THE SME OMBUDSMAN:

INTERNATIONAL PROFILES AND A POLICY PROPOSAL FOR MEXICO

This document examines the function of an SME ombudsman in supporting SMEs in their relationships with government. It examines approaches being used in the United States, Canada, Germany and the Netherlands. It identifies lessons for other countries and offers a threefold classification of SME ombudsman offices – the redress model, the clearing house model and the advocacy model. The report also provides a policy proposal for Mexico, which provided a voluntary contribution to fund the work as part of a follow up to the WPSMEE’s country review of SME and entrepreneurship policies in Mexico. This version has been declassified under the written procedure.

Marco Marchese, Economist, CFE, marco.marchese@oecd.org; Jonathan Potter, Senior Economist, CFE, jonathan.potter@oecd.org.
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EXECUTIVE SUMMARY

1. Following the completion of an OECD review of SME and entrepreneurship issues and policies in Mexico in 2012, the Mexican Institute of the Entrepreneur (i.e. Instituto Nacional del Emprendedor), part of the national Ministry of the Economy, expressed an interest in comparing different examples of SME ombudsman offices across OECD countries and exploring the scope for the establishment of a similar office in Mexico. Following this request\(^1\), the OECD Centre for Entrepreneurship, SMEs and Local Development undertook in 2014 an international comparative analysis of selected cases from OECD countries of ombudsman offices whose functions were relevant to small and medium-sized enterprises (SMEs). The examined cases included: i) the US Small Business Administration’s Office of Advocacy; ii) the US Small Business Administration’s Office of the National Ombudsman; iii) specialised federal ombudsman services relevant to SMEs in Canada (i.e. banking services, taxpayers, and public procurement); iv) state-level examples of SME ombudsman in Germany (i.e. the SME Clearing House of North Rhine-Westphalia and Baden-Württemberg’s government representative for SMEs); v) the Netherlands’ example of the EU SME Envoy which each EU member state needs to have. The comparative analysis was complemented by a fact-finding mission by the OECD Secretariat in Mexico in February 2014. The aim of this mission was to explore existing institutional arrangements in Mexico with responsibilities similar to those of ombudsman offices, as well as the views of government and private-sector stakeholders on the need and possible scope of action for an SME ombudsman in Mexico. The main findings from this exercise are presented below. The final version of the report will include the country case studies.

2. Ombudsmen in OECD countries have a tradition which dates back to the 1960s. However, the establishment of SME-dedicated ombudsmen is a more recent trend which has developed along three main models: redress model; clearing house model; and advocacy model. Countries interested in introducing an SME ombudsman are, therefore, faced with a first important choice about which model is most relevant to them.

3. Broadly speaking, for countries which already have in place an effective legal reparation system, even if this is generic and not specifically tailored to SMEs, a redress-type of SME ombudsman office may not be justified to the extent that it can result in institutional overlaps with other government offices with similar responsibilities. For example, the services of Ombudsman office with a focus on specific themes such as banking services or tax payment are available to everyone, including small business owners, who would find it difficult to understand where to seek reparation in case of maladministration if there were also an SME ombudsman office with a strong legal remediation mandate.

4. The advocacy model and the clearing-house model are, on the other hand, particularly appealing to countries where SMEs have not been at the top of the policy agenda and, as a result, business regulations have traditionally not been sensitive to the needs of SMEs. The origins of the US Office of Advocacy, for example, date from the mid-1970s when there was a strong feeling in the American government that the interests of small businesses were not adequately represented in legislation owing to the clout of large corporations.

\(^{1}\) Funding for the study was provided by the Mexican Institute of the Entrepreneur.
5. Some of the functions described above can co-exist, but others can hardly be performed together by the same SME ombudsman office. For example, an SME ombudsman can easily undertake advocacy and clearing-house functions at the same time, since countries where SMEs have not been a policy priority are also those where national legislation is less likely to have been crafted with the needs of SMEs in mind. However, redress and advocacy roles are too different to be played by the same government officer. While a redress-oriented SME ombudsman need, most of all, to be independent from the government and be able to provide transparent and neutral answers to legal complaints filled by individual entrepreneurs, an advocacy-driven SME ombudsman will rather act as the partisan of SMEs within the government and support legislation which is favourable to SMEs in different policy fields such as competition policy, access to finance, etc.

6. Design considerations are also important when setting up an SME ombudsman. Independence will buttress the credibility of the SME ombudsman among small business owners, but this will in turn depend on the legal status of the office, a clear mandate and budget and high-level political endorsement. Independence will be the highest when the responsibilities and scope of action of the SME Ombudsman are set in stone by a national law and the ombudsman is appointed directly by the highest political figure at the national level. Independence will be of greatest importance to the redress-type of SME ombudsman, who needs to be perceived as autonomous from the government, but it will also be relevant for the clearing-house type who will have to be free to express concerns about reforms which raise the cost of doing business for SMEs. Moreover, countries with a decentralised system of government will also have to consider the costs and benefits of replicating this structure within the SME ombudsman office. On the one hand, local offices would allow the SME Ombudsman to be accessible by a larger number of small business owners across the country and thereby strengthen his/her “universality”, which has traditionally been an important characteristic of SME ombudsman. On the other hand, a decentralised structure requires greater policy coordination and bigger funding.

7. The report goes on to argue that in the current policy framework of Mexico – where competition continues to be stifled in many sectors of the economy and the interest in SME policy is relatively new – an SME ombudsman office which combines advocacy and “clearing house” functions can help increase the political visibility of SME policies, give a voice to small business within the government and promote reforms which set a level playing field for all companies. “Clearing house” functions, referring to regulatory impact assessment (RIA) could be interpreted in two different ways: i) a light-touch second-level analysis of the comprehensive RIA of national legislation carried out by the Federal Commission for Regulatory Improvement (COFEMER), with a narrow focus on re-examining in greater detail the implications of new legislation for SMEs; ii) a more resource-intensive first-hand assessment of the impact of new regulations on SMEs through the use of standard methodologies such as the standard cost model (still in collaboration with COFEMER to avoid institutional overlaps). On the other hand, there does not seem to be the need in Mexico for a redress-model of SME ombudsman who seek legal remediation for entrepreneurs victim of maladministration. In fact, there are already in the country a number of government institutions which play similar roles and to which small business owners can refer to in case they perceive to have been treated unfairly by the government.

8. As elsewhere, high-level political endorsement and a clear legal mandate and budget will heighten the institutional profile of the SME ombudsman in Mexico. It would therefore be ideal for the Mexican office of the SME ombudsman to be created by a national law setting its competences and scope of action and for the ombudsman himself/herself to be appointed by the President of the country, with this decision finally ratified by the Parliament. Alternatively, a second-best scenario would be to give the SME ombudsman office the same political autonomy granted to INADEM (i.e. a decentralised administrative body), implying that the ombudsman would directly report to the Minister of Economy. By contrast, any internal solution that would place the office of the SME ombudsman within INADEM would restrain its independence and scope of action.
9. Finally, it is suggested that the Mexican office of the SME ombudsman start small and eventually grow later, in order to be flexible and adjust to the needs and requests of the small business community as they arise from the field. The simplest approach would see the SME ombudsman restrain himself/herself to performing a role of advocacy at the federal level, whereas more ambitious options would encompass “clearing house” functions and the creation of a small network of five/six regional ombudsmen assisting the federal office in outreach work at the state level. Responsibilities and geographical outreach can expand once the initial model has proven valuable to small business owners and the office has built its reputation in the national policy system.
CHAPTER 1
MODELS OF SME OMBUDSMAN OFFICES

The role of the ombudsman: traditional views and definitions

10. Ombudsmen are a longstanding tradition in many OECD countries, especially in Northern America and Europe. The first country to introduce this function was Sweden in the 1960s, and the concept subsequently spread rapidly. However, there has been wide variation in the way the office has been implemented with respect to powers, range of responsibilities, and governance.

11. The role of the ombudsman has traditionally been associated with a government officer, generally independent from other government departments, who investigates individual cases of injustice caused by maladministration and seeks improvement in the initial decision-making process or in the way complaints are internally handled. In this view, the ombudsman is a powerful and independent watchdog who monitors government behaviour and acts as an advocate for those affected by mismanagement and maladministration.

12. Different definitions of the office of ombudsmen have been suggested. The International Bar Association (Allen, 1974) defines an ombudsman as: “an office provided by the constitution or by action of the legislature or parliament and headed by an independent high level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and has power to investigate, recommend corrective actions and issue reports”. The American Bar Association (2001) points that “an ombudsman is a person who is authorised to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombudsman’s defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially”. A more recent definition highlights the importance of the ombudsman’s position between the legislative and executive branches of government, stressing that “the ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activities of the executive branch. The ombudsman receives and impartially investigates complaints from the public concerning the conduct of government administration (... The general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public” (Reif, 2004).

13. These definitions point to three key features of the ombudsman’s office. First, the ombudsman is appointed and empowered by the legislature and headed by an independent individual who is responsible to parliament. Second, the ombudsman takes action in response to grievances from individuals or acts of his own initiative to remedy perceived or actual injustices. Third, the ombudsman has access to sufficient investigative capabilities to enable an independent evaluation of any grievance or complaint.

14. However, in most situations an ombudsman has no binding powers to resolve disputes. Instead, where he finds that a complaint is justified, he criticizes, publicises, recommends corrective measures and submits annual and/or special reports to the legislature. The power of the ombudsman, therefore, does not hinge on sanctions but on criticisms, publicity and persuasions (Abedin, 2011).
A new trend: the emergence of SME ombudsmen

Rationale and models

In recent years, the notion of an ombudsman has been extended beyond the traditional one to embrace other areas and sectors, including the private sector. Corporate ombudsmen have, for example, emerged to settle disputes within a business corporation on behalf of internal complainants or external customers. Hybrid roles in which an ombudsman’s responsibilities span private and public sector activities have also sprouted; an example is the Canadian Ombudsman for Banking Services and Investment (OBSI).

In the public sector one of the most interesting trends has been the emergence of Small and Medium Enterprises (SME) ombudsmen, that is, ombudsmen whose specific mission is to protect the rights of SME owners, address their individual complaints of maladministration or unfair law enforcement, and more broadly support legislation that is favourable to small business development.

The establishment of SME ombudsmen has been the outcome of two major recognitions by governments. The first is the growing understanding of the weight of SMEs in the economy not only in terms of sheer number of firms, but also of employment creation and value added generation. Therefore, anything that can be done to release the potential for small business growth, such as reducing red tape and avoiding overly-complex regulation, has potentially substantial economic benefits. The second recognition is that in spite of the key contribution to employment and economic growth, when compared with large companies, SME are more affected by market failures (e.g. information asymmetries in credit markets), are disproportionately impacted by administrative burdens, and are less able to protect themselves from unfair law enforcement by state organisations or unfair behaviour of large corporations. Moreover, in political terms, the creation of a small business ombudsman has been attractive because it can be portrayed to voters as supporting the underdog small business against the interests of the government and the corporate world.

The case studies reviewed in this report are illustrative of the different rationales behind the SME ombudsman offices worldwide. In the United States, for example, the Small Business Administration (SBA) Office of the National Ombudsman (ONO) was set up as part of the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) with a view to addressing complaints by small business owners in relation to unfair enforcement of existing federal rules and regulations. Likewise, Canada’s ombudsmen for banking services and investments, taxpayers and public procurement have all important sections in charge with handling complaints respectively from users of financial services, taxpayers, and suppliers of public contracts. While these offices are not exclusively tailored to SMEs, small businesses are major users of their services.

The objective of protecting the rights of SMEs has also taken other forms than the mere handling of individual complaints by small business owners. For example, some governments have given to the SME ombudsman the prime role of assessing the impact of new legislation on SMEs. This is the case of the German state of North-Rhine Westphalia, where work flow starts with a legislative proposal or assessment request from a department, moves on to a confidential investigative and consultative stage, and ends with a public report that assesses the effects of legislation on SMEs (costs, administrative effort and employment) and makes recommendations for improvement that should not, however, challenge the fundamental objectives of the legislative project. Similarly, Canada’s Office of the Taxpayers Ombudsman (OTO) has requested the Canadian Revenue Agency (CRA) to comply with five commitments to SMEs: i) minimise compliance costs; ii) working with other orders of government to streamline service; iii) provide service offerings that best meet the needs of SMEs; iv) carry out outreach activities to SME owners; v) and explain the agency behaviour to small business owners.

2. Examples of unfair law enforcement are repetitive audits or inspections, unreasonable fines and penalties, and threats or acts of retaliation by government agencies.
Finally, still other countries have taken an even broader perspective on the functions of the SME ombudsman, interpreting this office as the champion of SME policies “within the government and by the government”, according to the definition by the Chief Counsel for Advocacy of the US SBA’s Office of Advocacy. Here, the main role of the ombudsman is to make the case for policies and changes in legislation that are favourable to small business development, provide ex-ante recommendations on draft legislation from the viewpoint of the possible impact on SMEs, train officials on how to draft SME-friendly legislation and, more generally, act as a liaison between the government and the small business community.

Three main models of SME ombudsmen, therefore, emerge:

- **Redress model** – similar to the traditional view of the ombudsman concept, this type of SME ombudsman investigates the grievances of individual SMEs and, where appropriate, seeks redress. Key attributes of this type of ombudsman are independence, accessibility to all SMEs with potential grievances, and investigative capability. Examples are the SBA Office of the National Ombudsman (ONO) in the United States and Canada’s Ombudsmen for Banking Services and Investment (OBSI), Taxpayers and, to a lesser extent, Public Procurement.

- **Clearing house model** – the focus of the SME ombudsman is here on the implications of new or existing legislation for SMEs. The impact analysis is not ex-ante before the legislation is even drafted – which is a role more typical of advocacy – but rather ex-post before legislation is enforced. Methodologies such as the SME test or the standard cost model are common practice in this model, which generally leads to recommendations for the revision of legislation. An example is the North Rhine-Westphalia clearing house, which provides advice on legislation to ensure that government departments formulate SME-friendly laws, rules and regulations.

- **Advocacy model** – in this approach the ombudsman becomes the champion or public voice for SMEs within the government system. An advocacy-driven ombudsman may respond to issues highlighted by individual firms, representative organisations, data analysis or new legislative or regulatory proposals. The objective here is not to seek redress for individual SMEs but instead to reduce barriers to SME growth and development within the entrepreneurial eco-system. Independence is not as important in this case as the perception that the Ombudsman is on the ‘side’ of small companies. Accessibility and capacity remains important, however. Illustrative of this model is the US SBA Office of Advocacy.

Some of these models can be combined easily in the everyday practice of an SME ombudsman’s office. For example, SME envoys in EU member states monitor national policies and actions with an impact on SMEs and develop methodologies to reduce administrative and regulatory burdens on small business, but also inform small business owners about new legislation and collect feedbacks from the small business community to inform policy making at the national level.

However, other roles are more alternative than complementary. For example, a redress-type SME ombudsman has to maintain his independence if the results of his investigations are to be accepted by both parties. Alternatively, playing an effective advocacy role requires partiality and a more proactive approach in which the ombudsman has the ability to initiate investigations on issues that he reckons undermine SME development. Moreover, while in the redress model the SME ombudsman focuses on situations of injustice

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3. The standard cost model measures the impact of legislation on business in terms of financial costs, number of procedures and number of days to fulfil all procedures.
and maladministration that affect individual firms, the advocacy model has an opposite approach where benefits are sought for the whole SME population through changes in legislation.

**Design considerations**

22. Besides the choice of the model, governments interested in introducing an SME ombudsman office in their policy system are faced with some important choices. One concerns the legal status and political endorsement of the ombudsman, which will strongly affect his political clout and independence. Another involves the governance of the ombudsman, including whether a network of local-level ombudsmen should be established to ensure better communication between the centre and the periphery and a better outreach of the national office to local small business communities.

**Legal status and political endorsement**

23. International evidence suggests that the strongest SME ombudsmen are those that have a clear legal status, for example through the means of a government decree or parliamentary Act. This is shown by the US SBA Office of Advocacy, whose legal authority exists in its founding legal statutes and subsequent amendments and additions. Several provisions to enhance the Office’s independence were enacted by the American Congress in 1999, when the Independent Office of Advocacy Act was approved to grant special hiring procedures, separate budget, and separate organizational structure to the SBA Office of Advocacy. Similarly, in Canada the establishments of the Taxpayer Ombudsman and of the Public Procurement Ombudsman are also set in stone of national legislation, which give the two offices clear roles and functions. In Germany, the North Rhine-Westphalia SME Clearing House was established as part of a broader package of legislation aimed at the support of SMEs. In this respect, SME envoys in EU member countries are the exception, as they are directly appointed by Prime Ministers to whom they report without such appointments going through a Parliament’s vote, which makes EU SME envoys less independent than, for example, the US SBA Chief Counsel for Advocacy. The experience of the Netherlands, reviewed in this report, suggest that SME envoys, who are generally high-level civil servants, play a useful role of coordination of the whole SME policy system but are mere executors of decisions taken at the Ministerial level.

24. Independence, especially the ability to be critical of the government, is crucial for the “redress” and “clearing house” models, which would make little sense if they were perceived by entrepreneurs and small business owners to be too “cosy” with the government. However, to a lesser extent, independence is also relevant for advocacy-oriented ombudsmen, who should be the champions of SMEs but should also be able to comment and reprehend any legislation which creates new barriers for small businesses.

25. One of the best ways to guarantee the independence of an ombudsman office is through the creation of separated and inviolable budgets. For example, in the United States, the SBA’s Office of Advocacy has its own separate budget line from the rest of the Small Business Administration, while in North Rhine Westphalia the Clearing House office is run by the regional Association of Chambers of Industry and Commerce, but staff is paid by the Ministry of Economic Affairs.

26. The type of political endorsement will also affect the status of the SME ombudsman by ensuring that other government departments are responsive to his requests and pay appropriate attention to his recommendations and reports. In this respect, an eventual appointment of the SME ombudsman through a Presidential act ratified by the Parliament will grant the highest possible political endorsement to the ombudsman, which will greatly influence the scope and nature of his action. The US SBA Office of Advocacy is the closest profile to this case thanks to his direct appointment by the President and confirmation by the senate. By contrast, an appointment by any other government minister not backed by a legislative Act will make the scope of action of the ombudsman more limited. Canada’s specialised
ombudsmen dedicated to the protection of individuals, including small business owners, in the use of financial services, access to public procurement or payment of taxes are illustrative of this restriction.

Geographical scope and coverage

27. In most countries, responsibility for policy development and implementation has both federal and local elements, although the extent of local policy influence varies markedly. In systems with a considerable degree of state autonomy, ombudsman offices have tended to develop a structure which mirrors the broader policy framework, i.e. a dual national and localised structure. In the United States, for example, the SBA Office of Advocacy is supported by a network of ten Regional Advocates who serve as the “eyes and ears on Main Street” of the office. These Regional Advocates are co-located with SBA Regional Offices but maintain an independent status and authority. Their daily duties involve outreach to regional community leaders, such as small business owners, bankers, or economic development officials, and report on regional business trends or issues of special interest to local small business owners. Likewise, in some EU countries SME envoys have created a network of regional SME envoys to be informed about place-specific barriers to SME development, to spread information about national policies and programmes and facilitate the diffusion of policy best practices at the local level, and to monitor regional laws of interest for micro-enterprises and SMEs.

28. On other occasions, however, state-level organisations have been created but with very little relationships with the national ombudsman. In the United States, there are several redress-type SME ombudsmen across the country, but they are not related to the SBA ONO. State-level SME ombudsman are responsible for addressing problems that arise from misinterpretation or ill-enforcement of state legislation, whereas the SBA ONO only deals with complaints concerning maladministration and unfair law implementation at the federal level.
References


American Bar Association (2001), Standards for the Establishment and operation of Ombudsman offices.

CHAPTER 2

A POLICY PROPOSAL FOR AN SME OMBUDSMAN IN MEXICO

Why is an SME ombudsman needed in Mexico?

29. The recent OECD Review of SME and Entrepreneurship Policies in Mexico (OECD, 2012) concluded that although more attention had been given by the Mexican government to new and small enterprises during the period 2000-2010, including through an increase in SME policy funding and the introduction of new programmes for nascent entrepreneurs and micro-enterprises, SME and entrepreneurship development was still held back by barriers of legal, financial and human capital nature. For example, the OECD study reported how widespread informality, high tax rates, crime, corruption, the obtainment of licenses and permits, and access to land, were all perceived by entrepreneurs as bigger problems in Mexico than in the rest of the Latin American and Caribbean region (i.e. LAC average value). In particular, the practices of the informal sector were regarded as one of the top three barriers by firms of all sizes, while small firms (below 20 employees) also expressed unease with the overall tax rate and access to finance, medium firms (20-99 employees) with crime and the tax rate, and large firms (100 or more employees) with getting licenses and crime. A more recent survey carried out in 2013 by the National Institute for the Entrepreneur (i.e. Instituto Nacional del Emprendedor – INADEM) confirmed most of these issues as major impediments for entrepreneurs, who reported corruption, crime, the informal economy and difficult access to finance to be their biggest concerns. Interestingly, though, lack of government support, access to public procurement contracts, and dealing with taxes, were not major worries among the respondents.

