



Department for
Business, Energy
& Industrial Strategy

UNLOCKING THE POTENTIAL OF PRIMARY AUTHORITY:

Implementing the Enterprise Act 2016

February 2017

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Implementing the Enterprise Act 2016

The consultation can be found on the BEIS section of GOV.UK:

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Any enquiries regarding this publication should be sent to us at pa@beis.gov.uk

Contents

General information	3
Executive summary	5
Enabling national regulators to support primary authorities	8
Delivering Primary Authority in Scotland and Northern Ireland	9
Clarifying and simplifying enforcement action in Primary Authority	10
Determinations: updating requirements for applications	12
Proposal to replace the categories system	13

General information

Purpose of this consultation

We are keen to hear your thoughts and examples around the implementation of the Primary Authority changes detailed in this consultation and about the supporting regulations, specifically on how these proposals might affect your organisation or those you represent.

It is important to note that this is not a consultation on the policy changes that are laid down in the Enterprise Act 2016.

Issued: 13 February 2017

Respond by: 7 April 2017

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Consultation reference: Unlocking the potential of Primary Authority: implementing the Enterprise Act 2016

Territorial extent

This consultation relates to England and Wales and reserved matters in Northern Ireland and Scotland.

How to respond

Your comments will most useful if they are framed in direct response to the questions posed, though further comments and evidence are also welcome.

This consultation is also available on Citizenspace at: <https://beisgovuk.citizenspace.com/brdo/primary-authority-regulations>

Additional copies

You may make copies of this document without seeking permission. An electronic version can be found at <https://www.gov.uk/government/consultations/unlocking-the-potential-of-primary-authority>.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. 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 by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the [Government's Consultation Principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

Email: enquiries@beis.gov.uk

Executive summary

- 1.1. Primary Authority enables businesses to obtain consistent advice on compliance with regulation, in a tailored and cost effective manner, from local authorities. Primary Authority advice is assured – the primary authority may direct against enforcement action if it is deemed to be inconsistent with advice given – and this gives businesses the confidence to invest and grow. The scheme is statutory, established by the Regulatory Enforcement and Sanctions Act 2008 (RESA). As at December 2016, 15,850 businesses and 181 primary authorities are in Primary Authority partnerships.
- 1.2. Government recognises the value of Primary Authority to businesses and regulators alike. Primary Authority represents a new way of regulating, in which regulators work closely with businesses to ensure compliance while encouraging growth. Since Primary Authority began in 2009, the scheme has been extended to include more areas of regulation and to enable more businesses to participate. Businesses which are regulated by multiple local authorities are able to partner directly with a primary authority, or are able to access the scheme via a coordinator such as a trade association.
- 1.3. Following public consultation and a review of Primary Authority, the Enterprise Act 2016 further extends and simplifies Primary Authority, with effect from 1 October 2017. These changes include:
 - opening up Primary Authority partnerships to pre-start up businesses and businesses trading in only one local authority area;
 - making it easier for groups of businesses to access Primary Authority by placing coordinators at the heart of partnerships, removing the requirement for individual businesses that rely on their co-ordinator to sign up for partnerships;
 - creating a statutory role for national regulators to support primary authorities, thereby allowing greater consistency across local and national regulation; and
 - updating and streamlining administrative processes.
- 1.4. This consultation includes a draft statutory instrument containing the details needed to effect these changes. The draft statutory instrument proposes to:
 - specify several national regulators to be ‘supporting regulators’ to Primary Authority partnerships;

- ensure that the scope of Primary Authority in Scotland and Northern Ireland continues unchanged;
 - simplify the definition of 'enforcement action' for the purposes of notifications to the primary authority; and
 - update the requirements for applications for the determination process.
- 1.5. The consultation also outlines proposals to replace the 'categories' system which determines the scope of partnerships and underpins the current administration of Primary Authority.
- 1.6. A series of engagement events is planned for Spring 2017 and all stakeholders are encouraged to attend. These events will outline how Primary Authority will operate from 1 October 2017 and will give participants further opportunity to express their views. We are building a new Primary Authority Register, ready for 1 October 2017 and input from users is shaping its development.
- 1.7. General views, in addition to responses to specific questions, are welcome. The consultation closes on **7 April 2017**.

