph 6.22

Question 9: When a complaint is not relevant, or dismissed, should the Commissioner be allowed but not required, to notify the person against whom a complaint is made?

Paragraph 6.26 – 6.29

Question 10*: Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?

Paragraph 6.30 - 6.37

Question 11*: If you answered No to Question 10 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the above, or any other, indicators should be included?

Paragraph 6.38

Question 12: Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?

Paragraph 6.39 – 6.46

Question 13: Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular impacts should not be listed in the Regulations?

Question 14: If you think particular types of impact should be listed, which should be included in the Regulations?

Question 15*: Are there any other factors that should be included in the Regulations (in addition to the four proposed)?

Paragraph 6.41

Question 16: Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?

Question 17: If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances?

Paragraph 6.42 – 6.45

Question 18*: Which factors (including but not confined to those above) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?

Paragraph 6.46

Question: 19: If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name a respondent, what should these circumstances be and what factors should the Commissioner consider?

Question 20: Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?

8. What happens next?

- 8.1 This consultation will close on 7 December 2016 at 11:59pm.
- 8.2 The government will publish its responses to the consultation as soon as possible and within 12 weeks of the consultation closing, setting out the decisions made in light of the consultation, a summary of the views expressed and reasons for the decisions taken
- 8.3 The document will be published at: www.gov.uk/government/consultations/small-business-commissioner-process-for-handling-complaints.

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.

www.gov.uk/government/publications/consultation-principles-guidance

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:

Angela Rabess
BEIS Consultation Co-ordinator
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 1661

Email: angela.rabess@beis.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead ([paragraph 2.5](#)).

Annex B: List of individuals/organisations consulted

ADS Group
Advice UK
African Caribbean Business Network
Agri-technology Industry Advisory Group
Alliance of Industry Associations
Association of Accounting Technicians (AAT)
Association of African owned Businesses (UK)
Association of British Insurers
Association of British Mentors
Association of Business Schools
Association of Chartered Certified Accountants (ACCA)
Association of Chief Executive of Voluntary Organisations (ACEVO)
Association of Convenience Stores
Association of Licensed Multiple Retailers
Association of Recruitment Consultancies (ARC)
Association of Specialist Fire Protection (ASFP)
B&B Association
BALPPA (British Association of Leisure Parks, Piers & Attractions)
BBA – the voice of banking
British Beer & Pub Association
British Business Angel Association
British Chambers of Commerce
British Exporters Association
British Healthcare Trade Association
British Hospitality Association
British Library
British Pharmaceutical Industry
British Plastics Federation
British Ports Association (BPA)
British Retail Consortium
British Venture Capital Association
Btube
Business Disability Forum
Business Doctors

Business in the Community
Business Support Helpline
CBI
Central Working
Centre for Entrepreneurs
Chairman's Network
Chartered Institute of Arbitrators
Chartered Institute of Credit Management (CICM)
Chartered Institute of Marketing (CIM)
Chartered Institute of Personnel & Development
Chartered Institute of Purchasing & Supply
Chartered Institute of Taxation (CXIOT)
Chemical Business Association
Civil Justice Council
Civil Mediation Council
Cockpit Arts Business Hub
(CISAS) Construction Equipment Association
Competitive and Markets Authority
Construction Products Association
Co-operative & Community Finance Association
Core Cities Group
Creative England
Crowd for Angels
Devon & Somerset Rural Growth Network
Digital Leaders
Digital Shoreditch
Disability Rights UK
E2Exchange
EEF
Engineering Employers Federation
Enterprise Nation
Enterprising Women
Entrepreneurs' Organisation
Entrepreneurs with Disabilities Network
Everywoman