Figure 1. Obstacles to all business in Mexico

As a percentage of firms identifying the main problems as an obstacle

Notes: Regional and world averages of indicators are computed by taking a simple average of country-level point estimates. For each economy, only the latest available year of survey data is used in this computation.
30. The OECD review, together with a more recent OECD fact-finding mission in Mexico (10-14 February 2014), also confirmed that competition is not adequately developed in a large number of economic sectors in Mexico. This applies not only to network industries such as telecommunications and utilities, which are typically less open to competition than others owing to high entry costs and major state involvement, but also to sectors such as retailing and banking typically more driven by competition. Market concentration in retailing results in a downward pressure on prices for SME suppliers and micro-enterprises located in proximity of large retailers, while the dominance of a few large groups in the banking sector has led to unfavourable loan terms for SMEs (i.e. high interest rates and collateral requirements) and very low levels of bank credit.

![Figure 2. Domestic credit provided by the banking system](image)

**Figure 2. Domestic credit provided by the banking system**

As a percentage of GDP

<table>
<thead>
<tr>
<th>Year</th>
<th>Colombia</th>
<th>Brazil</th>
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<th>LAC countries</th>
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Note: Domestic credit provided by banking sector refers to all credit to various sectors on a gross basis, except to the central government, which is net. The banking sector includes monetary authorities, deposit money banks, and other banking institutions for which data are available (definition from World Bank 2011).

Source: World Development Indicators Database, World Bank

31. Recent years have brought changes that bode well for Mexican new and small firms. First, entrepreneurship and SME policies have both higher political visibility and bigger budgets. While the responsibility for these policies was previously within the Undersecretary Office of the Ministry of Economy, it is today under the responsibility of a new “decentralised administrative body” (i.e. INADEM) whose President reports directly to the Minister of Economy. The programme budget of INADEM, compared with the previous SME Undersecretary Office, has increased by nearly three times. If the budget of the SME Fund had been of MXN pesos 9.7 billion for the whole period 2009-2011, INADEM’s budget for 2014 is of MXN pesos 9.4 billion. Increased visibility and budget are consistent with the general political discourse of making SME development a long-term policy objective, what Mexicans call una política de estado.

32. Competition policy has also become a major priority of the Mexican government, whose objective is to lower prices in key services such as energy and telecommunications that affect the life of individuals and businesses alike. The National Commission for Competition (i.e. Comisión Federal de

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4. The National Institute of the Entrepreneur (INADEM) was established in January 2013 to manage policies and programme measures aimed at the support of entrepreneurs and the SME sector.
Competencia Económica – COFECE) has been strengthened and given strong anti-trust powers such as the ability to impose fines on enterprises found guilty of unfair trade practices (e.g. price setting) or to grant permits and licenses provided that they do not distort market competition. COFECE has also been upgraded from a “decentralised government body” to a “constitutional autonomous body”, which entails juridical personality and inviolable budget, both of which strengthen its political autonomy. In a similar vein, a new regulator for the telecommunications sector (i.e. Instituto Federal de Telecomunicaciones – IFETEL) has been established to open up a sector that has traditionally been dominated by a handful of large corporations, while new banks have been allowed to operate by the Mexican Commission for the Banking Sector and Stock Market to increase competition in the banking industry.

33. These recent trends point to a new interest by Mexico in entrepreneurship and SMEs, which are seen for the first time as a core element of a national growth strategy that intends to democratise productivity through a simpler tax system, the respect of the rule of law, less informality, more competition and better access to finance.

34. Given this background, where the interest for entrepreneurship and SME development is still relatively new, a role of advocacy for small business within the government would help make strides in the promotion of legislation and programme measures favourable to new and small firms. This role could effectively be played by an SME Ombudsman. This view is shared by most of the stakeholders that the OECD expert panel interviewed during the week of the 10-14 February in Mexico City. There were some exceptions, with a few stakeholders who did not think that there was a need for an SME ombudsman in the existing policy framework, but the majority convened that such as office would help make a better case for SME-friendly policies within the federal government. To some extent, the situation of Mexico is similar to that of the United States in the 1970s when the Small Business Administration (SBA) Office of Advocacy was made independent by the lawmaker to better represent the interests of small business within the government and to counterbalance the clout of corporate lobbying in key policy areas such as government contracting, employment laws or regulatory flexibility.5

35. By contrast, most of the interviewed stakeholders did not see the need for a redress-type of SME ombudsman handling individual complaints filed by entrepreneurs, the main reasons being that there is already a host of redress mechanisms in place in Mexico to which entrepreneurs can appeal if they think to have been victims of maladministration or unfair law enforcement. Further desk research cemented this view in the OECD expert panel, who believes that a redress-type of SME ombudsman would not be the most beneficial in the current Mexican policy framework. The responsibilities typical of this model of SME ombudsman would overlap with those of other specialised ombudsman-like offices which, albeit not exclusively dedicated to SMEs, are accessible by small business owners in policy areas such as public procurement and financial services.

36. Finally, based on the results of the fact-finding mission, the OECD panel came to consider that a future SME Ombudsman would better serve the needs of entrepreneurs and small business owners if he/she were to combine the role of advocacy with one of “clearing house” assessing the impact of new legislation on SMEs. In spite of recent progress, doing business in Mexico continues to be difficult owing to barriers of a legal and regulatory nature. In 2014, Mexico ranked 53rd, down from 51st in 2013, in the World Bank’s Doing Business index, with more severe problems in the areas of ‘registering property’, ‘getting electricity’, and ‘paying taxes’. As a result, there is scope for an SME ombudsman in Mexico also to assess

5. The Office of Advocacy was mandated with three activities at that time, all of which were clearly specified in its legal authorities: i) represent the interests of SMEs in the development of new federal regulations; ii) produce research on the contribution of small enterprises to the economy and on how changes in legislation could improve the life of small business; iii) carry out outreach activity towards the small business community and act as a contact point between the small business community and federal policy makers.
the impact of new legislation on SME development. There is an important difference between the research activity that is behind the role of advocacy and the evaluation work related to the “clearing house” function, since the latter would be of a more technical nature and focused on the cost implications of forthcoming legislation. The main goal of the “clearing house” role would be to give recommendations that improve the impact of legislation on start-ups and small businesses without thwarting its original objectives. Not every single piece of legislation should be assessed, but only the law projects with a potential significant financial or administrative impact on SMEs.

Further considerations on the role of the SME ombudsman in Mexico

Advocacy should be a priority area

37. Advocacy for SME-friendly policies and regulations was considered by the interviewed stakeholders as the core task an SME ombudsman should perform in Mexico. The consensus was that such a role would not find any opposition within the federal government system owing to the high-priority that the President of Mexico has given to democratising productivity through the development of the SME sector. However, more opposition, it was believed, could arise at the state level, where governors are sensitive about the prerogatives the Mexican federal Constitution gives to states and tend to oppose federal interventions if they fall close to policy areas of their competence. It is therefore suggested that SME ombudsman receive a Presidential mandate ratified by the Parliament, to give him the authority to intervene both at the federal and state level like COFECE does in sphere of competition policy. The rest of this section provides an overview of advocacy actions that the SME ombudsman could undertake as part of his functions, both at federal and state level.

Presidential high-level conferences

38. One of the first and possibly easiest ways to create momentum and push forward pro-SME reforms would be through the organisation of Presidential high-level conferences on SME and entrepreneurship policy. To mark the importance of the event the Presidential conference should be every three or five years, rather than every year. It should also be preceded by a series of events at the national and state levels that would pave the way to the final conference where the President of Mexico would address the national small business community. Preparatory events at the national and state levels would serve to collect first-hand information from small business owners across the country about the key problems they experience in the everyday management of their business. The top three/five reported problems could then become the subject of further investigation by the office of the SME ombudsman, who would eventually submit to the government reform proposals aimed at solving these problems. Finally, at the high-level Presidential conference, the President could publicly announce one-to-three reforms that would be implemented in the following year by his government to tackle the most pressing problems emerged from the itinerary consultation process with the SME sector.

Box 1. The White House Conference on Small Business

One of the main activities of the US SBA Office of Advocacy, at least in its early life, was the organisation of the White House Conference on Small Business, which was held on three occasions (1980, 1986, and 1995). These large events typically included a year of regional hearings and conferences, which culminated in a Washington DC-based conference that included attendance by the President and other key Administration leaders. They also produced an agenda for action, which typically led to new legislative proposals related to small business concerns. The last White House Conference, held in 1995, engaged more than 20 000 business owners who debated more than 3 000 different policy proposals.
39. Mexico introduced a major tax reform at the end of 2013 to increase fiscal revenues and finance a stimulus package that intends to trigger stronger growth rates than those recorded more recently. The fiscal reform was a much-needed step towards a “fairer Mexico”, since Mexico has the lowest tax-take (20% of the national GDP) and the second-lowest tax wedge on the average wage earner (19.2%) of all OECD countries. Some of the points of the reform are SME-neutral, such as the introduction of a tax on capital gains and dividends that has nonetheless been set at a rate low enough (10%) to avoid stifling the nascent Mexican stock market. Other measures such as the opening of the oil and gas industry to foreign investors may be beneficial to SME suppliers which, thanks to more competition and increased demand, should in principle fetch better prices.

40. However, it is also believed that the reform could have done more to enlarge the tax base by involving more actively micro-enterprises and tackling the informal sector, which involves 60% of the Mexican labour force and accounts for 30% of the national GDP (Schneider, 2010). This problem is aggravated by the fact that Mexico has observed over the last ten years a widening gap between productivity in large firms, which increased by an annual 5.8% during the period 1999-2009, and productivity in small firms, which over the same time span declined by an annual rate of 6.5%. Worryingly, the share of employment in micro firms, which are generally fully or partly informal, increased from 39% to 42% during this time. The establishment of a new legal profile of self-employment enjoying a special tax regime could help pull more Mexican own-account workers into the formal sector, although penalties in case of full defiance of the law should be severe enough to represent a disincentive. The French legal status of the “auto-entrepreneur” provides a good example of reform that goes in this direction.

**Box 2. The French "auto-entrepreneur" system**

The “Auto-entrepreneur” came into effect in the Law on Economic Modernization on 1 January 2009 and aims to promote the legal recognition of self-employment, simplify administrative procedures for self-employed individuals (e.g. lower bookkeeping obligations), and reduce their social and fiscal contributions. For example, auto-entrepreneurs are exempt from registering with the national business registry and have much lower bookkeeping obligations.

An auto-entrepreneur is defined as a person engaged in a business activity as their main source of income, or as a supplementary source of income. The conditions for operating as an auto-entrepreneur are having an annual gross turnover less than EUR 80 300 for commercial ventures (i.e. purchase and resale of goods, services to be consumed on the premises & accommodation) and EUR 32 100 for services (excluding services to be consumed on the premises & accommodation). The scheme aims to encourage people to start businesses by removing regulatory obstacles to business start-up and growth. This is particularly helpful for disadvantaged groups and marginal workers, such as those in the informal economy, that are impacted more by institutional barriers than mainstream entrepreneurs.

The scheme was able to bring unemployed people into the workforce as approximately 30% of auto-entrepreneurs were previously unemployed and 12% had no professional experience. Moreover, 6 % were retired, and 5% were students. The scheme has also had an impact on supporting part-time entrepreneurs, as 40% of auto-entrepreneurs were running part-time businesses intended to integrate income from wage employment. Moreover, three-quarters of auto-entrepreneurs indicated that they would not have started a business had it not been for this new regime.

*Source: OECD/EC (2013)*

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41. In addition, while the increase in the income top tax rates was probably needed to compensate for declining revenues from the oil sector, it might discourage investments by those medium-sized entrepreneurs who do not run incorporated business and whose business-generated profits are only subject to the income tax, thus penalising economic growth.

42. Business taxation has been at the core of the policy debate in Mexico. In this debate, the SME ombudsman could be an influential voice, championing reforms that create an incentive for the informal micro-enterprise sector to become formal and for the formal SME sector to be able to invest and grow. Whenever possible this role of advocacy should be evidence-based, which is why it would be relevant for the office of the SME ombudsman to have the capacity to undertake legal and economic research, either internally or externally (by contracting out research work to universities and research institutes).

Business regulations and competition

43. The Mexican government has placed much emphasis on boosting competition and simplifying regulations to renew with economic growth. This is warranted by the high costs with which entrepreneurs are faced to do business in Mexico, including the cost for highly regulated services such as the internet or electricity. A key institutional player in competition policy is COFECE, Mexico’s Anti-trust Authority, which has the power to impose sanctions on companies that use unfair trade practices or not to grant licenses if these are thought to distort market competition.

44. Here, the role of the SME ombudsman would be different from that of COFECE and concentrate on policy advice aimed at easing market entry and reducing administrative burdens on SMEs. For example, two regulation-related problems that affect Mexican small business owners are the frequent renegotiation of leases for business premises and the government approach to tax and labour inspections.

45. With respect to the first issue, a reform that stabilises prices would help small business development by shifting entrepreneurial resources from unproductive uses (rents) to productive uses (investment). In many OECD countries, for example, the terms of rental contracts can only be renegotiated every certain number of years, although during this time the rent is allowed to increase in line with the official inflation rate. With respect to the second issue, tax and labour inspections are an important deterrence to comply with the law, but sanctions that are disproportionate to the detected irregularity may well cause unintended consequences such as the shutdown of the business or its further shift towards the informal sector. Here, the role of the SME ombudsman would be to encourage reforms in the inspection system by introducing ‘early warnings’ by which inspection authorities send business owners that do not fully comply with the law guidelines to do so by a certain deadline. In this case, more than changing the law, the role of the SME ombudsman would be to change the way the law is interpreted and the approach of government officers in inspection authorities through appropriate training.

46. OECD countries have a long tradition of reform in the simplification of business regulations which can be a source of inspiration to Mexico’s SME ombudsman. Some countries have, for example, introduced guillotine clauses and sunset clauses with the aim to reduce the number of laws affecting the life of a business. Other countries have accelerated the digitalisation of administrative requirements (i.e. e-

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8. Guillotine clauses look back to laws that are older than, for example, 10-20 years, assess whether they still meet the requirements for which they were enforced, and decide on whether they should be repealed or maintained. Sunset clauses share the same objective of guillotine clauses, i.e. eliminating unneeded laws, but integrate this objective in the law itself through a deadline of validity after which the law needs to be confirmed to continue to be valid.
government), introduced the “silent is consent” principle in the communication between government and business, reduced the number of required administrative forms, or established one-stop shops to minimize the time entrepreneurs spend in public offices. Most of these reforms have been beneficial to small business owners, although the success of some also depends on collaboration from the local level (e.g. the one-stop shops).

47. The following two case-studies give relevant examples of business regulatory reforms in three OECD countries (Korea, France and Italy) and set out the OECD Guiding Principles for Regulatory Quality and Performance.

Box 3. Regulatory reform in three OECD countries: Korea, France and Italy

Korea shares with Mexico the presence of monopolistic markets due to the weight of industrial conglomerates (i.e. chaebol) in the Korean economy. In the aftermath of the global economic crisis, Korea set a new Temporary Regulatory Review (TRR) mechanism to waive or mitigate the implementation of some burdensome regulations for a certain period of time, usually one or two years. For example, as a result of the TRR, existing factories located in special areas called “preservation zones”, can build additional facilities of size up to 40%, instead of 20% as before, of the existing building without the need to ask another construction permit. In the frame of the same reform, administrative investigations are also performed on a less regular basis.

France introduced a programme of administrative simplification for SMEs at the end of 2010. The programme was informed by research undertaken at the local level by 100 ‘SME correspondents’ who were charged with undertaking on-the-ground research by interviewing more than 500 entrepreneurs. The research found that the three main difficulties for entrepreneurs were the complexity of the vocabulary used by the public administration, the lack of information on government requirements, and ever-changing regulations. The top three measures sought by firms were a reference administrative service that could act as only contact point, the simplification of the obligations for SMEs through, for example, an end to requests for the same information by different government departments, and the possibility to deal with procedures online. This research led to the development of an action plan that encompassed 80 measures, including: i) the creation of a ‘secure digital vault’ which would allow firm managers to provide all the necessary information to the administration only once; ii) the simplification of pay slips that would generate savings worth EUR 100 million in management costs; iii) the use of a single form for social contributions.

Finally, the Italian government took in 2012 important steps to streamline the civil justice system, including a geographical aggregation of courts, thematic specialization of judges, and stricter rules on filing appeals. Alternative forms of conflict resolution have also been introduced to lessen the burden of legal procedures on courts. Since March 2011, for example, a dispute between two companies or between a company and a consumer can be settled through an administrative procedure called “mediation”, which is managed by administrative bodies such as the local semi-public chambers of commerce. In two-and-a-half years of operation, 220 000 disputes have been settled generating savings worth EUR 420 million for the companies involved. The average time to settle a dispute has been 36 days, considerably less than the average time of a civil lawsuit in Italy. In the same year, a similar conciliation procedure was conceived for those firms that wish to oppose a trademark that is too similar to their own.

Source: OECD (2014) and OECD (2011)
Box 4. The OECD Guiding Principles for Regulatory Quality and Performance

Better regulation and structural reforms are necessary complements to sound fiscal and macroeconomic policies. Based on the findings and policy lessons of 20 country reviews of regulatory reform, the Council of the OECD endorsed the following guiding principles for regulatory quality and performance:

- Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
- Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.
- Ensure that regulations, regulatory institutions charged with implementation, and regulatory process are transparent and non-discriminatory.
- Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
- Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
- Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Source: OECD (2005)

State-level reforms

48. It was been a common view of Mexican stakeholders during the fact-finding mission that the bottlenecks that constrain SME development are found not only at the federal level (national level), but also at the state level (local level). In particular, it has been stressed there is too much heterogeneity across Mexican states with respect to the rules to open a business or obtain a license, which makes the cost of doing business in Mexico very different depending on the state. Similarly, it has repeatedly been reported that information on the destination of use of land and buildings – that is, whether they can be used for business purposes or only for living purposes – is fuzzy and difficult to obtain, making it a breeding ground for corruption at local level. The federal government has started tackling this problem through a pilot project that aims to uniform and digitalise the process of business creation in three Mexican states, with a view to rolling out soon the initiative in the other twenty-nine states of the country.

49. The SME ombudsman can play an important role in keeping up these reform efforts at the state level although, as mentioned, the Mexican Constitution limits the powers of the national government in policy areas that fall within the remit of state governments. One available approach would be that of “moral suasion”. In collaboration with research institutes or other government institutions (e.g. the future Observatory of Entrepreneurship), the office of the SME ombudsman could assess the cost-implications of state-level business regulations (e.g. start-up procedures, rules governing permits and licenses, cadastre) and compile a ranking that identifies leading and lagging states. The goal would be to stir competition among the states and share local policy good practices to buttress pro-business regulatory reforms across the country.
Similar analyses have already been done in Mexico by private research institutes and NGOs engaged in entrepreneurship promotion. Yet, a study endorsed by the office of the SME ombudsman would have a different institutional weight, since it would represent the official position of the federal government on which states are doing well and which ones are not with respect to business regulatory reforms.

Finally, some state-level issues that affect the life of a business could also be addressed directly at the federal level. For example, anti-corruption laws that have established uniform codes of conduct for public-sector workers and clear rules to protect whistle-blowers have helped other OECD countries to fight corruption in public administration across each level of government.9

“Clearing house” functions should complement advocacy ones

The profile of Mexico’s new SME ombudsman would be strengthened if his advocacy role were to be integrated by the role more typical of a legislative “clearing house”, which assesses the future costs and administrative burdens of new legislation on SMEs. Examples in this report are the North-Rhine Westphalia Clearing House and, to some extent, the SBA Office of Advocacy. The German case provides advice on legislative proposals to ensure that their design and implementation is SME-friendly, while the US SBA Office of Advocacy comments on small business impact analyses carried out by federal government agencies as part of the requirements of the Regulatory Flexibility Act.

In Mexico the performance of a “clearing house” role by the SME ombudsman is likely to require close collaboration with the Federal Commission on Regulatory Improvement (Comisión Federal de Mejora Regulatoria – COFEMER), whose mission is to ensure that federal regulations have more benefits than costs to society and to make legislative proposals coherent with this principle. There seems to be two main options available to the Mexican lawmaker to avoid that the work of the SME ombudsman and COFEMER overlap.