Enabling national regulators to support primary authorities

- 2.1 Primary Authority has successfully improved consistency of regulation for businesses regulated by more than one local authority. For those businesses regulated by both local and national regulators, Primary Authority has a role to play in improving consistency of regulation for business, and in assisting regulators to fulfil their statutory functions effectively in relation to that business. Some Primary Authority partnerships are already working with national regulators which is bringing benefits to business by allowing access to comprehensive advice and a consistent approach to regulation. We expect these arrangements to continue, but Government recognises that being able to formalise these arrangements will maximise benefits both to business and regulators.
- 2.2 The Enterprise Act 2016 enables national regulators to be specified as ‘supporting regulators’ which will enable them to play a statutory role in Primary Authority partnerships. Specified national regulators will be able to support primary authorities as they develop advice and guidance for businesses in direct and coordinated partnerships. This will enable businesses to access advice which is consistent at the local and national level, tailored to specific needs, giving business confidence to grow. It will improve working arrangements around inspection plans, giving greater confidence to regulators that businesses are investing in their compliance. Local and national regulators will similarly benefit from closer working arrangements and sharing knowledge and experience.
- 2.3 In order to participate, national regulators must be specified by regulation. Specified regulators will be entitled, with prior agreement, to recover reasonable costs incurred from the business or the coordinator.
- 2.4 The proposed regulations will specify five national regulators as ‘supporting regulators’. These regulators are responsible for those regulatory areas in which Primary Authority is most active, and have been chosen following consultation with stakeholders and the regulators themselves.¹ It will be possible to specify further supporting regulators in future.

¹ <https://www.gov.uk/government/publications/primary-authority-extension-and-simplification>

2.5 The five national regulators proposed to be specified as supporting regulators are:

- the Health and Safety Executive (HSE) for functions, in scope of Primary Authority, relating to health and safety;
- the Food Standards Agency (FSA) for functions, in scope of Primary Authority, relating to food safety and standards, agricultural produce and animal feed;
- the Gambling Commission (GC) for functions, in scope of Primary Authority, relating to age restrictions on gambling activity;
- the Competition and Market Authority (CMA) for functions, in scope of Primary Authority, relating to fair trading, with the CMA sharing powers with local authorities in many areas; and
- Regulatory Delivery for functions, in scope of Primary Authority, relating to weights and measures and product safety.

Consultation questions

Q1. What are your views on the list of proposed supporting regulators and their functions?

Q2. What benefits do you envisage these arrangements, with these specific regulators, will bring for business and for local and national regulators?

Q3. What demand might there be from your organisation, or from those you represent, for the additional support given by the proposed supporting regulators? Will this be over and above what they already provide by way of advice and guidance? For businesses and coordinators, would you be willing to pay, on a cost recovery basis, for support from these regulators?

Delivering Primary Authority in Scotland and Northern Ireland

- 3.1 The application of Primary Authority in Scotland and Northern Ireland differs to that in England and Wales. The Co-ordination of Regulatory Enforcement (Regulatory Functions in Scotland and Northern Ireland) Order 2009 lists the reserved functions that are included in scope of Primary Authority in Scotland and Northern Ireland. This means that businesses in Scotland are able to access Primary Authority for matters such as health and safety, and businesses in Northern Ireland are able to access Primary Authority for matters related to product safety. Local authorities in Scotland are able to provide primary authority partnerships for reserved matters and all local authorities in Scotland and Northern Ireland must act in accordance with Primary Authority when carrying out reserved functions.
- 3.2 The Scottish Government is working towards implementation of a Scottish Primary Authority scheme to cover certain devolved functions. This consultation is separate to, and is not concerned with, the proposed Scottish scheme. We recognise the importance to business of minimising costs and continue to work closely with Scottish Government officials on the workings of Primary Authority and the Scottish scheme.
- 3.3 The amendments effected by the Enterprise Act 2016 mean that it is necessary to replace the Order for Primary Authority to continue to operate unchanged in Scotland and Northern Ireland. Regulations 3 and 4 of the proposed regulations replaces the list of functions from the 2009 Order. The proposed regulations reflect the 2009 Order and we do not intend to change the scope. If the proposed regulations were not enacted, Primary Authority would cease to operate in Scotland and Northern Ireland. The drafting of the proposed regulations would enable Primary Authority to continue to operate unchanged.