Federation of Licensed Victuallers Association
Federation of Small Businesses
Financial Ombudsman Service (FOS also provide ADR in some of the other sectors classified here, such as rental and leasing activities)
Fire Industry Association
Hospitality Ulster
ICAEW
Impact Hub Westminster
Institute for Family Business
Institute for Small Business & Entrepreneurship
Institute of Chartered Accountants of England & Wales
Institute of Exporters
Invest NI
IoD
IOEE
IPSE (Association of Professional & Self-Employed)
ISBE
Keating Chambers
Kitchen Bathroom Bedroom Specialists Association
Law Society
Legal Ombudsman
Local Government Association
London South Bank University
Mentor/Suffolk Enterprise
Mumpreneur
Muslim Women's Network-UK
National Asian Business Association
National Black Women's Network
National Caravan Council
National Enterprise Network
National Federation of Retail Newsagents
National Specialist Contractors Council
New Entrepreneurs Foundation
North West School for Social Entrepreneurs Northumberland
Northern Ireland Food and Drink Association (NIFDA)

Prince's Trust
Renewables UK Cymru
Retail Motor Industry Federation
Royal Institute of Chartered Surveyors (RICS)
Sage
Federation Scottish Decorators Federation
Screwfix
Security Industry Authority
SFEDI
Social Enterprise UK
Social Firms Wales
St John's Innovation Centre
Start up in Stilettoes
Start UpLoans
StartUp Britain
Start-up Loaded
Successful Sussex
Suffolk Enterprise Agency
Sussex Innovation
Swindon & Wiltshire Rural Growth Network
Tech City
The Arreca Group
The Business Circuit (London)
The Enterprise and Diversity Alliance
The Enterprise Diversity Alliance
The Entrepreneurs Network
The Supper Club
The Virtual Entrepreneur
Tourism Alliance
Trade Association Forum
UK Fire Association
UKinbound
Unltd
Vehicle Builders & Repairers Association Ltd
(VBRA) Warwickshire Rural Growth Network

Waterwatch Scotland

WiRE

World Trade Centre Hull

X-Forces Ltd

Youth Enterprise Live

YTKO

Annex C: Small Business Commissioner: Policy for Secondary Legislation response form

The Small Business Commissioner: Policy for Secondary Legislation Consultation is available on the consultation page at: www.gov.uk/government/consultations/small-business-commissioner-process-for-handling-complaints.

The closing date for responses is **7 December 2016 at 11:59pm**.

Please return completed forms to:

Tinu Fagbayi

Small Business Commissioner Secondary Legislation
Department for Business, Energy and Industrial Strategy
1 Victoria Street
Westminster
London
SW1H 0ET

Tel: 0207 215 4273

Email: SBCPolicy@beis.gov.uk

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. Please see page 8 for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall 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.

I want my response to be treated as confidential

Comments:

Name:

Organisation (if applicable):

Address:

Please check a box from a list of options that best describes you as a respondent. This allows views to be presented by group type.

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

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 BEIS 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

Please refer to relevant paragraph numbers in the consultations to answer the below questions.

Consultation Questions

Paragraph 6.2 – 6.8

Question 1*: Do you agree with the proposals set out in paragraphs 6.2 - 6.7 for how and when to calculate a business's staff headcount to determine whether they are a 'small business' which can use the Commissioner's services?

Yes

No

Please give your reasons.

Paragraph 6.10 – 6.11

Question 2: Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?

Yes

No

Please list any other circumstances.

Paragraph 6.12 – 6.15

Question 3: What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?

Please give your answer.

Paragraph 6.16 - 6.17

Question 4: Do you agree that complaints referred to the Commissioner should meet the following requirements?

	Yes	No
a. Be made in writing	<input type="checkbox"/>	<input type="checkbox"/>
b. Include the date(s) of the matter complaint of	<input type="checkbox"/>	<input type="checkbox"/>
c. Include confirmation by the complainant that they have previously communicated the issue to the respondent and given them reasonable opportunity to deal with it or their reasons if they have not done so	<input type="checkbox"/>	<input type="checkbox"/>
d. If the complainant wishes the Commissioner to extend the time limit for submitting a complaint.	<input type="checkbox"/>	<input type="checkbox"/>

Please give your reasons for your answers and list any other requirements that should be considered.

Paragraph 6.18

Question 5: Do you agree that the Commissioner should be able to dismiss a complaint in the following instances?