The first “light-touch” approach would be for the SME ombudsman to overview the SME impact analysis of COFEMER and produce comments on whether it agrees or not with its final results. Part of this task could also be for the SME ombudsman to monitor whether COFEMER’s recommendations to improve the impact on SMEs of regulations have been taken into consideration by the relevant government departments in the final draft legislation. An annual report that summarises the outcomes of this monitoring process could also be produced. The role of the Mexican SME ombudsman in the field of regulatory assessment would, therefore, be similar to that of the US SBA Office of Advocacy. The advantage of this approach is that it would not require much additional work to the one needed to undertake advocacy; clearing house and advocacy roles would be easily combined. The disadvantage is that the regulatory impact analysis would remain a very small area confined to a second-level assessment of the first evaluation done by COFOMER.

The second approach would be more ambitious and consist in passing some of COFEMER competences on to the SME ombudsman, which would become the main office responsible for the assessment of the impact of new draft legislation on SMEs. COFOMER would still be in charge with the more holistic assessment of new regulations on different aspects of society, from individual welfare to environmental impact, whereas the SME ombudsman would focus on the costs and benefits of new legislation for new and small businesses by using experimented methodologies as the “standard cost model” or the SME-test in use in the European Union. The benefit of a similar approach is that the “clearing house” functions would become, since the very beginning, an important part of the responsibilities of the SME ombudsman, whereas the main downsides relate to: i) the work and cost

9. A whistle-blower is a person who exposes instances of illegal activity or misconduct in a public or private sector organisation.
involved into this second stream of work; \textsuperscript{10} ii) the need for a more structured organisation of the SME ombudsman’s office since the first day of operation, based on two different departments respectively responsible for advocacy and regulatory assessment; iii) possible opposition by COFEMER, which would see its role diminished and whose collaboration would nonetheless be necessary.

56. Were this second approach to be chosen, another key strategic decision would concern whether the SME ombudsman’s regulatory impact assessment should only be done in response to a request by a government department, in the guise of the North-Rhine Westphalia’s clearing house, or whether the ombudsman would have the faculty to analyse any regulations he reckons might have cost implications for SMEs. Obviously, a pro-active role guarantees a more thorough assessment of the impact of draft legislation on SMEs, but it comes with higher costs.

57. As will be explained in the next section, the OECD view is that it would be better for the office of the SME ombudsman to start small and eventually expand later. With respect to its “clearing house” functions, this means that the SME ombudsman office could start by either providing SME-related comments on the impact analysis undertaken by COFOMER or by carrying out its own SME impact analysis on demand of other government departments – although certain mandatory cases should also be provided by the law. \textsuperscript{11}

58. This work could be combined with capacity building and training sessions for lawmakers and small business owners. The former would receive capacity-building on how to design laws more aware of the impact they may have on new and small firms, whereas the latter could receive training on compliance with new regulations through the network of puntos para mover across the country. Admittedly, in fact, new legislation with cost implications for small enterprises often involves improved environmental standards or health and safety conditions at work which are costs for SMEs in the short-term but which in the long-term require SMEs to upgrade their production and result in increased productivity. Thus, opposing these changes \textit{tout court} would be counterproductive from the perspective of the long-term development of Mexico’s SME sector.

Institutional arrangements

59. This final section examines the institutional arrangements that should govern the office of the SME ombudsman in Mexico, including the type of powers, political endorsement and legal status, and whether or not a local network of state-level ombudsmen is needed. It is the opinion of the OECD expert panel that undertook this study that Mexico’s future office of the SME ombudsman should start small and eventually expand later to gain experience and better address the needs of small business owners as they come from the ground.

Type of power

60. In all national experiences surveyed in this report SME ombudsmen do not have executive powers but only consultative powers. This is especially true for advocacy-oriented ombudsmen, whose role is to influence the decision-making process, but also for redress-type ombudsmen, who typically seek mediation and conciliation but who cannot impose a solution to the parties involved in the dispute. \textsuperscript{12} In line

\textsuperscript{10} It has been reported that COFEMER has a staff of thirty-five members. If the second approach to the “clearing house” functions were to be followed, some staff might have to be moved from COFEMER to the office of the SME ombudsman, which has cost implications.

\textsuperscript{11} For example, if the law explicitly refers to the promotion of entrepreneurship and small enterprises.

\textsuperscript{12} The US SBA Office of the National Ombudsman (ONO), for example, sends the complaints received by individual small business owners to the relevant federal agency or government department, which has 30
with this general profile and the fact that the Mexican SME ombudsman would mainly be advocacy-driven, s/he should only have consultative and “moral suasion” powers.

**Political endorsement and legal mandate**

61. Based on the reviewed national and regional experiences, a high-level political endorsement and a clear legal mandate positively affect the independence and stature of the SME ombudsman. Independence is an important feature in every type of SME ombudsman: redress-oriented ombudsmen need to be perceived as impartial by the parties involved in the dispute, whereas advocacy-oriented ombudsmen cannot be considered too close to the government to be credible by the small business community.

62. The highest political endorsement, and thus independence, for the future Mexican SME ombudsman will descend from a direct appointment by the President of Mexico, followed by ratification by the relevant branch of the Parliament; this would give the ombudsman political authority in spite of formal powers of a consultative nature. This type of endorsement is generally associated with an autonomous and inviolable budget, which would also make the SME ombudsman less easily influenced by other government departments or private sector organisations. Should this option not be viable, a second-best would be for Mexico’s SME ombudsman to be a decentralised administrative body in the same way as INADEM and COFEMER; this would give the ombudsman technical and operative autonomy, but not financial autonomy.

63. Any institutional arrangement below these two options – for example, an office of the SME ombudsman within INADEM and dependent on its leadership – would inevitably cramp the scope of action of the Mexican SME ombudsman. Indeed, it would make him/her closer to the profile of the EU national SME envoys, who are high-level civil servants in charge of policy coordination, than to that of the SBA Chief Counsel for Advocacy, who is a Presidential political appointee who does not report to the director of the SBA but operates through a separate legal authority and budget.

64. A clear legal status that defines nature, mission, objectives and activities of the new office would also facilitate the work of the SME ombudsman. For example, the US SBA Office of the National Ombudsman was established in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) to expand the influence of small business on new legislation and create new tools to redress federal agency enforcement actions. Similarly, Canadian specialised ombudsmen have all a clear mandate established by the government and codified in either an Act of the Parliament or regulations descending from the Act. The importance of a clear legal status has also been confirmed by the OECD fact-finding mission, when many of the stakeholders stressed that for the SME ombudsman to be effective, his competences and responsibilities should be clearly outlined in the law.

days to respond. Once the response has been received, the ONO shares it with the client. If the client is still unsatisfied with the government answer and if the ONO reckons grounded his/her disaccord, the ONO may push for further review. In the entire process, though, the SBA ombudsman has only a mediation role and cannot impose remediation to the government office nor can it grant compensation to the business owner.

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13. For example, in a similar situation it would be difficult for the SME ombudsman to be critical of INADEM strategies and programmes if they did not meet the needs of SMEs, for example in the case programmes were not adequately catering for a certain segment of the SME population or if programme beneficiaries were not adequately dispersed across the different regions of the country.

14. This choice, made in the mid-1970s, was the result of allegations by which the White House and the SBA leadership were influencing the decisions of the then Chief of the Office of Advocacy.
Decentralised structure

65. As Mexico is a federal country, a natural question is whether the office of the SME ombudsman should only be a federal office or whether it should be replicated at the state level. In line with the principle of “starting small”, there does not seem to be a need for an SME ombudsman in each of the 32 states of Mexico. Arguably, though, a network of 5/6 regional ombudsmen in as many macro-regions of the country – in the same fashion as the 10 regional advocates of the US SBA Office of Advocacy – could help the federal ombudsman to perform his functions more uniformly across the country. Regional SME ombudsmen would then be expected to undertake: i) outreach activity towards local small business communities, thus sparing the federal ombudsman from travelling too much around the country; ii) research on local business trends to inform the federal ombudsman of place-specific barriers to SME and entrepreneurship development; iii) assessment of state legislation and its impact on SMEs, on request of the federal ombudsman and provided that the national ombudsman also undertakes this task at the federal level.

66. Regional ombudsmen could be high-level civil servants from the Ministry of Economy or external political appointments. They could be selected by the Minister of Economy or directly by the federal SME ombudsman; in either case, they should preferably depend from and report to the federal SME ombudsman. On the other hand, it is not recommended that state-level SME ombudsmen be established within state-level governments, the risk being that their action could be “captured” by state governors and become inconsistent with the action of the federal ombudsman. Regional ombudsmen should also maintain a low institutional profile, leaving major public statements about the need for reform at state level to the federal SME ombudsman, who would be the only one with sufficient political weight to intervene on state-related matters.

Staffing and budget

67. The size of staff and budget strongly depends on the final competences and responsibilities that will be given to the Mexican SME ombudsman. The conclusions of this section should be regarded as tentative, although it is important that the office of the SME ombudsman be given a budget adequate to the mission that it is asked to perform.

68. In the reviewed case studies, ombudsman offices tend to be relatively small. For example, the Office of Advocacy in the United States, which is the closest to the role the OECD envisages for Mexico’s SME ombudsman, has a staff of 40 full-time workers (including the 10 regional advocates) and an annual budget of USD 8.9 million, 87% of which goes to personnel costs. Still in the US, the redress-type SBA Office of the National Ombudsman runs a much smaller budget of USD 2 million per year, while the Canadian Taxpayers Ombudsman has a staff of 26 and an annual budget of CND 2 million (i.e. USD 1.8 million). One conclusion from this comparison is that advocacy ombudsmen are more resource-intensive than redress-type ombudsmen, unless a light approach like the one represented by EU national SME envoys – who have almost no budgetary implications – is chosen.

69. Taking the size of the US Office of Advocacy as the benchmark and making a population pro-rata calculation, the Mexican office of the SME ombudsman would have approximately 15 staff members. However, the Mexican economy is much more fragmented than the US economy, so that if we look at the number of business enterprises in the economy the two countries end up with very similar numbers: 4.1 million units in Mexico vs. 4.2 million units in the United States. This could in principle justify a bigger size for the Mexican SME ombudsman office than what suggested by the population pro-rata calculation, although anything above 20/25 staff members, depending on whether the regional network of decentralised ombudsmen is created, would most likely make the office oversized. If the “clearing house” functions were to be taken on board as well, additional technical staff should be recruited to perform the regulatory impact
assessment (RIA), with the actual number depending on whether this role would be of reactive type, i.e. based on request by other government departments, or of proactive type.

70. The number of staff will largely determine the total budget, since personnel costs account for most of budget in SME ombudsman offices.

71. The following table provide a very simple snapshot of these considerations.

<table>
<thead>
<tr>
<th>Roles</th>
<th>Number</th>
<th>Skills profile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advocacy</td>
<td>20</td>
<td>Legal and business research and analysis, information mgmt., PR</td>
</tr>
<tr>
<td>Local network</td>
<td>5</td>
<td>High-level civil servants, PR</td>
</tr>
<tr>
<td>Clearing house (reactive)</td>
<td>3</td>
<td>Technical RIA (SME test and standard cost model methodologies)</td>
</tr>
<tr>
<td>Clearing house (proactive)</td>
<td>7</td>
<td>Technical RIA (SME test and standard cost model methodologies)</td>
</tr>
</tbody>
</table>

Note: The number of clearing house (proactive) is additional to that of clearing house (reactive).
References


CHAPTER 3
THE SBA OFFICE OF ADVOCACY IN THE UNITED STATES

Rationale

72. The U.S. Small Business Administration’s (SBA) Office of Advocacy was first established in 1976 with a mission to “serve as an independent voice for small business within the federal government.” More specifically, the mission of the Office of Advocacy is to encourage policies that support the development and growth of American small businesses by:

- Early intervention in federal agencies’ regulatory development process on proposals that affect small entities, and providing Regulatory Flexibility Act compliance training to federal agency policymakers and regulatory development officials;

- Producing research to inform policymakers and other stakeholders on the impact of federal regulatory burdens on small businesses, to document the vital role of small businesses in the economy, and to explore and explain the wide variety of issues of concern to the small business community; and

- Fostering two-way communication between federal agencies and the small business community. Advocacy reaches out to its many stakeholders to solicit their views on issues of concern to small firms. In addition to seeking feedback through meetings and roundtables, Advocacy also communicates with small business owners through various platforms including Regulatory Alerts and comment letters.

73. The Office of Advocacy operates as an independent office serving as a voice for small business, a unique position within the federal government. The Regulatory Flexibility Act (RFA) is the primary legal tool that gives small businesses a voice in the rulemaking process. Advocacy oversees federal agencies’ compliance with the RFA, which establishes in law the principle that government agencies must analyze the effects of their regulatory actions on small entities—small businesses, small nonprofits, and small governments—and consider alternatives that would minimize the economic burden on small entities while still achieving their regulatory objectives.

Historical origins and institutional context

74. The Office of Advocacy’s creation can be seen as part of a long-term trend to ensure that the economic contributions of small business are fully appreciated and understood within policymaking circles in Washington. The SBA itself was first established in 1953, but, by the 1970s, small business advocates still felt that the voice of small business was still being drowned out by the resources and lobbying clout of major corporations. In response, the position of Chief Counsel for Advocacy was created in 1976. At first,

15 SBA Advocacy webpage “About Us”
this position was part of the official SBA department structure, but the office was made fully independent via new legislation.

75. SBA’s Office of Advocacy is structured in a manner completely unique in the U.S. government. The office is associated with SBA, but remains fully independent. The office is headed by the Chief Counsel for Advocacy, who is appointed directly by the President and must be confirmed by the Senate. The Chief Counsel does not report to the SBA Administrator, and operates via separate legal authority from SBA. The office can hire its own staff, without approval from the SBA Administrator, and the office operates with a separate budget line item for its operations. Much of this structure was established at the time of the office’s creation in 1976, but several provisions to enhance the office’s independence were enacted by Congress later. Public Law 111-240, the Small Business Jobs Act of 2010, further amended the Office of Advocacy’s statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account.

76. The Office of Advocacy’s legal authority exists in its founding legislative and executive statutes and in subsequent amendments and additions. The office engages in three types of activities, all of which are specified in its legal authorities. First, it serves as a voice for small business in the development of new federal regulations. Second, it produces research that documents the important role of small business in the economy and that investigates other issues affecting small business. Finally, it promotes two way communications between federal policy makers and the small business community.

77. The Office of Advocacy operates with approximately 50 full time staff members, including Advocacy’s 10 regional Advocates that are not located in Washington, D.C. Congress provided Advocacy with USD 8.75 million in new budget authority for Fiscal Year (FY) 2014. The USD8.75 million supported USD 7.7 million planned for personnel costs, USD 650,000 for economic research, and USD 400,000 for everything else.

78. The ten regional advocates who serve as the Office’s “eyes and ears” are mostly co-located with SBA Regional Offices (see Figure 3) but maintain an independent status and authority. They report directly to the Chief Counsel for Advocacy. They regularly cooperate with regional SBA staff, but have no formal legal connections to SBA. Their daily duties involve outreach to regional community leaders, such as small business owners or economic development officials, and report on regional business trends or issues of special interest to local small business owners.

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17 SBA Office of Advocacy, FY 2014 Congressional Budget Justification, p. 2
Role and activities

SBA’s Office of Advocacy engages in a variety of activities, but its core work revolves around the three areas of regulatory review, research, and outreach. Figure 2 depicts the office’s current organizational structure. The Interagency Affairs and Economic Research offices assume the greatest roles in regulatory review; the Information and Regional Affairs offices focus on outreach work. The Office of Economic Research leads research initiatives.
Regulatory Review

80. In 1980, with passage of the Regulatory Flexibility Act (RFA), the Office of Advocacy first assumed a role in the regulatory review process thus becoming a formal part of Advocacy’s mission. The concept for the RFA emerged from the 1980 White House Conference on Small Business. It established into U.S. law the principle that government agencies must consider the impact of their regulations on small entities, and where possible, try to mitigate them. The RFA requires all federal government agencies to produce a small business impact analysis with every final rule or regulation. The Chief Counsel for Advocacy is required by law to produce an annual report assessing agency compliance with the RFA.

81. The RFA has been strengthened on several occasions since 1980, most significantly with passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. SBREFA further expanded the role of Advocacy to include special regulatory review panels for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). A panel for the Consumer Financial Protection Bureau has also been recently added. These agencies were singled out because of their large role in developing new regulations that affect small business.

82. Advocacy’s regulatory review process proceeds in the following manner. When considering new regulations, federal agencies must complete a threshold analysis that assesses the rule’s potential impact on small entities.

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18 Chart based on presentation in U.S. Small Business Administration, Office of Advocacy, Background on the Office of Advocacy, 2012 p. 2.


impact on “small entities.” The agency must then formally certify that the proposed rule will not have a “significant economic impact on a substantial number of small entities.” The Office of Advocacy reviews this analysis to ensure that the data and analysis is solid and that the impacts on small firms are indeed insignificant. In cases where concerns still remain, the Office of Advocacy can provide a formal comment letter that provides its assessment of the agency’s analysis. In FY 2014, 22 such comment letters were provided to other federal agencies, citing problem areas such as an inadequate economic analysis of small business impacts or insufficient outreach to assess potential small business concerns. Agencies are required to respond to all public comments, including those from Advocacy, prior to final promulgation of any new regulations.

83. While a large share of Advocacy comment letters focus on areas where federal regulatory agencies are especially active, such as health and safety, their inputs can address new regulations that stem from a diverse range of agencies and cover a wide range of topics. For example, one of the most recent Advocacy comment letters recommends that the U.S. Securities and Exchange Commission’s (SEC) new rules governing crowdfunding create too many administrative burdens for small companies.

84. Advocacy staff also provides regular training to other federal agencies on effective RFA compliance. This training is typically provided to agency regulatory and policy staff to ensure better compliance and to prevent potential future litigation. Advocacy has also offered technical assistance to state governments in the past. In the mid-2000s, Advocacy launched a Model Legislation initiative to encourage U.S. states to adopt their own state regulatory flexibility programs. Between 2002 and 2007, 45 U.S. states and territories adopted regulatory flexibility programs, and twenty of those programs included all elements of the model legislation package.

85. The Office of Advocacy regularly tracks the impact of its regulatory review activities, with particular focus on its ability to generate cost savings. In FY 2014, 13 of the rules on which Advocacy provided comments on behalf of small business were made final and contained flexibilities reflecting this input. As a result of these flexibilities, Advocacy achieved regulatory cost savings of more than $4.8 billion on behalf of small businesses.

86. The Office of Advocacy not only focuses on regulatory issues but this office is also viewed by many small business stakeholders as a resource regarding federal procurement. On a day to day basis, Advocacy staff participates in national and local procurement forums and inter-agency committees on procurement issues, and the staff is in daily contact with small businesses on individual federal procurement issues. The Chief Counsel for Advocacy maintains an open dialogue with the Office of Federal Procurement Policy, the Small Business Administration, the Department of Defense, the Department of Homeland Security and the General Services Administration on a broad range of procurement issues that impact small business. Reverse auctions, size standards, prompt pay for primes and subcontractors, international trade, innovation and research and development, veteran and women-owned business procurements, and cyber security are just a few of the major procurement issues that the Chief Counsel for Advocacy has been directly involved in to level the playing field for small businesses.

21 SBA Office of Advocacy, Official Statute.
23 See http://www.sba.gov/advocacy/816/789271
Economic research

87. Economic research has always been a core activity for Advocacy. Its Office of Economic Research (OER), staffed by trained economists, fulfills several primary functions. About half of the OER staff support regulatory review activities while the other half are solely research economists. However, all OER economists conduct and supervise economic research and provide statistics on small business.

88. Advocacy staff work closely with federal statistical agencies, such as the Census Bureau and the Bureau of Labor Statistics, to develop the data and statistics. Advocacy provides direct funding to help these agencies address specific questions or to develop unique data sets focused on issues of concern to small business. For example, Advocacy provided funding to the Internal Revenue Service (IRS)--the federal tax agency--to create a database that tracks the performance of sole proprietors. In other cases, Advocacy simply collaborates with these agencies to jointly develop new data sources. This process led to a partnership with the IRS and the Census Bureau to create the Business Information Tracking System (BITS) database, the first federal database to track business growth patterns over time.

89. These activities are supplemented by contracts with outside researchers who produce reports on pressing issues of the day. These research contracts are typically subject to competitive bidding and formal review by subject area experts. In fiscal year 2014, Advocacy produced 23 contract and internal research reports on a variety of topics including access to capital, employment, environment, minority- and women-owned businesses, procurement, retirement, taxation and veterans.

90. Advocacy-backed research has sometimes gained significant public attention. For example, Advocacy was an early supporter and funder of the research of David Birch, who is widely credited with publicizing the concept of “gazelle” companies and the claim that new small ventures create the majority of new jobs in the U.S. economy.