Consultation questions

- Q4. Do you have any comments on the proposed regulations in relation to Scotland and Northern Ireland?
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Clarifying and simplifying enforcement action in Primary Authority

- 4.1 One of the purposes of Primary Authority is the coordination of enforcement action. When Primary Authority began in 2009, partnerships were only available to businesses regulated by more than one local authority. Primary Authority was quickly established as an effective means of enabling both business and local authorities to deal with enforcement action effectively and efficiently. The extension of Primary Authority to include new regulations and to enable coordinated partnerships has maximised these benefits for many more businesses.
- 4.2 The definition of enforcement action establishes which actions enforcing authorities are required to notify to the primary authority before taking action or, in some circumstances, retrospectively. This is crucial to the successful operation of Primary Authority and is the mechanism that delivers assurance for business. It also helps the primary authority to gather intelligence and allows the enforcing authority to respond to non-compliance in a proportionate way.
- 4.3 Enforcement action is currently defined in the Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009, which has been amended to keep pace with new legislation. The Order lists individual notices under specified legislation as well as some more generic provisions.
- 4.4 This approach presents two significant difficulties. First, it makes the definition complicated and difficult to understand, particularly as the Order has now been amended several times. Second, difficulty arises when new legislation is enacted and included in Primary Authority, for which the current definition of enforcement action is inadequate. This means that an amending regulation must be drafted, consulted on and enacted before the new legislation is included in Primary Authority. This is inefficient and creates a time lag in between new legislation being enacted and its inclusion in Primary Authority, this causes uncertainty for business and regulators.
- 4.5 We have previously considered creating a more generic definition of enforcement action to provide clarity,² reduce administrative burden and ensure new types of enforcement action are automatically included. The proposed regulation would create a more generic definition of enforcement action, such as notices and prohibition orders, and consolidates previous amendments to the original Order. This means it is

² Extending and Simplifying Primary Authority: Keeping the UK Competitive 2015, para 4.2-4.7 URN: BIS/15/423

more easily understood, and also reduces the need to make amendments in future to cater for new types of enforcement action. The proposed changes do not alter the types of enforcement action included in (or excluded from) Primary Authority. The existing exclusions for licensing activity, including for gambling and alcohol licensing, are maintained.

Consultation questions

- Q5. Is the proposed regulation sufficiently clear as to what constitutes enforcement action, and what is not enforcement action? Is anything missing?
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- Q6. Is the proposed regulation sufficiently clear as to the types of enforcement action which can be notified to the primary authority retrospectively? Is anything missing?
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Determinations: updating requirements for applications

- 5.1 RESA enables questions that arise in relation to proposed enforcement action against businesses in Primary Authority to be referred to the Secretary of State for determination. The determination process is a two-stage process which requires the applicant to first obtain consent for the matter to be referred to the Secretary of State for determination. Should consent to refer the matter be granted, the Secretary of State then determines the matter. It is an essential mechanism for resolving disputes in relation to enforcement action and provides confidence for users of Primary Authority.
- 5.2 The statutory process for determinations is currently set out in RESA Schedule 4 and the Co-ordination of Regulatory Enforcement Action (Procedure for References to LBRO) Order 2009. Both RESA and the Order set out requirements which applicants must follow.
- 5.3 The proposed regulation sets out the determinations process and the requirements for applications. There is no intent to change, simply to maintain the current approach, updating it to reflect the new legislation.