	Yes	No
a. The complaint is frivolous and vexatious	<input type="checkbox"/>	<input type="checkbox"/>
b. The matter is more appropriately dealt with in another way, for example through the legal system, an ombudsman or regulator	<input type="checkbox"/>	<input type="checkbox"/>
c. The matter has not caused the complainant to suffer any financial loss, material distress, material inconvenience or other material adverse effect, or is not likely to do so	<input type="checkbox"/>	<input type="checkbox"/>
d. The complaint has been remedied	<input type="checkbox"/>	<input type="checkbox"/>
e. The complainant is seeking an outcome that the Commissioner does not have the power to provide (e.g. something other than a recommendation)	<input type="checkbox"/>	<input type="checkbox"/>
f. The matter has been subject to legal proceedings or adjudication proceedings or become subject to legal or adjudication proceedings	<input type="checkbox"/>	<input type="checkbox"/>
g. The matter has been previously considered under the Commissioner’s complaints scheme or by another complaints-handling body, ombudsman or regulator	<input type="checkbox"/>	<input type="checkbox"/>
h. There are other compelling reasons why it is inappropriate for the complaint to be dealt with under the Commissioner’s complaints scheme	<input type="checkbox"/>	<input type="checkbox"/>

Please give your reasons and list any other circumstances where the Commissioner should be able to dismiss a complaint.

Paragraph 6.19

Question 6: Do you think there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed above?

Yes

No

Please give your reasons.

Paragraph 6.20

Question 7: Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?

Yes

No

Please give your reasons.

Paragraph 6.21

Question 8: Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?

Yes

No

Please give your reasons.

Paragraph 6.22

Question 9: When a complaint is not relevant, or dismissed, should the Commissioner be allowed but not required, to notify the person against whom a complaint is made?

Yes

No

Please give your reasons.

Paragraph 6.26 – 6.29

Question 10*: Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?

Yes

No

Please give your reasons.

Paragraph 6.30 - 6.37

Question 11*: If you answered No to Question 10 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the following, or any other, indicators should be included?

- a. The respondent's report on payment practices,
- b. Whether parties have acted in a transparent, honest and open manner,
- c. Accessibility of the respondent including how easy it is for the complainant to contact the respondent,
- d. Evidence and information provided by the parties within required timescales,
- e. Willingness to negotiate with a view to promptly resolve the issue,

- f. Reasons given by the respondent for payment matter.

Please list your reasons and any other indicators that should be included.

Paragraph 6.38

Question 12: Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?

Yes

No

Please give your reasons.

Paragraph 6.39 – 6.46

Question 13: Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular impacts should not be listed in the Regulations?

Yes

No

Please give your reasons.

Question 14: If you think particular types of impact should be listed, which should be included in the Regulations?

Please give your answer.

Question 15*: Are there any other factors that should be included in the Regulations (in addition to the four proposed)?

Yes

No

Please give your reasons and list the other factors you propose should be included.

Paragraph 6.41

Question 16: Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?

Yes

No

Please give your reasons.

Question 17: If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances?

Please give your answer.

Paragraph 6.42 – 6.45

Question 18*: Which factors (including but not confined to those listed below) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?

- a. Any representations made by the respondent or the complainant as to whether the respondent should be named
- b. Any information or evidence that the respondent knowingly or deliberately misled the complainant
- c. Any information or evidence that the respondent knowingly or deliberately misled the Commissioner
- d. Any information or evidence that the respondent used undue influence, pressure or intimidation tactics
- e. Any information or evidence as to risk of personal harm to any staff of the respondent
- f. Any information or evidence as to the seriousness of the harm caused to the small business by the respondent
- g. Any information or evidence as to the respondent's knowledge of the harm caused to the complainant
- h. Whether naming the respondent is likely to deter similar acts or omissions in the future
- i. Whether naming the respondent is likely to encourage more businesses to follow good practice of a respondent
- j. Whether naming the respondent is likely to have adverse consequences for the supplier
- k. Whether the respondent has helpfully engaged with the Commissioner Complaints process

Please give your reasons and list any other factors.

Paragraph 6.46

Question: 19: If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name the respondent, what should these circumstances be? And what factors should the Commissioner consider?

Please give your answer.

Question 20: Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?

Please give your answer.



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Department for Business, Energy and Industrial Strategy
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

Email: enquiries@beis.gov.uk

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