Outreach and Advocacy

91. As Advocacy’s focus on regulatory review has grown, it still continues its role as the “voice of small business.” Advocacy reaches out to its many stakeholders to solicit their views on issues of concern to small firms. In addition to seeking feedback through meetings and roundtables, Advocacy also communicates with small business owners through various platforms including Regulatory Alerts, comment letters, blogs, social media, and a newsletter.

92. Advocacy’s ten regional advocates outside of Washington, D.C. report back directly to the D.C. office about small business regulatory concerns. The regional advocates’ extensive outreach also helps identify regulatory concerns of small business by monitoring the impact of federal and state policies at the grassroots level. In FY 2014, Advocacy’s regional advocates reported a total of 536 outreach events, substantially exceeding their annual goal of 360 such events for this activity.

93. When Advocacy was first created in 1976, it devoted significant resources to its outreach arm of the office. At that time, it was best known for convening the White House Conference on Small Business.

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which was held on three occasions—in 1980, 1986, and 1995. These large events typically included a year of regional hearings and conferences, which culminated in a Washington DC-based conference that included attendance by the President and other key Administration leaders. They also produced an agenda for action, which typically led to new legislative proposals related to small business concerns. The last White House Conference, held in 1995, engaged more than 20,000 business owners who debated more than 3,000 different policy proposals. No White House conferences have been held since 1995, largely due to concerns about the cost of these activities.

However, in the fall of 2012, Advocacy began its Innovation Initiative with the inaugural national symposium on Small Business and Government: Maximizing Entrepreneurship, Driving Innovation in Seattle, Washington. This event was a day-long, participant driven conversation about the role of innovation and entrepreneurship in our economy. In the spring of 2014, Advocacy hosted its second Innovation Initiative Symposium in New Orleans, Louisiana and plans to hold another symposium in the fall of 2015. Smaller forums have also been held on this topic across the country. In addition, Advocacy issued a report titled, Small Innovative Company Growth—Barriers, Best Practices and Big Ideas: Lessons from the 3D Printing Industry in the winter of 2015. The report examined barriers hindering the growth and development of small innovative companies.

National and international Cooperation

Advocacy continues to transform with the changing needs of the American small business sector. The office values the input of the small business owner and ensures that government agencies keep small businesses in mind when promulgating rules. The Office consistently works to make sure that Advocacy’s small business research is both timely and actionable for the nation’s policymakers. In addition, Advocacy has been reaching out to the United States Trade Representative (USTR), the US International Trade Commission (USITC), the State Department, the Department of Commerce, the International Trade Association (ITA), and the U.S. Small Business Administration’s Office of International Trade (OIT), to provide information on how to reduce the burden of regulations that could have a significant impact on small businesses across borders.

Advocacy’s presence at high level stakeholder sessions has provided a platform to promote, educate, and encourage international stakeholders to consider the regulatory burdens that small businesses may face in international trade. Advocacy provides a unique perspective on the regulatory impacts on small businesses, and its involvement has been welcomed. Regulatory cooperation could help reduce burdens on small businesses, so Advocacy stresses the importance of regulatory flexibility towards small business.

At international level, Advocacy’s involvement with the Canada-U.S. Regulatory Cooperation Council (RCC) helped produce the Small Business Lens (SBL), the first of twenty-nine initiatives to be completed within a two-year time frame. The purpose of the SBL is to share approaches and tools being developed by the U.S. and Canada to assess and account for the needs of small businesses when developing regulations. In this respect, Canada was very interested in implementing a regulatory analysis requirement similar to the Regulatory Flexibility Act(RFA). Advocacy continues to be an active participant in RCC stakeholder events.

Assessment

98. Advocacy represents the interests of small businesses within the federal government. The office advances the views and concerns of small businesses before Congress, the White House, federal agencies, the federal courts, and state and local policymakers as appropriate. Economic research, policy analyses, and small business outreach help identify issues of concern. Documentation of the contributions of, and challenges for, small businesses in the U.S. economy provides policymakers with the information that they need to make better decisions.

99. In addition to those responsibilities included in Advocacy’s basic charter, further duties and powers were conferred upon the Chief Counsel for Advocacy by the Regulatory Flexibility Act (RFA) of 1980 as amended (5U.S.C. § 601 et seq.), and Executive Order 13272. These duties include the monitoring of federal agency compliance with the RFA, providing RFA compliance training to regulatory officials, and assisting regulatory agencies during all stages of the rule development process to mitigate the potential impact of rules on small entities while still achieving their regulatory objectives.

100. Public Law 111-240, the Small Business Jobs Act of 2010, further amended the Office of Advocacy’s statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. Before FY 2012, Advocacy was fully integrated within SBA’s Executive Direction budget.

Transferability issues

101. The basic functions of the SBA Office of Advocacy could be transferred to other governments in a relatively seamless manner. Advocacy’s outreach and economic research functions are most transferrable. Creating an advocate and “voice for small business” within public policy debates makes sense, and effective advocacy requires good data and analysis to back it up.

102. In terms of outreach, two key factors should be considered. First, it is important that the Office and its head have public standing or strong connections within the government. In the U.S., the Chief Counsel for Advocacy may not be considered a major player in national debates, but his role and voice are bolstered by the office’s unique independent standing and status. This status ensures a “seat at the table.” Second, the regional structure of the Office’s operations ensures its relevance and ability to effectively reach out to core small business constituencies. This regional network is an essential part of the office’s effectiveness, ensuring the transmission of ideas and concerns from the center to the periphery and vice versa.

103. In the area of research, Advocacy’s experiences again offer useful guidance. Advocacy’s small team of economists is a balanced mixture of regulatory, data and research specialists. Given Advocacy’s broad regulatory and research agenda, the office also opts to seed outside research, in academia and by private consultants. Much of its own in-house research has focused on small business economy issues (e.g. access to capital, small business markets, and small business owner demographics); other funding supports unique data collection and analysis efforts related to small business. In the U.S. context, these latter investments have proved invaluable in providing small business data where none previously existed.

104. In the area of federal regulatory review, Advocacy’s role and function may be unique to the U.S. system and the specifics of the RFA review process may not have relevance in other national contexts. However, the basic concept of assessing small business impacts of new regulation should be further examined. Because small firms do face disproportionate burdens from new regulations, efforts to mitigate these effects may be needed. While a complex process such as the RFA may not be needed, a simple
requirement of a small business impact analysis for all new regulations (akin to an environmental impact statement) could improve the responsiveness and effectiveness of government regulations.
CHAPTER 4
THE FEDERAL AND STATE-LEVEL SME OMBUDSMEN IN THE UNITED STATES

Rationale

105. The Office of the National Ombudsman (ONO), within the U.S. Small Business Administration (SBA), was first created in 1996 via the Small Business Regulatory Enforcement Fairness Act (SBREFA). The ONO’s formal mission is “assist small business owners when they experience excessive or unfair Federal agency enforcement actions.”\(^{28}\) ONO is part of wider network of small business ombudsman and advocacy services available at all levels of the U.S. system of governance—federal, state, and local. Within the federal government structure, ONO acts as a “trouble shooter” for small businesses facing issues with other Federal regulatory and enforcement agencies, such as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). ONO addresses concerns with federal regulations after they are enacted, while SBA’s Office of Advocacy provides comment and review during the development of new regulations prior to enactment.

106. Although small business ombudsman offices operate within some Federal agencies and at many state and local government agencies, ONO is the only office with jurisdiction extending to all federal agencies that impact small business. ONO receives comments and complaints directly from small business owners and advocates, but can also reach out to public agencies and other ombudsman offices on an as needed basis. ONO’s primary rationale is to serve as a “watchdog” over Federal agencies and to ensure that small businesses are treated in a fair and equitable manner in regulatory and enforcement decisions.

Historical origins and institutional context

107. ONO was created in 1996 as part of SBREFA, a comprehensive legislative package focused on providing new avenues for small business to participate and have access to the Federal regulatory arena.\(^{29}\) The act promoted three primary goals:

- Expand small business influence over the development of regulations,
- Provide additional assistance in complying with existing Federal rules and regulations, and
- Create new mechanism for addressing and responding to agency enforcement actions.

108. The legislative package that became SBREFA emerged in the aftermath of the 1995 White House Conference on Small Business. This event, sponsored and managed by the SBA Office of Advocacy, was the last of a periodic series of conferences with the purpose of sharing small business owner’s concerns and


\(^{29}\) For background on SBREFA, see the SBA Office of Advocacy Website section on SBREFA at http://www.sba.gov/advocacy/825
issues related to key public policies. The actual White House conference, attended by more than 2,000 delegates, was the culmination of twelve months of state and local meetings to discuss the state of small business in the U.S. Throughout this process, 20,000 small business owners met at 59 state-level meetings and six regional planning sessions. Their work reviewed more than 3,000 policy recommendations which were eventually reduced to sixty “official” conference recommendations that were presented to the President and the Congress in late 1995.

These sixty recommendations covered a wide range of issues from capital formation to community development to environmental policy to health care and tax policy. But, recommendations related to regulatory fairness ranked among the top priorities of White House Conference delegates, and thus received high levels of attention from the White House and from key lawmakers in Congress. Vice President Al Gore’s remarks to the White House conference capture the theme: “Government regulators need to stop treating small business as potential suspects, and more as a partner sharing in a common goal.” SBREFA advocates supported special initiatives to assist small businesses that often lacked the resources or staff capacity to effectively comply with new federal rules and regulations.

In response, Congressional leaders, led by Senators Bumpers (D-AR) and Bond (R-MO), the Chairman and Ranking Minority Member of the Senate Small Business Committee, led the charge for SBREFA’s ultimate enactment into law. The bill had strong bipartisan support as well as backing from major business lobbies such as the U.S. Chamber of Commerce and the National Federation of Independent Business (NFIB). For Republicans, long wary of government regulation, SBREFA, and the new ONO, offered another check on overzealous regulatory agencies. For Democrats, the proposal aligned well with the Clinton Administration’s push to “reinvent government” for the 21st century.

SBREFA mapped the structure of the ONO and its supporting agencies; it also expanded the Office of Advocacy’s role in reviewing federal regulations. The ONO operates within the U.S. Small Business Administration, and the National Ombudsman is an official employee of SBA. The National Ombudsman is typically appointed by the President as a non-career member of the Senior Executive Service, the highest level of federal civil service positions. In contrast, the SBA Office of Advocacy’s Chief Counsel is one of the President’s four political appointees at SBA in a position subject to confirmation by the Senate. SBA is an independent agency, and operates separately from other agencies such as the Department of Commerce or other business focused agencies, such as Export-Import Bank, the Department of Treasury, or the Securities and Exchange Commission. The SBA Administrator is considered a formal member of the President’s Cabinet in the Obama Administration.

ONO operates with a small in-house staff and small budget of less than $2 million per year. ONO typically relies on support from other offices within SBA, and also manages 10 Regional Regulatory Fairness Boards who advise ONO and the Federal government on key regulatory issues facing small business. These boards are located in all ten SBA Regions across the U.S. Each board includes five volunteer small business owners. Regional board members serve for a three year term, and participate in one annual meeting, other planning sessions as needed, and local and regional outreach events including hearings and roundtables with small business owners.


In addition, SBREFA created special small business regulatory review policies for three agencies: EPA, OSHA, and the Consumer Finance Protection Board (CFPB). These agencies, deemed to be the most aggressive of Federal regulatory agencies, are required conduct a Small Business Advocacy Review (SBAR) panel before promulgating any new rules or regulations. This panel meets with regulated small business owners and offers them an opportunity to provide input on regulatory alternatives to minimize the burden on small firms. This activity is typically managed by SBA’s Office of Advocacy and key federal agencies.

ONO operates within a complex and fragmented mix of ombudsman activities across the Federal government. ONO’s mission is to respond to small business concerns across all Federal agencies, which is unique among federal ombudsman programs. However, broad oversight of federal programs is shared with dozens if not hundreds of organizations across the federal bureaucracy. All three branches of the US government—judicial, legislative, and executive—maintain extensive oversight authorities. Within the legislative branch, Congress has Constitutional authority to develop and oversee the budget and operations of all federal agencies. This work is supported by the Government Accountability Office (GAO), an independent investigative arm for Congress, which regularly reviews nearly every federal program and spending item. Started in 1921, GAO is a large operation, with nearly 3,000 employees and an annual budget that exceeds $519 million.

Within the executive branch, ONO also partners with other ombudsman operations in individual federal agencies. Regulatory agencies such as the Food and Drug Administration (FDA) and Exchange Commission (SEC) and EPA operate ombudsman offices, with jurisdiction limited to issues arising under that agency’s own rules. The Department of Defense (DoD) operates the largest federal ombudsman operation as its spending far outpaces all other federal domestic agencies combined. Finally, the White House-level Office of Management and Budget (OMB), runs its own operation, the Office of Information and Regulatory Affairs (OIRA), which maintains extensive power via its role as the final reviewer of all federal regulations.

**State and local operations**

As ONO and its related institutional structure was set in place, a completely separate process governed the emergence of small business ombudsman offices at the state and local government level. Initial interest in ombudsman activities emerged in the 1960s as part of a nationwide “good government” movement. The state of Hawaii is recognized as creating the first U.S.-based ombudsman office in 1967, and ombudsman offices with a small business focus began emerging in states like Wisconsin in the 1970s. While the total number of ombudsman offices (small business focused and others) is not known, their numbers are sizable. In fact, the U.S. is home to the U.S. Ombudsman Association, started in 1977 and now the world’s largest national organization for public sector ombudsman professionals.

As at the Federal level, state and local ombudsman operate in a diverse mix of institutional structures. Some states support a state-wide Small Business Ombudsman, who operates in a manner akin to ONO. In addition, many state regulatory agencies, especially environmental regulators, also offer ombudsman-like services for regulated business. A small number of states, such as Florida, Maine, and Rhode Island, support a Small Business Advocate office that combines both small business advocacy and ombudsman functions, and operates in a manner similar to SBA’s Office of Advocacy.

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33 CFPB did not exist at the time of SBREFA’s enactment in 1996; it was required to comply with these rules in 2012.
The state of North Carolina operates with a state Small Business Ombudsman office. The office’s creation emerged from an original legislative proposal to require an extensive cost-benefit analysis for all new laws, rules, and regulations in the state. When this plan proved too costly, state leaders opted to create an Office of the Small Business Ombudsman based on the national models being promulgated by ONO and the SBA Office of Advocacy. Its official mission is stated as “investigating and responding to issues raised by business owners regarding rules and regulations that are interfering with business operations.”

The North Carolina Ombudsman office operates within the state’s Department of Commerce. Funds for a single staff member are provided, but the office has no other source of funding. It operates closely with the Business Link North Carolina (BLNC) operation, a one-stop-shop for questions on state support programs, business licenses, and the like. It operates a toll-free telephone help line and a website that links business owners to needed forms and services. BLNC refers any regulatory issues or questions to the office of the Ombudsman, who seeks to provide assistance when and where it is possible. In this role, the ombudsman has no formal legal authority, and must simply work via persuasion and via mobilization of relevant networks. This operating structure is typically used in state and local ombudsman operations.

These state and local ombudsman operations have developed via a mix of pathways. In many cases, they have emerged in response to small business complaints or other locally generated issues or concerns. In addition, national level advocacy may often affect local decisions. For example, ONO actively advocates for the creation of state and local ombudsman offices, and has produced a “how-to” guide for this purpose. In addition, small business advocacy groups, such as the National Federation of Independent Business, also advocate for ombudsman offices and other kinds of regulatory relief measures.

**Role and activities**

At SBA, ONO assists small business owners through an issue resolution process that revolves around comment/complaint taking and case management. The typical ONO case management process is presented in the figure below.

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36 The North Carolina Department of Commerce is in the midst of planning for a partial privatization of its operations, and the future location and standing of this office remains uncertain.

122. Regulatory complaints and comments are received through several channels. They most frequently arrive via ONO’s toll-free telephone line, via mail, or via a web-based system for receiving comments or complaints. Inputs typically come directly from business owners, but they can also be provided via trade associations, business support networks, or from Members of Congress providing case management services to constituents. Input is also received via ONO and SBA outreach efforts such as annual Regulatory Review panels and other events.

123. In the 2012 reporting (FY 2012), the ONO processed 254 small business comments, and responded to more than 2500 public inquiries via telephone or email contacts. In addition, the ONO Administrator and/or other staff led or participated in 35 public events designed to solicit input and feedback on the federal regulatory process. These events occurred throughout the country.

124. Once comments are received, ONO operates via a formalized process (as shown in Figure 5). It sends a letter to the relevant agency with an expectation that the issue will be addressed within thirty days. If the initial agency response is unsatisfactory, ONO will make additional agency contacts in an effort to seek resolution. The small business owner, or “commenter,” is advised when the agency response has addressed the specific concerns reported.

125. ONO deals with a wide variety of business complaints and concerns that fall into a variety of categories including: regulatory misapplication or misinterpretation, miscommunication, administrative errors or delays, or fines and other compliance costs. The ONO’s annual report includes a number of case studies of these cases. In many instances, ONO intervenes to help reduce fines that were so large that

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38 Figure 5 is based on a flow chart development by ONO and presented in Ibid, p. 9.
39 Data from U.S. Small Business Administration, ONO Annual FY 2012 report to the Congress. p. v.
they threatened to drive a small firm into bankruptcy. In other cases, ONO has worked with agencies to address issues related to miscommunication. Examples include a case where a small firm was not receiving prompt payment due to incompatibility between its payment systems and the systems used by a federal agency. ONO input helped resolve the issue. In another case, ONO assisted a firm that was incorrectly designated as operating outside of a HUBZone, one of the U.S. government enterprise zone programs designed to spur activity in distressed neighbourhoods.

126. These efforts are further supported by activities of members of the ONO’s Regional Regulatory Fairness Boards. These activities, which occur in each of the SBA’s ten regions across the U.S., include public roundtables offering an opportunity to hear input from members of the small business community. These forums are open to testimony and input from the public. Any issues or concerns identified in Board review sessions become part of the official ONO review process. In addition, the ONO Administrator regularly appears at conferences and workshops around the US and receives inputs and comments via this process as well.

127. To promote transparency and accountability in government, ONO provides an annual report to Congress on its activities, and also produces an annual report card on how each federal agency is supporting regulatory fairness for small business. Agency performance is scored on several measures:

- Responsiveness: Timeliness and quality of response to ONO inquiries
- Agency Non-Retaliatory Policy: Does the agency have a written and enforceable policy to prevent retaliation against small firms who complain about regulatory actions?
- Regulatory Compliance Assistance: Does the agency provide assistance to small firms seeking to comply with its rules and regulations?
- Legal Compliance: Does the agency share information on the ONO and its requirements under SBREFA?

128. In the latest report card, the vast majority of agencies receive “A” grades for their performance. Interviews with past Ombudsmen suggest that agencies are very concerned to receive high scores and work closely with ONO to ensure that they comply with the standards used in the annual ONO reviews. While ONO lacks legal authority to sanction agencies with lagging scores, the public attention they receive from low scores typically leads to further inquiries from Congress or from overall federal agency leaders.

State and local experience

129. Most state ombudsman offices operate in a somewhat less formal and established manner with fewer formal procedures or reporting practices. As noted above, some of these offices were set up in response to guidance from ONO or SBA’s Office of Advocacy, and thus operate in a manner quite similar to ONO. All of them focus on the key missions of complaint handling and regulatory review, and some offices provide a range of other services.

130. The state of New York has managed one of the more expansive state operations. For example, it has created a Small Business Environmental Ombudsman, who seeks to work proactively with businesses

41 For the latest version, see Ibid, pp. 38-39.
to help them develop plans for compliance with local, state, and federal environmental rules. The office is presently engaged with a new initiative to assist small firms seeking to comply with new state rules related to surface coating of manufactured products. In 2009, New York also supported the creation of a State Small Business Task Force, composed of leading small business owners. The Task Force produced a report that reviewed the small business impact of state regulations and offered suggestions for change. 43

131. In Oregon, the Small Business Ombudsman office was established in 1990 and has a special focus on assisting small business owners in dealing with issues related to workers compensation insurance and claims processing. This focus stems in part from the office’s creation as part of a major workers compensation reform package, but has persisted because workers compensation insurance issues remain a major concern for the state’s small business owners. In addition to complaint handling services, the office also produces guides for effective compliance with current regulations.

132. Wisconsin, Pennsylvania, and Colorado not operate with a stand-alone small business ombudsman who operates across all state agencies. In these states, the ombudsman is placed within major regulatory agencies. In these cases, small business ombudsman operations have been set up in state environmental regulation agencies. Kentucky and Ohio also require that all “business-facing” agencies also create a small business ombudsman operation to deal with potential small business concerns.