Consultation questions

- Q7. Do you have any comments on the proposed regulation in relation to determinations?
-

Proposal to replace the categories system

Current system: categories

- 6.1 The regulatory scope of Primary Authority is defined in terms of ‘relevant functions’. These functions are listed in Section 4(3) and Schedule 3 of the Regulatory Enforcement and Sanctions Act 2008 for England and Wales. For Scotland and Northern Ireland, the relevant functions are listed in the Co-ordination of Regulatory Enforcement (Regulatory Functions in Scotland and Northern Ireland) Order 2009. In Scotland and Northern Ireland, Primary Authority applies to reserved functions only. In Wales, Primary Authority applies to the same regulatory functions as in England, even though some of these functions are devolved.
- 6.2 For administrative purposes, relevant functions have been grouped into categories of regulation (such as ‘food standards’ and ‘fair trading’) with the scope of partnerships defined by the category(ies) upon which the partnership is nominated, at the request of the business and primary authority. There are currently 22 categories,³ with the geographic application of individual categories varying according to devolution. A business is able to partner with different primary authorities for different categories, but can only be partnered with one primary authority for any given category.
- 6.3 There has been a small increase in the number of categories since Primary Authority began in 2009. The additional categories were created to reflect the extension of Primary Authority into new areas of regulation, and to allow for differences in the application of some new legislation across England and Wales, due to devolution. If the current categories system was to continue, it is likely that a significant increase in categories would be required in future, because:
- further devolution of areas of competence to Welsh Government means that more categories will be needed to cater for a consequent increase in Welsh legislation where only Welsh local authorities can be primary authorities for Welsh legislation; and
 - as Primary Authority continues to grow, it is likely that new categories will be needed to cater for the inclusion of new relevant functions.

³ <https://primaryauthorityregister.info/par/images/documents/pa-categories.pdf>

Categories are unsustainable

- 6.4 It is believed that the number of categories would need to increase and this would create an unnecessarily complex system for Primary Authority, and could restrict the ability of Primary Authority to meet the needs of business.
- 6.5 The categories system, originally established to simplify Primary Authority, is now causing complications. As partnerships grow and seek to include additional regulatory functions, an administrative burden is created by the need for requests to be submitted to the Secretary of State to add categories to partnerships.
- 6.6 For these reasons, the current categories system is unsustainable and must be replaced by an alternative arrangement

Replacing categories with a new system based on the responsibilities of local authorities

- 6.7 It is proposed that from 1 October 2017, the categories system will be removed. Instead, the scope of partnerships will be determined by the regulatory responsibilities of the local authority. Partnerships will cover all relevant functions within the local authority's responsibilities.
- 6.8 This approach will enable primary authorities to provide a comprehensive service to businesses. Once nominated, each partnership will be able to choose the matters on which advice will be provided, with the only limitation being the primary authority's responsibilities. The current requirement to request the Secretary of State to add categories to an existing partnership will be removed. This approach would take away the uncertainty as to whether a particular relevant function is included in a partnership as it will no longer be necessary to determine whether a particular regulation fits within a category.
- 6.9 Some boundaries will be needed to cater for devolution. Only Welsh local authorities will be able to provide Primary Authority services in relation to Welsh legislation, and vice versa. Businesses operating across England and Wales may therefore wish to partner with an English primary authority and a Welsh primary authority in order to ensure access to advice in both nations. Local authorities in Scotland and Northern Ireland will remain able to provide Primary Authority only for relevant functions related to reserved matters.

- 6.10 It is expected that all existing partnerships, with agreement of both parties, will move to the new system on 1 October 2017. For a small number of existing partnerships, the proposed new system may require some adjustments. Regulatory Delivery will liaise with these partnerships to make these arrangements in advance of the categories system being removed.
- 6.11 The Primary Authority Register will continue to provide a publicly available list of partnerships and a secure area for access by primary and enforcing authorities. Measures are being taken as part of this to ensure that enforcement officers will be easily able to ascertain who is partnered with whom and for what functions.

Consultation questions

- Q8. Do you have any comments on the proposal to replace categories with a system based on the regulatory scope of the local authority ?
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- Q9. If you are in a partnership, or considering having a partnership, how will these changes affect you? Please focus on any benefits or disadvantages.
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