133. A number of states designate regulatory review boards to address business complaints and to lead regular reviews of existing laws to eliminate wasteful, unnecessary or burdensome regulations. Examples include the Arizona Governor’s Regulatory Review Council and Missouri’s Small Business Regulatory Fairness Board. This process may have reached its zenith with Kansas Governor Sam Brownback’s 2011 decision to create a state-wide Office of the Repealer, with powers to respond to citizen and business requests to repeal unpopular state laws and rules.

134. Finally, many U.S. states manage Ombudsman offices that cover any and all issues related to state government, including but not limited to small business concerns. In many cases, such as in Alaska and Hawaii, these offices operate more like an Inspector General function and may have formal legal authority to conduct investigations into agency matters and to root out waste, fraud and abuse.

135. There is no formal organizational connection between state small business ombudsman and the federal ONO. They may meet via professional networks or informal contacts, but they do not engage in any joint activities such as professional development or the sharing of “best practices.” Connections between state offices are similarly limited.

Assessment

136. The fragmented and decentralized structure of small business ombudsman offices in the U.S. reflects fragmented and decentralized government structure first defined in the U.S. Constitution. In this system, it is relatively easy to create new initiatives or operations, but providing long-term funding and program sustainability presents greater challenges. Similarly, efforts to coordinate across federal programs or between various levels of government are somewhat limited. These patterns result in a crazy quilt of oversight and ombudsman programs who all serve distinct niches but who have limited interactions and partnerships with one another. The differing functions and structures of these offices reflect their piecemeal development and implementation. Offices have typically been created in response to specific problems or needs, without reference to what is happening at other agencies or in other issue areas. A similar pattern

occurs more broadly across U.S. small business support or economic development programs, which are managed by a complex and diverse mix of public, private, higher education, and non-profit organizations.

137. This model has its own strengths and weaknesses. On the positive side, the SBA ONO, and similar state programs, are relatively lean and low cost operations. They are typically staffed by a handful of professionals are not expensive to operate. They perform a valuable function of responding to constituent concerns, promoting government transparency, ensuring the effective use of tax dollars, and ensuring that regulations do not unfairly hamper the operations of small businesses.

138. While opening opportunities for policy entrepreneurship and program experiments, this system contains downsides as well. The mix of ombudsman efforts creates great complexity and may create management challenges. It also likely increases the prospects for duplication of services and less effective use of limited resources. Recognizing this fact, several Members of Congress have proposed legislation to merge the ONO and the Office of Advocacy. 139. However, these proposals have rarely gained much momentum or active support. Meanwhile, several U.S. states have created state-wide ombudsman operations.

140. At the state level, the small size and limited (if any) budget of Ombudsman offices highly limits their potential effectiveness. Unlike ONO, which has some standing legal authorities, many state offices lack much regulatory power and influence. Instead, individual ombudsmen rely on the power of persuasion and effective deployment of their networks to get things done. Many states also rely on volunteers to serve on regulatory review bodies and boards. As result, the performance of this function will depend to a great extent on the individual skills and talents of program leadership or on the willingness of agency leaders to cooperate.

141. An additional issue concerns the potential for “capture” of these operations by outside small business interests. In the U.S. system, the small business lobby, led by the NFIB, is extremely powerful, and its anti-regulatory message is strongly supported within Congress, particularly within the Republican party. Many outside observers consider both ONO and the Office of Advocacy to be “anti-regulation,” and thus not serving as an independent arbiter or authority. Past ombudsmen respond by asserting that their role is to serve as the voice of small business and to help reduce the adverse impact of regulations on these firms. While they recognize the need to make a case for regulation, they argue that this role is the purview of the regulator, not the ONO or other such offices.

142. In the past, a lack of comparative assessment tools or benchmarks has made it difficult to independently assess the costs and benefits of ONO, but more recently ONO has decided to contract an evaluation research analysis to better track and understand the impacts of the programme. ONO also provides annual reports to Congress that provide extensive detail on its outputs and activities, and can also provide numerous case studies of its impact and effectiveness. However, these useful assessments do not address the key issues related to whether the ONO structure and process is the best and most cost-effective means to support these functions of complaint-handling and small business regulatory review.

Issues for consideration

143. Under its current operating structure, ONO brings many important strengths to its mission. It has a clearly specified function that it performs with limited cost and limited staffing. It serves as a key resource for ensuring that small firms are not unduly burdened by the costs of regulatory compliance. In this way, ONO helps to create a more level playing field for small business.

44 Interviews
144. At the federal level, the main issue concerns ONO’s independence. Is an independent ONO needed or could it be merged with the Office of Advocacy or have its functions transferred to other federal agencies? Interviewed experts with experience in both offices believe that ONO should remain as an independent operation. They argue that a merger with the Office of Advocacy may generate some minor budget savings, but could also limit Advocacy’s ability to serve as an advocate for small business during the process of reviewing regulations prior to final enactment. If this function was combined with ONO’s role of assessing annual agency performance, other federal agencies might be less willing to cooperate with Advocacy when developing new regulations. However, consolidation of the offices could also serve to improve both ONO’s and Advocacy’s responsiveness to pressing regulatory issues facing small firms.

145. At the state level, the main issues concern funding and budget stability. To be effective, ombudsmen need regular funding and legal authority to ensure that their concerns are heard. In addition, ombudsman offices should be regularly combined with larger customer service operations where residents and small business owners seek government help or access to support services. In addition, efforts to improve cross-state and federal-state peer learning networks should be encouraged.

146. In the U.S. system, the need for a major expansion of small business ombudsman-like activities beyond the status quo is somewhat limited. When many of these offices were first created, most federal, state and local leaders focused on large businesses and major corporations as their primary business constituents. Regulations tended to focus on large businesses, with little review of how small business could afford compliance costs. In addition, the role of small businesses as job creators was not as well understood or as celebrated as it is today. As other parts of the public sector have grown to recognize the unique issues and challenges facing small business, the need for these ombudsman services is not eliminated, but may be lessened.

Transferability issues

147. Much of the U.S. model for ombudsman services could be transferred to other countries with minimal revisions. Many state operations have been established with little more than funding to support one staff person. Unfortunately, these types of operations, while low cost, tend to have limited long-term impacts as well. A well-connected, tenacious, or lucky ombudsman may be able to resolve a few cases or address a pressing issue, but more long-term systemic impacts will be limited.

148. Operations like ONO at the national level remain relatively low cost, but also enjoy statutory powers that give them “a seat at the table.” Because of its role in providing an annual report card on agency performance and its operation of both regional and agency review boards, ONO has legal authorities (albeit limited) that allow it to have an influence on the federal regulatory process. Even with these legal provisions, ONO’s effectiveness hinges on the skills of its staff members or their connections to key agency leadership.

149. Based on these lessons, it seems that effective ombudsman operations combine two characteristics: a relatively open charter to address wide range of issues on an as needed basis, and specific legal authorities that provide it with a “seat at the table” in key issues areas. Finally, the most effective operations include a robust complaint handling and case management capability. This typically takes the form of a toll-free telephone line and a website to receive outside complaints and comments. At the national level, development of a regional outreach capacity, similar to ONO’s Regional Regulatory Fairness Boards, also helps to improve responsiveness to local concerns.
CHAPTER 5

SPECIALIZED SME OMBUDSMAN SERVICES AT THE FEDERAL LEVEL IN CANADA

The rationale for specialized ombudsmen

150. Ombudsman services have existed formally in Canada for nearly fifty years. These services have been significantly shaped by Canadian culture as well as institutional make-up of the Canadian federation. This can mean that by the time a problem is surfaced, it has strained the citizen and where the issue is systemic, may have adversely affected many people before action is taken.

151. Provinces responding to pressure of civil society action groups began establishing Ombudsman offices. In 1967, Alberta established the first Ombudsman's office. Other provinces followed with similar legislation and by early 1970's, most provinces had similar offices.

152. Three primary reasons have been offered as to why offices were established:

- A need to protect against the abuse of power by the state;
- The insufficiency of existing mechanisms to handle grievances arising from state actions;
- The utility of having a watchdog which serves both the legislature and the public (Levine 2004, 241).

153. The first Ombudsman offices were set up through legislation and followed the classical orientation of Ombudsman from Europe. In the cases of Legislative Ombudsman the ombudsman covers all ministries and all areas of responsibility of the government that established it. All provinces in Canada have a classical type ombudsman.

154. More recently, and in particular at the Federal Government level Ombudsman have been established using organizational directives or using a broader piece of legislation relating to a specific Department. These ombudsmen have a narrower focus related to an organization or a sector. They are often referred to as “specialized ombudsman”. While the first three reasons for establishing an ombudsman still apply to these newer offices have a fourth reason for being created, relating to the complexity of the subject areas they cover. It is noted that specialized knowledge and skills were necessary to conduct effective investigations. These specialized ombudsmen have mandates limited to the area of responsibility of the Department under which they were established and may have powers circumscribed within a specific operational area or by a specific piece of legislation. While specialized ombudsman in the private sector frequently referred to as organizational ombudsman are common and have existed for some time, specialized public sector ombudsman are more recent creations. It is these hybrid forms of Ombudsman offices that most directly relate to Small and Medium Enterprises (SMEs) in Canada.

155. At the most practical level, there are two advantages in establishing Ombudsman offices around specific areas of activity. The first relates to the organizing framework of government services as they affect Canadian businesses and ensure that the ombudsman’s powers correspond to the constitutional competence of Federal government. These involve the regulation of the financial services sector (federal
competence), public procurement (limited to federal procurements) and taxation (federal taxes and provinces that have their taxes collected by the federal tax agency). The second class of advantage of the specialized approach relates to the context of the Ombudsman function within a set of broader cultural characteristics that have influenced Ombudsman services in Canada. This involves a less legal approach focused on Alternative Dispute Resolution (ADR) approach and a preference for informal versus formal approaches which tend to rely on a good understanding of organizational process and procedure. There has been an orientation towards understanding the complainant as well as the issue and a willingness to look at systemic as well as specific issues.

156. The first and primary reason for the choice of specialized ombudsman offices over classical offices will be explored under the description of those services that are most specifically of interest to SMEs. Those more general influences that evolved in the Canadian context are explored in the first section of the paper as a way of understanding the evolution of Ombudsman services and why all three services that relate most specifically to SMEs, are of a similar form. The third section of the paper is reserved for discussion and conclusion.

The Canadian context

157. The Forum of Canadian Ombudsman (FCO) defines an ombudsman as “an independent, objective investigator of people’s complaints against government agencies and other organizations, both public and private sectors. After a fair, thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.”

158. The definition is general and could lead to the conclusion that the role in Canada reflects practice in other jurisdictions. That would leave the casual observer with a very imperfect impression of Canadian Ombudsman services and even confused about how the function works in this country.

159. Michelle LeBaron in studying Canadian ombudsman practices concluded that Canadian ombudsman services “have adapted their roles to changing social, economic and political conditions and have thus pioneered the transformation of ombudsman work to creatively meet new needs. ”

160. Canadian Ombudsman services have tended to be influenced less by legal principles than those in the United States. As Canadians tend to be less inclined to look for formal structures that support an adversarial approach, Ombudsman services often will initiate investigations in the absence of specific complaints and look at systemic issues as well as individual complaints.

161. Good access to internal records of organizations may also help more general investigative process. Canada has well developed procedures for the creation and maintenance of records in all government organizations. There are equally well-developed procedures that create access to records that become very useful in examining individual cases.

162. Expectations of public office holders are high, especially those charged with protecting the public interest. Fiona Crean, Ombudsman for the city of Toronto makes this point particularly well “Fairness, in the context of public servants’ duties and obligations, is much more than just a fair hearing or a provision of a service. It is about providing information that is easily found, accessed and understood. It is about treating the public with dignity and respect and providing an open, accountable and timely service. Last but not least, it is about providing well-reasoned decisions to the public about actions taken by public servants”.

163. Finally, Canadians have an expectation that once a complaint has been established as bona fide that the organization responsible will take appropriate action. This is reinforced by a strong tradition of journalism that will follow-up on stories related to complaints against the government and government-
regulated organizations. Following a scandal involving government sponsorship activities there was a loss of trust in many services provided at the Federal level. This loss of trust was reflected in a change in governing party following the election of 2005. The 2006 Speech from the Throne stated “no aspect of responsible government is more fundamental than having the trust of citizens. Canadians’ faith in the institutions and practices of government has been eroded…. It is time for accountability.” The “sponsorship program” and the controversies that surrounded it compelled the Government to respond to public concerns by introducing several new initiatives…”. Looking to increase both transparency and accountability the government increased the number of “watchdog” type functions as well as citizens access to redress when unhappy with either government or government regulated services.

164. All Ombudsman services touching on SMEs were either created or their framework revised as part of the Governments move to increase accountability and transparency. At the same time the evolution of the classical services to more dispute resolution in their approach influenced the creation of the new Ombudsman Offices.

165. As services for SMEs came much later to Canada then citizen based services they were developed in a space were general complaint services had a strong operating history. As such services were organized around activities that are important to small business rather than directed at the business community itself. The three primary areas where Ombudsman services benefit SMEs are financial services, taxation and public procurement. The first two are the purview of the federal government and the third while applying only to federal procurement represents a sizeable portion of all government business. Because the services are more recently created they have followed the pattern of specialized ombudsman and are located in the organization or sector where the activity occurs. Each will be looked at individually as there are some important differences in governance and comparing across all three allows for the identification of good practices.

Ombudsman services to SMEs

166. The following sections provide a detailed description of the three Ombudsman services of greatest interest to SMEs. The first relates to the banking and investment sector a sector regulated by the federal government and has the longest operating history. The other two involve government services in the areas of taxation and procurement and were initiated at the same time. All three were in response to dissatisfaction with the existing systems of redress and represent responses by the Federal Government to widespread unease and significant lobbying by organizations that support and represent SMEs. Each is discussed from the perspectives of their history, purpose, governance and operation. A short section of observations follow the factual description.

Ombudsman for banking services and investments

Rationale and history

167. The Canadian banking sector is heavily concentrated with six large banks controlling the bulk of financial transactions. The vast majority of Canada’s SMEs use one of the “Big Six”. In the early 1990’s the banks began imposing service charges on what had been previously free services. Around the same time they introduced new procedures for obtaining loans that made many small businesses feel that they were not being well served by the financial institutions. The recession in 1992 exacerbated small business concerns and by the mid-1990s public sentiment turned against the banks and the department of Finance considered actions to encourage more responsiveness from these institutions.

168. With the threat of an imposed solution imminent – the Canadian Bankers Association announced on November 7,1995, the formation of Ombudsman offices at each bank and a national Ombudsman to
hear small business complaints. The Canadian Banking Ombudsman (CBO) would review small business complaints that could not be resolved by the bank or through the banks internal ombudsman. Within a few months, the purview of the CBO was expanded to include all consumer complaints.

169. Initially the Ombudsman Office suffered from the perception by some that as an industry created body it could not adjudicate complaints in an objective fashion. In addition because its findings were not binding there was a concern that the banks would ignore or fail to fully implement recommendations.

170. In 2002, the mandate of the CBO was expanded to include investment dealers raising the number of participating organizations from 13 to nearly 500. The purview of the newly formed organization included a wide range of activities that takes place between individual clients and investment firms. At this time the CBO was renamed to the Ombudsman for Banking Services and Investments (OBSI).

171. In 2007, the OBSI, following recommendations of an interdependent review that had taken place a year earlier, changed its mandate to include the investigation of systemic issues. This caused concerns among its member organization and began tensions that eventually led to two of its members withdrawing their sponsorship. The members that exited cited administrative slowness as their reason for seeking a different means of resolving disputes with clients, though OBSI’s timeliness performance was better than the supplier chosen by the two banks. Later the OBSI revised its terms to moderate its interest in systemic issues.

172. In 2012, the Department of Finance created a new framework for banking dispute resolution requiring all banks to have an internal complaints resolution mechanism with guidelines provided by the Financial Consumer Agency of Canada (FCAC). All banks were also instructed to choose an external complaints adjudicator but were not specifically directed to use the OBSI. At the same time the new framework clarified that issues of a systemic nature would be referred to the FCAC for investigation.

173. In 2014, partially in response to consumer criticisms of the federal government’s approach to creating competition among banking dispute-resolution providers, OBSI’s investment mandate expanded once again. The Canadian Securities Administrators (CSA’s), representing Canada’s thirteen provincial and territorial securities commissions, amended securities rules to make OBSI the sole approved provider of dispute resolution for the investment sector. OBSI’s membership nearly tripled as almost one thousand portfolio managers, exempt market dealers, and scholarship plan dealers joined as participating firms.

174. Among the CSA’s reasons for making OBSI’s service mandatory was to ensure the independence of dispute resolution and mediation services, and consistency in expectations and outcomes for those services. Complaints considered by a common dispute resolution service would be handled to a uniform standard, and it would be clear to investors whom they should contact when complaints are not resolved at the firm level. There should be no perception that competition for business from registered firms might influence the recommendations of the common service provider.

**Purpose**

175. The Ombudsman for Banking Services and Investments describes itself as an alternative to the legal system placing itself in a broad class of Alternative Dispute Resolution mechanisms but with a single sector focus. It works confidentially and in a non-legalistic manner to find fair outcomes to unresolved disputes about banking and investment products and services. It is free to clients. If it finds an error, misleading advice or other maladministration that has caused a loss to a client, it can recommend compensation up to a maximum of $350,000.
Governance

176. The Department of Finance issues regulations covering complaints made against banks that cover the organization and function of internal dispute resolution processes for the banks and how external complaints are handled. The Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations were issued by the Department on February 27, 2014 and establish the framework under which the OBSI operates.

177. OBSI has signed a Memorandum of Understanding (MOU) with the Canadian Securities Administrators that provides for securities regulatory oversight of OBSI for disputes between Investment services and their clients.

Board of Directors

178. Independence is achieved via an external board of directors that oversees the organization but does not see or review individual cases, nor may it challenge decisions taken by the Ombudsman. Two thirds of the board members must come from the broader community while a minority is chosen from a shortlist provided by the industry. The current board has ten members including the chair. Three members are appointed from industry associations, one each from the Canadian Bankers Association, one from the Mutual Fund Dealers Association and one from the Investment Industry Regulatory Organization of Canada.

179. The board must meet at least quarterly and in addition have one strategy and planning session annually. The board has three committees:

180. The Governance, Human Resources and Compensation Committee reviews matters relating to corporate governance and structure, director recruitment, and employee human resources and compensation.

- The Policy and Standards Committee recommends and monitors OBSI’s quality and performance standards, independent reviews and the Code of Conduct, as well as overseeing any revisions to the Terms of Reference.

- The Finance and Audit Committee meets quarterly and reviews the financial statements of the organization, as well as receiving the report of the external auditor of OBSI. It also oversees the defined contribution pension plan for OBSI, including reviewing fund performance.

181. The directors receive an annual honorarium for participating on the board plus a per diem for attending meetings. The three industry directors do not receive compensation from the OBSI. The Board of Directors is responsible for selecting the Ombudsman who must be independent of the industry and government.

The Office of the Ombudsman

182. The Ombudsman is appointed for a period of five years that can be renewed. The Ombudsman is assisted by a Senior Deputy Ombudsman (who is the chief operating officer), and by two Deputy Ombudsman, one for the banking sector and the other the investment sector.

183. Investigative staff are drawn from a variety of fields and disciplines such as law, accounting, finance, banking and investments. There is a combination of full time and part time staff used to manage variations in workload.
The process of handling complaints

184. The OBSI can only handle complaints against participating members (Toronto Dominion Bank and Royal Bank of Canada are not participants on the banking side, though their investment subsidiaries are). When an individual or small business makes a complaint the OBSI determines whether 90 days have transpired since the complaint was raised with the financial institution or the client has received a response and is not satisfied (this establishes that the OBSI can proceed under the Governments framework).

185. The complaint is investigated to determine merit and if compensation is warranted. In cases where compensation is recommended, the OBSI will endeavor to work with the complainant and the bank to settle the matter. A final written recommendation must be made to both parties within 120 days of initiating an investigation.

186. The recommendation of the OBSI is non-binding and may be rejected by either the complainant or the Bank. In cases where the complainant concurs with the recommendation but the bank does not the OBSI may publish the name of the bank and the facts of their investigation.

187. In 2013, there were 207 complaints of which 92% were closed within the 120 day period and the average number of days to resolve a complaint was 67.5 days. The OBSI does not differentiate small and medium businesses in its case statistics but the number of small business cases is small which was in part the rational for increasing the organizations scope to cover all bank clients. About 18% of complainants indicate they are self-employed although it is not possible to determine whether the complaint is related to business dealings or a personal account. The OBSI tracks complaints by issues and products. Types of issues that result in complaints include chargebacks, fraud, penalties, service concerns, missing assets, collections, erroneous information and transaction fees. It also keeps statistics by banking product one of which is commercial accounts. The total number of cases is under 10.

188. The OBSI measures its service regularly. Most complainants agree that investigations are conducted in a reasonable amount of time and that the investigators are helpful and courteous. They equally agree that the process is easy to understand. The overall quality of the OBSIs service, however, is judged by whether compensation is awarded, for those who receive compensation, satisfaction is much higher than for those who do not.

Operations

189. Funding is provided from a levy on all participating firms, which includes banks and investment firms. The banks by virtue of their size provide most of the funding for the OBSI operations. In 2013, the OBSI received just under $8 million CDN from its participating members through a levy that is based on the economic size of the participating institution. Its expenditures for the same period were just under $7 million CDN. About 24% of the total expenditures are related to banking. Of the expenditures payroll at $5.5 million CDN represents the largest single expenditure followed by directors’ fees and expenses at $.3 million CDN and rent and operating expenses at a similar amount. Most individuals contact the OBSI by phone 56% with e-mail at 25% and on-line enabled contact at 9% representing the next preferred ways of approaching the organization.

Areas for improvement

190. The OBSI is among the first of the specialized Ombudsman Offices and proved out the concept in Canada. The fact that clients of the Banks have a single point of contact for issues that cannot be resolved by the banks’ own internal system allows for both promotion of the service by the government regulator and oversight of the service without having to make a direct intervention. This is a strong plus for a government that is thinking about establishing an ombudsman service and in Canada has become the
model at the federal level. As the banks pay for the OBSI there is a natural incentive for them to maintain high quality internal complaints resolution services from both a cost perspective (the larger the number of complaints the greater the OBSI levy will be) and from a reputation perspective (the OBSI can publish the names of banks who do not follow its recommendations). The levy system in Canada is based exclusively on the size of the bank (in total turnover) not on how many clients use the service. A combination of a base levy and a usage fee would create additional incentives for banks to handle complaints before they get to the OBSI.

191. Reputation is critical for Ombudsman. The OBSI suffered from initial reactions that it would not be possible for an Ombudsman to operate with complete independence when the organization being investigated contributed to the funding of the Office. The Ombudsman for Banking Services has had both time and incentive to create a high caliber service. The governance structure for the OBSI is primarily community based and the Office itself operates with complete independence on complaints. The Board chooses the ombudsman but after does not become directly involved in operational decisions. The Board also provides oversight on the budget of the office to ensure that value of the over all service is sound. The governance structure of the OBSI is effective and has proven itself over time.

192. Some have argued that the OBSI being voluntary creates an incentive for the Office to be efficient. The pressure associated with two of the big six banks choosing an alternative service intensified the OBSI’s efforts at providing effective service but at the loss of influence on the industry. In particular, with large institutions like banks, there needs to be a strong public complaints body. The decision of the Government in the most recent reforms to allow the banks to choose an independent third party to resolve complaints weakened the OBSI and may have weakened confidence in the overall intent of the concept of an independent specialized ombudsman for banking services. In the future other banks could choose to use another mechanism for resolving disputes not resolved by the bank’s internal complaints system further weakening the OBSI.

193. A second criticism of the recent reforms has been the separation of systemic and individual complaint investigation between two organizations. The division of responsibilities between the OBSI (individual complaints) and the FCAC for systemic issues mutes the role of the OBSI and focuses it away from pro-active examination of the banks service to its customers. This is significant in that it runs contrary to the strong cultural orientation of ombudsman services in Canada. The ability for the ombudsman to initiate an investigation that is broader than an individual complaint provides a strong consumer focused watchfulness of the banks’s relationships with its clients. In looking back at the origins of the OBSI it was in fact systemic issues with respect to the banks services to SMEs that provided the rationale for its creation. While in theory there is a mechanism for the investigation of systemic problems in practice having a second organization do the systemic investigations creates impediments to the transfer of knowledge from individual cases to general practice. It has also removed from the OBSI an important tool of influence on the banks.

194. The OBSI has a good system of feedback on the services it offers and good internal standards of performance. It could benefit from regular external evaluations with suitably broad scope to ensure that it is continuing to serve its functions, is working effectively within the complex ecology of banking regulators and watchdogs, and that gaps are not emerging at the boundaries of service mandates.

Office of the Taxpayers Ombudsman (OTO)

Rationale and history

195. The origin of the current Taxpayer Bill of Rights dates back to 1985 with the introduction of the Declaration of Taxpayers’ Rights and the six basic guarantees for taxpayers when dealing with the Canada
Revenue Agency (CRA). In 2007, the Minister of National Revenue updated the list, adding nine additional rights for all taxpayers (an additional right was introduced in 2013), plus five commitments to small business. The commitments include: administering the tax system in a way that minimizes costs of compliance; working with all governments to streamline service, minimize cost, and reduce the compliance burden; providing service offerings that best meet the needs of small businesses; conducting outreach activities to help small business comply with the legislation administered by the CRA; and explaining how the Agency conducts itself with small businesses.

196. At the same time as the introduction of the additional nine taxpayer rights and commitments to business, the government announced, through an Order in Council, the creation of the Taxpayers’ Ombudsman and the Office of the Taxpayers’ Ombudsman (OTO), pursuant to the Public Service Employment Act.

Purpose

197. The OTO’s mandate is: “to assist, advise and inform the Minister of National Revenue about the services provided to taxpayers by the CRA”

198. In carrying out this mandate, the OTO will:

- Provide an independent and impartial review and address any unresolved complaint made by a taxpayer concerning the service or treatment they received from the CRA;
- Identify and investigate systemic and emerging issues related to service matters that impact negatively on taxpayers;
- Facilitate access by taxpayers to redress mechanisms within the CRA; and
- Raise awareness of taxpayer service rights and the role of the OTO.

199. The conduct of the OTO follows four broad principles that are common to most Canadian Ombudsman services:

- Independence: the OTO operates at arm’s length from the CRA;
- Impartiality: the Ombudsman is neither an advocate for taxpayers nor a defender of the CRA;
- Fairness: the OTO acts with equity and justice;
- Confidentiality: a taxpayer’s communication is held in confidence, unless permission is given to share information with the CRA.

Governance

200. The Taxpayers’ Ombudsman and CRA report directly to the Minister of National Revenue. In having the Taxpayers’ Ombudsman occupy an executive position at arm’s length from the CRA and report directly to the Minister, the Ombudsman leverages the relationship with the Ombudsman Liaison Office (OLO) in the CRA. This relationship permits that any recommendations made by the Ombudsman to the Minister would have the benefit of understanding the Agency’s activities, policies, and procedures. In the event that recommendations are denied or ignored by the CRA, the Ombudsman has access to the Minister as a mediator to resolve any potential impasse.
201. The OTO’s understanding of Agency activities becomes very important in conducting investigations into systemic issues. Reports and recommendations on investigations of systemic issues are reported to the Minister.

202. While the OTO does not have a Board of Directors, it does have a Consultative Committee that is composed of external stakeholders that provide feedback, help in setting objectives, and identify potential systemic issues.

The process of handling complaints

203. The Ombudsman serves as a vehicle of last resort and a taxpayer must have first exhausted the internal complaints handling functions within the CRA’s Service Complaints Program. Under exceptional circumstances or at the request of the Minister, the Ombudsman may undertake an investigation before other methods have been exhausted. Examples of exceptional circumstances include: the complaint raising systemic issues; continuing with the internal redress system will cause undue hardship to the taxpayer; or when using the internal redress systems, the review will likely take too long.

204. The Operations Unit has the responsibility of informing and educating taxpayers about their rights and the complaints process. The Complaints Investigation team manages the complaints process by leveraging their relationship with the OLO to resolve the complaint.

205. Generally, complaints are acknowledged by phone and a follow-up letter is sent to the taxpayer to explain the next steps in the process. In cases that contain unresolved service-related issues, an investigation is initiated with requests for information or action sent to the CRA on behalf of the taxpayer. Once the CRA has responded to the OTO’s request concerning the complaint, the investigators send a letter to the taxpayer to notify them of the outcome of the complaint. Unlike the OBSI, no specified maximum period for an investigation is established for the OTO.

206. In 2012-2013, the OTO completed a total of 1,141 complaints. Of these complaints, 358 were not actionable (not the responsibility of the OTO) and closed after preliminary review, while 525 were resolved in an expedited fashion, and 191 investigations were completed. A majority of taxpayers (164 files) have between 1 to 3 issues, while only 27 files had more than four issues. Small business statistics are included in the above statistics, but are not reported on separately.

207. In addition to investigating individual complaints from taxpayers, the Taxpayers’ Ombudsman is responsible for the investigation of systemic and emerging service and fairness issues that have the potential to adversely affect taxpayers. The systemic investigation process includes the research phase, the analysis phase and the reporting phase. Should the research and analysis phase conclude that the CRA could do more to comply with the Taxpayer Bill of Rights, the Ombudsman will submit a Special Report to the Minister of National Revenue with recommendations for corrective action.

208. As an example, in January 2010, the Ombudsman launched a systemic investigation to review service and fairness issues relating to the interactions between small and medium enterprises (SMEs) and the CRA. The focus of this review was to determine whether the CRA provided professional service and fair treatment to SMEs.

209. Specific issues that have been brought to the attention of the OTO are related to the following:

- Payment misallocation (e.g., allocated to wrong year, account, etc.);
• Value added tax registration dates (e.g., inconsistent information regarding when a registration is effective);

• Direct Deposit Form (e.g., delays in processing); and

• Business Consent Form (e.g., delays in processing).

210. In their Annual Report, the OTO publishes statistics on the percentage of recommendations that were accepted by the Minister. The OTO does not provide statistics on the corrective action(s) taken by the Agency on systemic issues reported to the Minister. There is neither a satisfaction survey of the users of the service, nor an overall evaluation of the OTO.

Operations

211. The OTO is divided into two sections: an Operations section, with separate teams for complaint and systemic investigations, and a Corporate Services and Communications section. The OTO employs 26 full-time equivalent staff, with an annual budget of CDN 2 million.

Areas for improvement

212. Small business organizations, such as the Canadian Federation of Independent Business (CFIB), suggest that the creation of the OTO has helped, but conclude that too many businesses do not know of its existence. While some of this criticism will diminish with time as the service becomes more familiar, more significant efforts are likely needed to overcome a Canadian’s natural tendency not to complain. This is particularly true when facing institutions that have significant power, like the CRA. To balance this power and mitigate this tendency, the Taxpayer’s Bill of Rights added a new taxpayer right in 2013 – the right to lodge a service complaint or request a formal review without fear of reprisal. The inclusion of service commitments to small business offers an opportunity to promote both the OTO and these commitments. In order to make the commitments meaningful to SMEs, they will need to be more specific.

213. Other concerns that are raised by academics and practitioners include the perceived closeness of the OTO to the CRA. This is a general concern that all specialized Ombudsman offices must deal with, but it has extra meaning given the power of the CRA and the potential consequences of the CRA’s actions. The OTO has an advisory body that includes the CFIB, but establishing a formal board with representation from the SME community could strengthen this body. Additionally, strengthening the reporting on individual complaints using mechanisms similar to those practiced by the OBSI, would build credibility and influence. Having a respected body, such as the Auditor General, examining and commenting on the reporting structure could ensure continued independence.

214. While the OTO keeps statistics and reports on complaints received in a given year, little reporting is done based on measuring its performance. Greater attention needs to be paid to reporting to ensure that the OTO is able to measure the value of their service and continue to make recommendations to the Minister that are actionable by the CRA and improve the CRA’s service to taxpayers.

215. Additionally, there is no standard timeframe imposed upon the CRA to aid in the resolution of complaints or dictate when a complaint should be escalated to the OTO. This omission may result in complaints that are quite old by the time the OTO is involved. Establishing more specific timeframes for the CRA to resolve a complaint before it is escalated to the OTO would promote good practice in the CRA and ensure more timely involvement of the OTO. The referral of recommendations to the Minister of National Revenue is sound, as there is always the possibility of using the Minister to resolve impasses between the OTO and the CRA.
Office of the Procurement Ombudsman (OPO)

Rationale and history

216. The Office of the Procurement Ombudsman was established in 2008. The origins of the Office can be traced back to a 2003 interdepartmental task force that concluded that government’s procurement practices needed some oversight to ensure greater transparency and accountability. In 2006 the Federal Accountability Act and subsequent changes to the Department of Public Works and Government Services Act created the Office of the Procurement Ombudsman. The Office began its operations following the creation of the Procurement Ombudsman Regulations in May of 2008.

Purpose

217. The Public Works and Government Services Act sets out the mandate of the Procurement Ombudsman which is to:

- Review the practices of departments for acquiring goods and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;
- Review any complaint with respect to the award of a contract for the acquisition of goods under $25,000 CDN or services below $100,000 CDN (including taxes);
- Review any complaint respecting the administration of a contract for the acquisition of goods or services by a department regardless of dollar value; and
- Ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.

218. The Procurement Ombudsman also performs any other duty or function respecting the practices of departments for acquiring goods and services that may be assigned to the Procurement Ombudsman by order of the Governor in Council or the Minister.

Governance

219. The Ombudsman reports to the Minister of Public Works and Government Services. The Procurement Ombudsman’s mandate extends more than 100 federal organizations, more specifically to all federal organizations listed in Schedules 1, 1.1 and 2 of the Financial Administration Act. The Procurement Ombudsman Regulations excludes some organizations (House of Commons, Senate and Canadian Security Intelligence Service) from the Ombudsman’s mandate. Federal procurement in Canada is regulated through more than 15 Acts of Parliament and more than 35 different policies governing the procurement process. Federal organizations have delegated authority for procurements up to specific dollar thresholds and, when reporting on the results of a review, the Procurement Ombudsman’s recommendations are directed to the relevant Department Head.

The process of handling complaints

220. Of the 233 procurement-related contacts in 2012-2013, the Office was able to deal with 121 general inquiries by providing information and answering questions. Where issues are registered, they are assessed against the criteria of the Procurement Ombudsman Regulations to determine they have been filed properly and fall under the Ombudsman’s mandate to undertake a review. Of the 112 issues presented in
the reporting period, 82 were not filed in accordance with the prescribed criteria to be considered filed. Of those that met the filing criteria, a further 24 did not meet prescribed regulatory criteria to undertake a review. However, six complaints did meet all criteria so a review was undertaken.

**Services to Suppliers and Federal Organizations**

221. The Procurement Ombudsman’s legislative mandate provides for the following core services: Reviews of complaints regarding the award or administration of a contract; Reviews of Departmental Procurement Practices; and Provision of alternative dispute resolution services for contractual disputes. Examples of procurement practice reviews undertaken by the office include mandatory standing offers, construction contract amendments, advance contract award notices and acquisition of training services. All procurement practice review reports are made available on the OPO website.

222. The office also does reviews of complaints. By law, the Ombudsman shall provide the reports to the complainant, the Minister of Public Works and Government Services Canada and the Minister of the implicated department. The Procurement Ombudsman can recommend compensation up to 10% of value of contract. He also posts summaries of reviews of complaints on its website to provide information on complaint cases without reference to the complainant or the department; the intention being of providing information that could be useful in strengthening the procurement process in other organizations.

**Operations**

223. According to the 2013-14 Annual Report, the OPO has approximately 28 staff and an annual budget of CDN 3.8 million. The Ombudsman is appointed for a period of five years. The Office is divided into three areas reporting to a Deputy Ombudsman. The three divisions are Procurement Inquiries and Reviews, Quality Assurance and Risk Management and Communications and Corporate Management.

**Formative Evaluation of the Office**

224. In 2012, an evaluation on the effectiveness of the office was performed by an external consultant. The evaluation focused on experiences of suppliers, many which are small and medium enterprises and government departments. There were 13 findings that related to the establishment capacity of the Office as well as its operations. A number of these relate directly to SMEs. In summary, the Office was seen as providing an important service. The report states “The majority of the suppliers surveyed stated that there is a tremendous need for the services provided by the OPO because it plays a crucial role in maintaining the credibility and fairness of the procurement process in the federal government.” The evaluation also offers a number of recommendations for improvement. Recommendations included increasing efforts at communicating the Office’s existence and function. Many small enterprises are not aware that an ombudsman service related to federal procurement exists or that it is easy to use. Business can be concerned that complaining affects the possibility of doing business with the government in the future and reassurances that using the ombudsman services will not stigmatize the complainant is important.

225. The evaluation also recommended that the office improve its use of performance indicators and that the Ombudsman develop a method of reviewing and reporting on the extent to which its service standards are met. By improving it’s reporting on performance the OPO will contribute to building the communications messages that build credibility with the business community.

226. Two of the recommendations touch on the role and scope of the office. First, the report suggests that expanding the threshold levels for complaints that fall within the mandate of the Ombudsman be considered. Currently procurement of goods over CDN 25,000 and services over CDN 100,000 fall under the Canadian International Trade Tribunal (CITT). Because the process of filing a complaint under the CITT is more time consuming and formal, it might be more expeditious for both the federal government.
and suppliers to slightly increase the maximum threshold of OPO. Second, it was recommended that consideration be given to making it mandatory for Departments to participate in the OPO ADR process once a supplier has requested it.

227. The OPO developed an action plan, available on the Office’s website, which is informed by the opinions of external experts and addresses the evaluation report and its recommendations. On the question of thresholds the experts stated “In our view, there is no persuasive reason for changing the monetary thresholds that underpin the Procurement Ombudsman’s mandate. The original policy rationale – that the Procurement Ombudsman fills a gap in the dispute resolution system for contracts rather than providing a substitute forum – remains compelling. And the system overall is seen to be working reasonably well”.

228. On the question of making ADR mandatory, the experts concluded “the OPO should consider setting up a process (...) that could lead the Minister to establish standardized and uniform ADR processes in procurement contracts or frameworks, including the option to have recourse to OPO ADR services”. The suggestion to make OPO ADR services mandatory is premised on a potential finding of a practice review on ADR processes (i.e. “if there is a finding of a need to standardize and make uniform across the government ADR processes...”). OPO does not conduct practice reviews with a pre-determined outcome. Given suggested approach, and the fact that a finding of a practice review would be the “trigger” for the recommendation, conducting a neutral practice review (whether actual or perceived) on ADR processes would be difficult. As such, no changes are contemplated at this time.

Areas for improvement

229. The Office of the Procurement Ombudsman has developed a reputation for independence and neutrality in reviewing supplier complaints and systemic issues affecting the federal procurement system. This speaks in large measure to the importance of the persona of the ombudsman and that effectiveness of the office is in no small measure a function of selecting the right person.

230. The number of individual complaints remains small relative to the total volume of procurement activity within the office’s mandate. It is unclear whether this is a function of widespread good practice or that the service remains largely unknown to suppliers. Promotion of the service is core to establishing a good ombudsman office. Part of this will involve making sure that businesses feel comfortable that there will not be negative consequences on future opportunities if they use the ombudsman services. The informal dispute resolution approach adopted by the office that brings the parties together and looks for mutual understanding will help create confidence in the business community. Engagement with organizations that represent small business is another good way to promote the service; in this respect, a board established as part of its governance structure with small business representation might help.

231. The OPO has been particularly effective at looking into systemic issues and its practice of producing and publicizing reports on various aspects of the procurement process is a good practice that can inform the other specialized ombudsman services.

232. The formative evaluation performed in 2012 is a good way of periodically accessing the role and getting useful input into areas for improvement. It is critical that there is a component of the ombudsman services that “watches the watchdog”. Evaluations are one way of doing that but they should be regular and undertaken by evaluators chosen by the body that oversaw the creation of the office. Regular scrutiny from a trusted body such as the Auditor General is another good way of ensuring the office continues to be fit for purpose.
Discussion and conclusions

233. Canada has not adopted a single window office approach for an Ombudsman for SMEs, but instead has elected to focus on those services that are of greatest interest to small business. While this approach was not a strategy it does represent a viable alternative to a single window approach and indeed offers advantages over the single window model. For the federal government it allowed focus on areas of specific federal competence, imposed the financing of initiatives on the organizations that are responsible for the need for service and spread the operational risk across a number of organizations and initiatives rather than focusing them on a single initiative.

234. This approach could be pursued in Canada because of the well-established network of Ombudsman’s offices already in place and has sought to fill gaps without creating overlaps and duplication. At the federal level focus has been on federally regulated services such as banking, as well as federally provided services such as taxation and procurement.

Canada has created specialized Ombudsmen along sectors and organizational lines which offer advantages over a single window model

235. The overwhelming preference has been for the creation of Ombudsman’s services along sector or organizational lines that follow the use of specialized rather than classical Ombudsman’s offices. The rationale for this model has been that the complexity of the activities requires considerable knowledge in order to make determinations of which complaints are actionable, to organize and conduct investigations and to propose remedies. More importantly it allows the government to direct its attention to areas for which it is directly responsible either as a regulator or direct provider of service and to impose the costs of operating the office directly on those organizations that are generating the work for the Ombudsman. In addition, the view is that the proximity of the Ombudsman to the organization facilitates the collegial resolution of issues. Finally, concentration of activity along organizational lines places the Ombudsman in the position to observe and initiate investigations on systemic issues.

236. There are, however, criticisms of this approach. Typically they are that it becomes difficult for the Ombudsman to maintain independence when being close to the organization. In Canada, three solutions to this criticism are reflected in the structure of the services. The first is to have the reporting of the Ombudsman to a Minister who will, through political pressure from complainants and complainant advocacy groups, encourage the Ombudsman to act with independence. Secondly, boards composed of community membership with representation of SMEs can help give voice to business concerns in the selection of the Ombudsman and in ensuring that the scope of office is broad enough to capture systemic issues as well as individual complaints. Thirdly, the individual Ombudsman is selected for personality traits that favour independent thinking. While hiring strong minded individuals often personifies the office with the incumbent Ombudsman, these offices are personality driven by their nature.

237. The three organizations reviewed have a mix of approaches to address criticism around their independence. It is likely the combination of all three approaches that would produce the most effective solution.

It is essential to require organizations to use Ombudsman services

238. There is a question of whether organizations where Ombudsman services are established should be obliged to use the services. In two of the three examples documented here, the use of the Ombudsman’s services is voluntary. In the case of the OBSI, banks may elect to use an alternative service and for the OPO departments other that Public Works and Government Services can select when they will use the
dispute resolution service. Outside interest groups feel strongly that the use of Ombudsman services should be mandatory.

239. In order for services to be effective organizations should be required to use them. Ombudsman services that are of the specialized nature such as the three described are dealing with institutions that have huge embedded power. In order to do a good job there needs to be some righting of that power difference. Mandatory participation is an essential first step to bringing balance to the complaints process.

*Clear and formal mandates are needed*

240. All Ombudsman offices have a clear mandate established by government and codified in either an act of parliament, regulations emanating from an Act or both. This is particularly important in circumscribing the Ombudsman’s mandate where other bodies have functions in dealing with complainants. In the three Office’s detailed in this report, each organization must have an internal complaints resolution process and the ombudsman may only become involved after that process has been accessed and an impasse arises. In the case of the OBSI there is a prescribed period in which the internal process must resolve the issue or the Ombudsman can become involved. For the OTO and OPO no such limit exists risking protracted delays in the internal processes. The basic elements of the process with prescribed limits on how long a complaint can be investigated before a recommendation is tendered by the ombudsman should be codified.

*Ability to initiate systemic investigations is critical and represents the most significant advantage of the specialized model*

241. One of the most important benefits of specialized Ombudsman services is that they can detect systematic issues and pursue investigations that do not relate to individual complaints. Ombudsmen who are given a broad mandate to initiate investigations and reviews outside of individual complaints provide an additional public service of playing a general watchdog function on the organization. This part of the mandate needs to be clearly laid out in laws and regulations, as it will most certainly be challenged by the organization(s) being investigated. The banks resistance to the OBSI extending its mandate to include systemic investigations is an important example from Canada of how separating the complaint investigation and systemic issue investigation can harm the overall effectiveness of the ombudsman’s office.

*Outreach and promotion of the use of the services are needed and must be recognized as a core function of the office*

242. A significant challenge for all Ombudsman services examined is making people aware of the service and encouraging its use. This challenge is typical to services of this nature in Canada where people are by nature reluctant to formalize complaints. Outreach activities appear to help but must be balanced by monetary and time costs. Of the three the best awareness efforts are among the banks that signal to their clients that resolution services such as the OBSI are available. Consideration could be given to requiring organizations for which the Ombudsman Office is established be required to advertise its existence to clients.

*Establishing monitoring and reporting on internal ombudsman service standards is important to the credibility of the Ombudsman service*

243. The internal operations of the Ombudsman offices benefits from ongoing service level feedback such as that established by the OBSI. The effort at the OBSI is helped by a statutory maximum period within which recommendations must be issued. The process of obtaining and publishing complainant satisfaction statistics in its annual report signals attention to its clients and helps identify areas
improvement. In the evaluation of the OPO a recommendation was made to initiate performance measurement. It is essential to insist on strong internal monitoring of ombudsman operations and even better to have clear performance thresholds such as the maximum period to a recommendation for action specified in the enabling articles of the office.

\textit{Regular evaluations should be required}

244. Offices should have regular evaluations including a look at their mandate to ensure that gaps in service are not emerging and that services remain effective and efficient. Evaluations should be directed to the Legal authority responsible for establishing the Ombudsman’s office. In addition to evaluations trusted bodies such as the Auditor General should periodically look at ombudsman services.
CHAPTER 6
SME ADVOCACY IN GERMANY: TWO REGIONAL EXAMPLES

Introduction

245. SME advocacy (or SME lobbying) has a strong position in the German political and economic system, going back to the craft guilds of the Middle Age, which represent the first instances of organisations supporting the interests of small businesses. Today, the lobbying and advocacy landscape still is shaped by the strong role of chambers of industry and commerce as well as chambers of crafts and various business associations. Germany also has advocacy representatives at political level. On national level, Germany features two political positions which represent the interests of SMEs. These are the Appointee of the federal government for SMEs and tourism and the SME Envoy. Both positions are oriented towards shaping broad political directions and public debates rather than directly supporting SMEs against government or large companies’ abuses.

246. The SME envoy, a position that exists in each EU country, represents Germany in the EU network of SME envoys. The head of the department “SME policies” in the Federal Ministry of Economic Affairs and Energy traditionally acts as SME envoy.

247. The appointee of the federal government for SMEs and tourism, Iris Gleicke, holds a position as Parliamentary State Secretary at the Federal Ministry for Economic Affairs and Energy and is also the appointee for East Germany. As Parliamentary State Secretaries are political appointees, representing the Minister in the political arena and in specific policy fields, her responsibility for SMEs ensures continuous public attention towards SME relevant themes.

248. Due to the federal structure of Germany, initiatives for SME advocacy also exist on the level of the federal states. These are the SME Clearing House in North Rhine-Westphalia and the Government Representative of the Federal State of Baden-Württemberg for SMEs and Craft-Based Industries. These two profiles will be described and analysed in detail in the subsequent chapters.

The SME Clearing House of North Rhine-Westphalia

Rationale

249. The SME Clearing House in the federal state of North Rhine-Westphalia is based on the perception that self-employment and entrepreneurship in SMEs ensure welfare, growth and employment in the state. Businesses in North Rhine-Westphalia contribute 22% to Germany’s gross domestic product; and SMEs dominate the state economy with 99.6% of all enterprises. They are to be found in key sectors such as energy, chemicals, metal engineering and automotive, but also more and more in ICT and business-oriented services. Many North Rhine-Westphalian SMEs are hidden champions, offering their products worldwide in niche markets.

250. In order to support and consolidate the SMEs, economic policy needs to set a long-term framework which preserves economic diversity, contributes to fair competition and enables the SMEs to create and secure jobs and training positions, while at the same time taking into account both the interests
of SMEs on the one hand and of large companies on the other hand in a balanced way. The clearing house is one element of this policy, aiming to enhance SME-friendly conditions in legislation and administration on state level, and – in specific cases – also on national and EU level.

Historical origins and institutional context

251. Following the introduction of a SME law in 2003, the state of North Rhine-Westphalia introduced a Representative for SMEs in 2004 as an honorary position with a rather general field of activity: The representative was to act as the first point of contact for SMEs, but did not possess any authority to approach or influence governmental entities. The position was abolished after a few years.

252. In 2008, the state parliament organised a hearing regarding the SME law, with particular emphasis on experiences and potential areas for improvements. In 2010, the state secretary at the state Ministry of Economic Affairs launched an initiative to install a clearing house as part of the new SME support act. From the very beginning, all relevant stakeholders (chamber of trade and industry, chamber of crafts, professional associations, local government associations) have been involved in the process of shaping the new organisation, its scope and its tasks.

253. According to the SME support act, the clearing house is to be run by a self-regulatory body of the economy provided for by law (i.e. an umbrella organization of chambers of industry and commerce or chambers of crafts) or one of its subsidiary organisations. The state Ministry for Economic Affairs concludes an agreement with an eligible organisation and co-finances the clearing house. Currently, the Association of Chambers of Industry and Commerce in North Rhine-Westphalia has been appointed to run the clearing house which started working in May 2013. It operates with four employees: two lawyers, one economist and one office worker. Personnel are paid by the Ministry of Economic Affairs, while the Association of Chambers of Industry and Commerce in North Rhine-Westphalia bears all other costs. Nevertheless, in its operative work the clearing house is to be independent from both the state government as well as any interest of the responsible organisation. Still, every governmental department has the right to ask for advice from the clearing house regarding the development of bills and acts, which the clearing house is obliged to reply to.

Role and activities

The clearing process

254. The clearing house provides advice on legislative projects with regard to their relevance for SMEs and the compatibility of the projects with the needs of SMEs. To this end, it checks and revises legislative proposals and makes recommendations on how to shape the act itself or its implementation in an SME-friendly way. A revision process starts upon request from a department or the state government. The clearing house itself or the state parliament does not have the right to initiate a revision. During revision, the clearing house acts in close consultation with all relevant stakeholders, such as chambers, local government associations, business associations (e.g. Association of Liberal Professions, Umbrella Organization of Business Associations), trade unions and state ministries, especially the Ministry of Economic Affairs. All information revealed during the revision process are to be treated confidential by the organizations involved.

255. A revision by the clearing house leads to a report, including statements on effects on costs, administrative effort and employment in SMEs; effects on sustainability and resource efficiency in SMEs; recommendations how to prevent potential negative effects without challenging the fundamental objectives of the legislative project.
Legislative Proposals on State Level

256. Legislative proposals on state level with significant relevance for SMEs have to be revised by the clearing house in order to determine whether they are compatible with the needs of SMEs. A significant relevance for SMEs is given if the legislative proposal is expected to have considerable effects on costs, administrative effort and employment in SMEs, especially relative to company size. Whether or not a legislative proposal is of significant relevance for SMEs is determined in close consultation between the clearing house, the department leading the proposal and possibly the ministry of economic affairs.

257. Two processes can lead to a revision of a legislative proposal on state level:

- Counselling procedure: The governmental department responsible for a legislative proposal asks for a revision. This is also possible if the proposal is not of significant relevance for SMEs, although in this case costs and benefits of a revision are carefully weighed against each other. The counselling can already start at an early stage of developing the legislative proposal.

- Formal procedure: The conference of deputy ministers orders a revision. In this case, the revision usually starts at a later stage of the legislative process, i.e. when a first draft of the bill exists and before it is passed to the state cabinet. When initiated as formal procedure, the revision has to be completed within 6 weeks.

258. Reports are made available to the responsible department, the state government, the ministry for economic affairs and all relevant stakeholders, such as chambers, local government associations, business associations (e.g. Association of Liberal Professions, Umbrella Organization of Business Associations) and trade unions. Once a cabinet resolution is reached on the draft bill, the clearing house report is published. It is also admitted as an expert’s opinion in the parliamentary process, e.g., in hearings.

259. Up to now, the clearing house has completed one revision on a state bill regarding the sales of new goods on flea markets. The clearing house is also working on a report on a state bill on exceptional public holidays in 2017 that has already been passed. Here, the task is to make recommendations how to implement a resolution reached by the (federal) Conference of State Prime Ministers in an SME-compatible way on state level. Both revisions have been initiated by the responsible department, i.e. according to the counselling procedure.

Legislative Proposals on Federal and EU Level

260. The state government or a state department can also request a revision of legislative proposals on federal or EU level. The resulting report is provided to the responsible state department who can then use it in consultations on federal or EU level. Currently, one revision of a federal legislation proposal on criminal law of corporations and enterprises is pending.

Supervision of the Clearing House

261. The clearing house submits an annual report to the SME Advisory Board, stating its activities and results. The first report is due in late 2014.

262. The SME Advisory Board, also established by the new SME support act, is an independent body on state level affiliated to the Ministry of Economic Affairs. It consists of 12 representatives from chambers, business associations, organisations representing municipalities and employees, and two advisory members (EFA – Energy Agency NRW; IfM Bonn – Institut für Mittelstandsforshung). The advisory board reports annually to the standing committee on economy of the state parliament. Besides
controlling the clearing house, the advisory board also evaluates other measures and activities to promote SMEs on state level and can commission reports on topics with high relevance for SMEs.

Assessment

263. The SME Clearing House constitutes the most advanced and institutionalized form of advocating the interests of SMEs in the legislative process in Germany. Besides the fact of installing an innovative type of advocacy, a major achievement is the degree of commitment connected to the clearing house: in any legislative project deemed to be of high relevance for SMEs, involvement of the clearing house is compulsory by law. Moreover, the institutional set-up of the clearing house shows a high awareness of potential attempts to exert influence on the work and results of the clearing house.

264. A major challenge in the set-up phase of the clearing house was that it is linked to one stakeholder organization, which initially produced a certain caution of other stakeholders (e.g. other chambers or professional associations). However, installing it at the ministry would not have been advisable either, since this could not have ensured its independence from the political sphere.

265. The clearing house met those initial concerns by providing a clear additional benefit to every stakeholder involved. Thanks to this orientation, it has managed to persuade most relevant stakeholders of its value. Chambers and professional associations appreciate the fact that the clearing house adds weight to their position in the political process, while the governmental departments find the clearing house reports helpful when revising their bill drafts. Moreover, its de-facto “control” by the SME Advisory Board of the state Ministry of Economic Affairs ensures broad commitment and participation of all relevant stakeholders.

266. However, given its short time of existence, the clearing house will still have to prove its effectiveness in the legislative process. Challenges might arise due to attempts of the funding organisations (ministry of economic affairs and a self-regulatory body of the economy) to exert influence on the work of the clearing house, due to missing or waning support by various stakeholders the clearing house relies on, or due to disregard of the revision results in the subsequent process.

Transferability Issues

267. The organisation as well as its scope and tasks, in particular the structure of the clearing process, are based on an intensive dialogue with all relevant stakeholders. In order to ensure their support for the clearing house, it is highly recommendable to involve them in the development process from a very early stage.

268. A critical factor of success of the SME Clearing House is its institutional affiliation. On the one hand, it is necessary to ensure its independence from the interests of particular stakeholders. Otherwise stakeholders might decide not to cooperate with the clearing house, or the clearing house might not be able to enforce the interests of SMEs against government opposition. On the other hand, the clearing house needs to be perceived as a relevant player in the economic and political arena, as it relies on voluntary cooperation from the stakeholders. This is difficult to achieve with a completely new organisation. On a more practical level, such a clearing house also needs financial support as it does not offer saleable services.

269. Finally, governments wishing to implement a clearing house need to make binding and long-term commitments not only on organisational structure, institutional affiliations, scope and tasks as well as its financing, but also on how and when to integrate the clearing house and its results in the legislative process.
The government representative of the federal state of Baden-Württemberg for SMEs and craft-based industries

**Rationale**

270. The economy of the Federal State of Baden-Württemberg in South Germany is strongly characterised by a large variety of successful, regionally embedded SMEs and family enterprises. It displays a specific Mittelstand-culture and has one of the highest densities of Mittelstand world market leaders. However, compared to large multinational companies, SMEs have significantly less resources for lobbying activities and often encounter substantial problems in voicing their interests and feeding them into the political debate. The rationale behind the SME commissioner was to establish an independent contact person at the Ministry of Finance and Economic Affairs who represents SME interests in the political decision making process and advocates for SME friendly framework conditions. Furthermore, the SME representative should also safeguard that SME interests are sufficiently taken care of at all levels of the state government and thus takes over a cross level co-ordinating function.

**Historical Origins and Institutional Context**

271. For many years, business associations in Baden-Württemberg, especially craft and business chambers on various levels, had been advocating for the creation of a special government representative for SMEs and the craft sector. The main reason was that they had been missing a special institution within the State Government which acted as a direct contact point for the economic interests of SMEs. This was especially true after the regional trade office ("Landesgewerbeamt") had been abolished during a reform of administrative structures in Baden-Württemberg in 2004.

272. On 5 July 2011, the new government of the Federal State of Baden-Württemberg decided by way of a cabinet resolution – proposed by the Minister of Finance and Economic Affairs – to appoint Mr. Peter Hofelich as Government Representative of the Federal State of Baden–Württemberg for SMEs and Craft-Based Industries. The representative is independent in the execution of his tasks. He has an office at the Ministry of Finance and Economic Affairs (MFW) and, in terms of organisational integration, is directly assigned to the Minister.

273. After his appointment in 2011, the SME representative initially worked on an honorary basis, in addition to his activities as a Member of the State Parliament of Baden-Württemberg. As of 1 February 2015, Mr. Hofelich was appointed as the full-time Permanent Secretary of the Ministry of Finance and Economics. However, he will continue to occupy the post of Government Representative for SMEs and Craft-Based Industries.

**Role and Activities**

The Role and Rights of the SME Representative

274. The approx. 489,000 SMEs and craft enterprises in Baden-Württemberg now have an independent contact partner within the state government. The SME representative is regarded as an important element of the government's dialogue-oriented economic policy as he provides the state government with the opportunity to address especially small and medium-sized enterprises and to explain its economic policy to them in a more targeted way. In this context, the SME representative also takes over the task of creating awareness and interest among business associations, intermediaries and SMEs for important new SME policy measures and initiatives, e.g. in the fields of entrepreneurship, start-up support, innovation and human resources. However, the SME representative also works the other way round: he collects and bundles suggestions, concerns and interests of SMEs, assesses them, forwards them (with
commentary notes) to the competent units within the state government and/or integrates them into the policy making process.

275. The SME representative pursues and advocates SME interests not only at the MFW but within the whole state government. At the Ministry of Finance and Economic Affairs, approx. seven units regularly deal with SME relevant topics. Here, the SME representative has been formally integrated into their work processes: whenever important SME-relevant decisions or policy recommendations have to be made within these units, the SME representative has to be routinely consulted and asked for his views and comments. Other ministries also have to integrate the SME representative in their decision making processes when SME relevant topics are concerned; though the co-operation is less formally standardised (as the frequency of contacts is lower). As his competency covers the entire state government, the SME representative may also address (upon his own initiative) single ministries or specific units whenever he feels that SME aspects and interests are not sufficiently considered or when he has not been consulted.

276. The SME representative is permanently in contact with the Minister of Finance and Economic Affairs, he has the formal right to address him and discuss SME relevant themes ("Direktvortragsrecht"). In addition, he also holds the right to represent the Minister or the Prime Minister on official occasions ("Vertretungsrecht"). Besides these two, the SME representative does not hold additional formal rights, in particular no formal consultation or veto right in the legislative process nor the right to speak in parliament in his position as SME representative (as this right is restricted to cabinet members only).

Activities of the SME Representative

277. SMEs, business associations and other SME stakeholders can address the SME representative through almost any communication channel. In practice, approx. 60% of suggestions from SMEs and stakeholders reach the SME representative by e-mail, phone or regular post, the remaining 40% mostly through personal contacts (e.g. at company visits, conferences etc.). After an internal process of assessing, selecting and bundling important SME suggestions or concerns, the SME representative forwards them (together with first comments) to the competent unit in the respective ministry, to other subordinated institutions in the state government or in some cases directly to the Minister. Usually, the ministry examines the suggestions and then elaborates and sends a policy recommendation back to the SME representative which he may either follow or otherwise develop an alternative suggestion of his own.

278. The main operative activities of the SME representative include among others: discussions with the Minister of Finance and Economic Affairs and with specialised (SME-relevant) units in various ministries, receiving guest groups at the MFW, external visits at companies, business associations and trade exhibitions, holding speeches at conferences, and chairing the SME advisory board. In his daily work, the SME representative co-operates with all relevant SME stakeholders. In addition to a large variety of SMEs of all sizes and economic sectors (from one person service companies to industrial world market leaders), this includes various ministries and subordinated institutions, regional district administrations, business chambers and associations, cluster initiatives, trade exhibitions, R&D-institutions, universities and trade unions. An important instrument which supports the SME representative in fulfilling his tasks is the SME advisory board composed by representatives from the leading business associations in Baden-Württemberg. The SME advisory board is chaired by the SME representative and meets twice a year. It was implemented to discuss SME relevant topics, elaborate suggestions for future-oriented SME policies and to indicate starting points for possible state activities in Baden-Württemberg or for state initiatives on Federal or EU level.

279. The SME representative addresses all important policy fields which determine the current and future development of SMEs: safeguarding the supply of skilled employees, dual vocational training, innovation, energy policies, entrepreneurship and start-up, enterprise transfer, internationalisation, design
of SME support policies, access of SMEs to public procurement, cluster policies, craft policies. Whenever new important policy themes arise, the SME representative is free to deal with them and extend the scope of his activities.

Assessment

280. Business associations and SMEs have reacted very positively to the appointment of an SME representative. The high frequency of contacts with SME stakeholders and the large number of invitations and suggestions received demonstrate the high acceptance of the SME representative within the target groups. This has been achieved, among others, through almost weekly press releases, media coverage (especially on local and regional level), active working contacts with all relevant stakeholder groups and through the participation in a large number of external events, conferences, exhibitions etc.

281. Several specific factors are of key importance for the success of the work of an SME representative. It is vital that the SME representative is perceived as a credible, trustworthy personality with some degree of charisma who has got something important to say on behalf of SMEs. It is also very helpful that the current SME representative speaks the “language of business” as he has an SME family background (craft trade) and has been working for 20 years as senior manager in a large IT company. A more institutional success factor is the functional integration into the Ministry of Finance and Economic Affairs with formalised participation in all SME relevant procedures.

282. Although political achievements usually result from the co-operation of several players and cannot be ascribed to single persons, the SME representative had an important role, e.g., in the design of policies supporting the supply of skilled employees, in innovation policies (extending the scope of the innovation voucher programme) and in establishing a risk capital fund for start-ups. However, the work of an SME representative is not a “fair weather” affair, as it is integrated into the political domain which is characterised by (often) opposing political interests and priorities.

283. For example, in March 2015 the Baden-Württemberg State Parliament adopted the so-called “Bildungszeitgesetz”, (Law on Educational Leave) which fundamentally entitles workers to (paid) leave from their jobs for training purposes. This proposed legislation was met by resistance from business organisations and SMEs, which feared that it would entail additional costs. On the initiative of the SME representative amongst others, the legal provisions were designed to be SME friendly, for example by applying the legal right to educational leave only to companies employing at least 10 workers.

284. Another example was the discussion of a new version of the Municipal Economic Law 2014. A bill by the Ministry of the Interior to amend a variety of municipal legal provisions initially included plans to facilitate the economic activity of municipalities and associations of municipalities through the establishment of their own companies outside of the so-called essential public services. Small and medium-sized enterprises, especially from the craft trade sector, feared that this would bring significant disadvantages and revenue losses. As a result of the work of advocacy of the SME representative, the amendment of the relevant provision of the Municipal Code was removed from the bill.

285. In situations like this, it seems to be important that the SME ombudsperson carefully listens to the concerns of SME stakeholders and integrates them into the political process (without taking over final responsibility for the outcome of this process which ultimately consists of weighing various political arguments and interests and in setting priorities). Nevertheless, the SME stakeholders should have the understanding that their concerns and interests have been understood and considered in the decision making process.
When the SME representative newly started his work, he encountered the initial challenge to make himself known at all relevant state government institutions (in particular at the ministries with SME relevant work tasks). It takes some time until all involved institutions adjust to the new situation and integrate the SME representative into their normal work processes. Moreover, it also requires some time until a positive reputation can be built up at the target groups.

The SME representative is in close contact with the EU SME envoy in order to provide a stimulus for the creation of similar regional SME ombudspersons in the EU.

Transferability Issues

The concept of an SME representative is basically transferable to other countries. However, some conditions would increase the chances of a successful transfer of this policy model to other political and economic environments.

It is of primary importance that the competent ministries, policy makers and intermediaries hold family enterprises and SMEs in high esteem and highly appreciate their economic and societal contributions. An economic and political culture which values SMEs and family enterprises greatly enhances the chances of a successfully operating SME representative. However, such a culture usually develops over long periods of time and cannot be generated over night or on command.

Equally important is political influence and political back-up in the government. SME stakeholders must have the impression that the SME representative has the political power to successfully represent their interests and to feed them into the policy making process. For this reason, it would seem to be less promising to appoint a high ranking regular staff member of a ministry (i.e. a civil servant) as SME representative. In this case, the representative would be bound to directives and strictly integrated into the hierarchy of the ministry. Therefore, he would lack both the independence and the political influence to successfully represent and enforce SME interests. A credible SME representative, by contrast, should be able to make up his mind and reach decisions independently. Moreover, it obviously helps if the SME representative has easy access to all SME relevant government institutions, which may be supported by integrating this position into the respective Ministry of Economic Affairs. Finally, a formal cabinet resolution or act which provided a clear legal basis and specified the tasks and rights of the SME representative as well as any financial or personnel support, supports the work of the SME representative.
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CHAPTER 7
THE EU SME ENVOY: THE EXAMPLE OF THE NETHERLANDS

SMEs and public policy

Small and Medium-Sized Enterprises (SMEs) have been an important part of the economy with respect to job creation and innovation. Normally, SMEs have been less well collectively organized than large Enterprises, which makes it both harder for them to make the SME sector heard in public policy and to communicate a well-defined and circumscribed interest, and for policy makers to find representative partners from the SME sector to inform policy on the bottlenecks (groups of) SMEs face in practice. In addition, serving a large number of SMEs, in contrast to a smaller amount of large Enterprises, causes relatively high transaction costs for public policy: the search, contract and control costs are much higher for a large set of smaller users of policy instruments than for a small set of relatively large users. There are thus multiple barriers to a well-functioning dialogue between the SME sector and public policy.

This suboptimal position and representation ranges from the situation in Russia, in which 3 million entrepreneurs have been put in jail over the last 10 years due to alleged corruption (for example by more powerful competitors), which, among others, induced the establishment of an ombudsman for entrepreneurs’ rights (Kesby 2012) to the underservice of SMEs in most R&D tax deduction programmes around the world, in spite of its larger additionality for SMEs than for large Enterprises (Lokshin and Mohnen 2011). How can SME policy be improved, and more in particular how can this be done by introducing an SME Envoy? In this chapter we will introduce the experience with the SME Envoy in Europe and more in detail the SME Envoy in the Netherlands. This SME Envoy in optima forma realises a triple dialogue: between public policy and the SME sector, but also vertically between national level SME policy and supranational EU level SME policy, and horizontally between different EU member states’ SME policies.

Figure 6. The triple dialogue of the SME Envoy
SME Envoy in Europe

293. SME policy has long been a relatively underdeveloped area in the European policy landscape (Dannreuther 1999), in contrast to the US (Stevenson and Lundström 2001). This is rather surprising given the larger employment share (70 percent) of SMEs in the European private sector than in the US private sector (49 percent) (Observatory of European SMEs 2003). In the last decades SME policy has become a core element of the EU’s political economy (Dannreuther 2006). SMEs have become central in the knowledge-based economy reform agenda of the Lisbon process, the EU’s response to globalisation since 2000.

294. In order to give SMEs an opportunity to express themselves the European Commission decided to appoint an SME Envoy. The establishment of this SME Envoy was one of the measures taken to implement in practice the “Think Small First” principle set out in the European Charter for Small Enterprises adopted in 2000: the “Think Small First” principle implies that policy makers give full consideration to SMEs at the early policy development stage. The SME Envoy was initially established at the European level to act as the interface between the European Commission and the SME sector. The objective was to put in place a “recognized interlocutor for the SME community with a dual role, acting both inside the Commission and vis-à-vis the outside world” (EC 2003: 2). This dual role (inside the public administration and towards the outside world) was further specified as follows (EC 2013).

295. Inside the public administration, the SME Envoy aims to reinforce SME interests in the European Union as well as at the National level, in particular to:

- ensure a “watchdog function” to monitor policies and actions affecting SMEs originating in services throughout the Administration and ensuring potential impacts on SMEs are properly assessed; specifically develop and refine the “SME test” and assist/monitor its application;
- develop methodologies how to reduce over-proportional administrative and regulatory burdens on SMEs – in particular small businesses – with a view to offering them to other services to use them in the legislative proposals;
- organise a “SME network” inside the Public Administration, composed of the SME contact points of all Ministries / Directorates General / Services with relevant policies in order to increase awareness about SME issues; regularly discuss their on-going SME-initiatives; specifically promote and provide guidance on the application of the “Think Small First” principle in all Community and national initiatives;
- communicate and support the dissemination and application of the many identified good practices in Entrepreneurship and SME Policy through the funding programs in various policy domains, specifically the cohesion and education policies;
- intensify contacts between SME organisations and other public services whose action can either benefit or have an impact on SMEs. The SME Envoy will also, where appropriate, provide guidance to SMEs about the right department to contact.

296. In its role towards the outside world, the SME Envoy aims to be a visible contact person for SMEs and SME organisations in the broad sense, i.e. business organisations, sectoral federations, Chambers of commerce and Chambers of crafts. This implies:

- conduct direct dialogue through meetings and visits with SME organisations, at EU and national and regional level;
inform SMEs and SME representatives regularly about new legislative initiatives and programs currently being developed, which have a potential impact on SMEs or could be of interest to them;

provide a focal point for complaints from SMEs and answer them with the help of the other Public Services;

collect feedback from the SME business community on issues of interest to them, especially on legislation and access to support programmes;

facilitate access of SMEs to information on programs and initiatives.

The SME Envoy has both an intelligence and a lobby function, in acquiring information about the bottlenecks SMEs face and in representing (i.e. giving a proper weight to) the SME sector in the EU’s policy and law-making processes. In practice this one person should maintain direct, informal and regular contact with SMEs and their representative organizations all over the European Union, providing information and collecting feedback.

In 2011 the EU also decided that the SME Envoy function should not be concentrated in one European Commission civil servant, but should be performed by a more decentralized group of civil servants, representing SMEs in each of the EU member states. This means that the task of reaching out to Europe’s 23 million SMEs (99 percent of all EU companies) was redistributed to more manageable pieces. This decision was part of an Action Plan to involve SMEs more in shaping EC decisions. The network of national SME Envoys was provided the opportunity to give their views on where exemptions and lighter regimes are most need, and how they should be framed (House of Commons 2012). The national SME Envoy had also been initiated to reinforce the position of DG Enterprise vis-à-vis the other DGs in Brussels, especially to put SMEs higher on the EU policy agenda.

In 2011 the first formal meeting of the international network of SME Envoys took place. In this meeting it was emphasized that the key role of the national SME Envoys was to improve the governance of the Small Business Act (SBA). A key issue here is the integration of the “Think Small First” principle into policy making, regulatory proposals and funding programmes at all levels of government. The national SME Envoys were envisaged to become the main channel between Commission services and national policy-makers for contributing towards the dialogue on SBA implementation. In addition it was thought to be a great opportunity for policy learning by exchanging national good practices (EC 2011). In practice it should give a new impetus to growth in the fragile economic situation since the 2008 financial crisis, and to deliver concrete policy actions (EC 2011). The latter especially involved the SBA priority areas of easing access to finance, helping European SMEs to access markets (including within the Single European Market), and cutting red tape.
SME Envoy in the Netherlands 45

Rationale

300. The Netherlands is a small open economy, in which traditionally large established enterprises (like Philips, Shell, Unilever) have dominated public policy for the business world. There have been several attempts for increasing the intelligence about the SME sector and giving them a more adequate voice in the policy process, such as the establishment of a strategic research program in 1988 on the role and nature of SMEs and entrepreneurship in the Dutch economy (improving the intelligence about SMEs), including SMEs in the “Top Sector Policy” (the Dutch flagship industrial policy initiative, since 2011), setting up the so-called Koplopersloket, 46 and establishing the Dutch SME Envoy. However, there is still room for improvement in the representation of SMEs in policymaking, as evidenced by the establishment of “Ondernemend Nederland” (ONL) in 2013, a lobby organization to improve the position of entrepreneurial firms in the Netherlands (as a reaction to the perceived lack of SME representation in Dutch policy making), and the continuous complaints about the suboptimal role of SMEs in innovation policy (Jacobs and Theeuwes 2005; WRR 2008). The establishment of the SME Envoy in the Netherlands has therefore been of the initiatives undertaken by the government to become more receptive towards SMEs in public policy.

301. On the other hand, the creation of an SME Envoy in the Netherlands was not driven by the rationale of setting a level playing field where SMEs enjoy the same opportunities as large companies (e.g. with respect to access to public procurement and public programmes): even though this might be a realistic public problem for SMEs in the Netherlands (see WRR 2008), this had not been identified and articulated as a public problem by relevant stakeholders. The SME Envoy was also not established as a means to fix market failure in specific markets (e.g. credit market) undermining the development of small businesses: this had already been high on the agenda of the Ministry of Economic Affairs for a long time. Corruption in public administration also played no major role in the establishment of the SME Envoy, given that the Netherlands has one of the lowest levels of political corruption in the world (Transparancy International 2013).

Role and activities

302. The Dutch SME Envoy was created in 2011, as a positive response to the invitation by the EC to establish a network of national SME Envoys within the European Union. The SME Envoy in the Netherlands has no legal status, and as such has no statutes, staff, separate budget, and there are no annual reports. In the Dutch practice, the role of the SME Envoy largely overlaps with the role of the Directorate Entrepreneurship within the Ministry of Economic Affairs. The person leading the Directorate Entrepreneurship is also fulfilling the national SME Envoy function. The most important task added to its traditional function of acting as a liaison between SMEs and economic policy has been the reinforced connection and more active role towards the European Union. This link to the EU has especially been

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45 The analysis of the SME Envoy in the Netherlands is partly based on information and feedback received from the previous (first) and the current SME Envoy of the Netherlands, respectively Rinke Zonneveld and Pieter Waasdorp. Both integrated this National SME Envoy role into their leadership position at the Directorate Entrepreneurship of the Ministry of Economic Affairs of the Netherlands.

46 This “Front runners’ desk” is a one stop shop for innovative SMEs to be guided through interdepartmental government bureaucracies. It is a rather active, but very small desk (1-2 persons) that provides support and advice for innovative SMEs that are facing constraints within the public bureaucracies. This “Front runners desk” is however not so much a point of contact for the SME Envoy, but it informs the SME Envoy about actual policy / bureaucratic blockages for innovative SMEs.
important for acting as an ‘early warning device’ for new SME policies being developed in Brussels, in
order to safeguard the relevant input of the national context into this EU process.

303. There have been relatively few explicit supranational, EU SME topics in the network of national
SME Envoys, as most topics are already covered in the national context. The explicit EU SME policy
topics are the provision of finance for SMEs, cutting back red tape and access to foreign markets (reduce
obstacles to the EU internal markets). One example in this respect is the white paper on SME finance that
has been written by SME Envoys (led by the Dutch SME Envoy).

304. The SME Envoy explicitly aims to adapt or abolish SME unfriendly laws and regulations. However, the EU and national SME Envoys do not have the mandate to adapt or abolish SME unfriendly
laws and regulations themselves, which means that this happens via more subtle modes of communication
and informal networking. An effective channel is to inform the commissioner, who then puts this issue on
the relevant policy agenda. The network can also be used to organize a contra-power within the member
states against the support by other parts of the government for SME unfriendly regulation. One example
here is how the network of SME Envoys was successful in realizing a critical mass of opposition against
(partial) German support for SME unfriendly Corporate Social Responsibility regulation.

Assessment

305. In this section we will discuss the achievements and failures of the SME Envoy in the
Netherlands, focusing on the formal mandate of the SME Envoy, political support and policy learning.

Formal mandate

306. The SME Envoy as such does not have a formal mandate, neither in the EU context nor in the
national context. This is problematic in the sense that it does not give the SME Envoy the formal power to
adapt, establish or abolish policies and the underlying laws and regulations. In practice, the national SME
Envoys frequently have such a strong political or policy role that the effectiveness of the SME Envoys is
rather large. In contrast, the EU Enterprise Policy Group does have a formal mandate, but is much less
effective than the SME Envoy network.

307. Political power of the SME Envoy is reflected in the number of secretaries of state that are
involved. However political power does not equal policy effectiveness. Policy effectiveness is higher when
civil servants with substantial expertise in SME policies and governmental leader roles are involved (like
with the Dutch SME Envoy). The lack of formal mandate of the SME Envoy can thus be compensated by
the political power of the national SME Envoy (when he or she has a ministerial role), or by the expertise
and leadership role of the civil servant. The overall effectiveness of the SME Envoy is thus very contingent
on factors external to the SME Envoy function per se, and in that sense very sensitive to the national
process of selecting the person taking the SME Envoy function. The trade-off for selecting either a
ministerial candidate or a high level civil servant frequently reflects the trade-off between formal power
and expertise about relevant policy areas. The SME Envoy turned out to be very successful in larger, more
strategic SME policy operations. The SME Envoy is at the table and able to influence all kind of large
SME policy operations, like the merger of the public SME innovation advice practice and the regional
Chamber of Commerce organization. But this probably has more to do with the formal role and expertise
of the Directorate Entrepreneurship of the Ministry of Economic Affairs in the Netherlands than with the
position and role of the SME Envoy in itself.

308. The lack of political support can be a severe constraint, as will be discussed in the next
subsection.
**Political support**

309. Not all initiatives by the SME Envoy have been successfully implemented. These initiatives did not acquire sufficient political support (direct, or indirect via stakeholder organizations, like the employers’ unions). Examples of issues that have been put high on the policy agenda, but that have not been implemented are the abolishment of non-compete clauses and the expansion of public procurement for innovation (SBIR like program). To improve the access for SMEs to public procurement turned out to be a more complex problem than expected. For example, a sustainable start-up that developed printing fonts that used much less ink than regular fonts could not supply the public sector due to a large set of governmental requirements. Even with the involvement of the SME Envoy and support by the “Front runners’ desk” such policy problems could not be solved. What, however, worked is that in practice the “Front runners desk” informs the SME Envoy about actual policy and bureaucratic blockages for innovative SMEs, which can then be put on the table in other relevant government meetings. This again emphasizes the ‘expert’ role of the SME Envoy.

**Policy learning**

310. The added value of the SME Envoy in the Netherlands, above the formal function of the Directorate Entrepreneurship, has been the expanded and improved use of the network of similar SME policy makers in other EU member states. For example, the Dutch SME Envoy has been presenting policies to SME Envoys in Finland and Denmark, and the British SME Envoy has presented UK policies to the Dutch SME Envoy. This has stimulated collective SME policy learning, for example with respect to SME finance policies and the SME growth policies. Even though this is not as formal as the Open Method of Coordination\(^\text{47}\), it does work in a similar intergovernmental way to enhance policy learning. This means that it has the potential to work best for the countries that are lagging behind. The Netherlands is not in the best situation in this respect, as it scores well above the average with respect the extent to which public policies give support to entrepreneurship, and the presence and quality of programs directly assisting SMEs at all levels of government (national, regional, municipal) (Amarós and Bosma 2014, chapter 3\(^\text{48}\); Stevenson and Lundström 2001).

311. In addition there is also no formal reporting about the activities of the SME Envoy, which makes it less visible in the policy process. In a sense this is a missed opportunity for making more explicit the benchmarks and the results of the policy learning process.

**Issues for consideration**

312. The activities of the SME Envoy could be improved by providing the SME Envoy a more formal mandate and political power. This would improve the effectiveness of the SME Envoy in implementing measures to improve the position of SMEs in the economy. However, this has to be weighed against the drawbacks of a formal mandate: this necessitates much more ex-ante adjustments, synchronizations, and authorizations up until the political level for each meeting of the SME Envoys, which might severely constrain policy learning in an informal setting.

\(^47\) The Open Method of Coordination (OMC) is an intergovernmental means of governance in the European Union, with which member states voluntary cooperate to monitor each other’s policies and improve their own policies based on the best practice within the European Union. The open method rests on soft law mechanisms such as guidelines and indicators, benchmarking and sharing of best practice. This means that there are no official sanctions for laggards. Rather, the method’s effectiveness relies on a form of peer pressure, as no member state wants to be seen as the worst in a given policy area.

\(^48\) The Global Entrepreneurship Monitor provides a good overall benchmarking tool for comparing entrepreneurship and SME policies internationally and over time.
Even though the network of national SME Envoys provides clear opportunities for policy learning, the scope of this policy learning could be enlarged by codifying the lessons learned and communicating this more broadly amongst policy makers in European countries and regions.

Transferability issues

The first successful aspect has been the visibility of a ‘formal’ point of contact to SME policy for entrepreneurs and entrepreneur/SME associations: a high level civil servant who also speaks the language of the entrepreneurs. This aspect is less likely to be successful when the SME Envoy role is taken by a politician or civil servant at a large (cognitive) distance from the daily world of entrepreneurs.

The second successful aspect has been the policy learning that took place: sharing of best, or at least good practices internationally within the network of national SME Envoys.

The SME Envoy in optima forma realises a triple dialogue: between public policy and the SME sector, but also vertically between national level SME policy and supranational EU level SME policy, and horizontally between different EU member states’ SME policies. These dialogues enable improved intelligence about SME policy. It provides an open dialogue without being captured by vested interests, which would normally be the liability of a dialogue between government and the business world in the context of industrial policy (Rodrik 2007; Nooteboom and Stam 2008).
References


EC (2011) Summary of the 1st formal meeting of the Network of national SME Envoy s. European Commission, Brussels.


