

Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations. Other aspects are considered elsewhere in the text (for example appeals are considered in Chapter 6).¹

Assessment and recommendations

Public consultation on regulations

The United Kingdom has a well established culture of open consultations aimed at maximising transparency in the process. The framework for promoting public consultation on regulations via the Code of Practice on Consultation (which has been in place for eight years) is well-established, and promotes a very open approach. Government departments are expected to consult widely and carefully, and if they do not take this approach and apply the Code's criteria, they are expected to explain why. The sample of recent consultations reviewed for this report (including the consultation on the Code of Practice, and the consultation on regulatory budgets) suggests that consultation documents for major issues are clearly written and should be easily digested by stakeholders. The 2008 consultation with stakeholders on the Code and its effectiveness is also very positive evidence of the United Kingdom's search for continuous improvements in its Better Regulation tools and processes. The latest version of the Code of Practice on Consultation is brief, clear and to the point.

There is, however, evidence of an important gap between the principles of the Code of Practice on Consultation and stakeholders' views on the process in practice. The recent

review of the Code showed that there was concern at the way consultations are carried out in practice. The OECD team picked up a general desire from stakeholders for improved consultation, and a certain fatigue linked to too many successive initiatives. Some stakeholders complained that the government sometimes appears to consult at a time and on issues of its choosing. There were a number of comments to the effect that the 12-week response time was not always respected by departments, that consultations were of uneven quality and that there was sometimes inadequate consideration of the best method for consultation (for example workshops might have been more effective than bulky written documents, and easier to handle especially for SMEs). Stakeholders also said that they would welcome a single website for consultations. Some stakeholders expressed concern that it might be difficult to uncover the true views of consultees, if responses came from trade associations rather than directly. There was also some concern that the voice of business might be too strong, business associations being effective and powerful lobbyists with an ability to influence consultation processes to strengthen their case, and having the ready ear of government.

Recommendation 3.1. Given the feedback from stakeholders, there is a need for effective quality assurance of the Code of Practice on Consultation. The BRE should ensure that the practical application of the new Code of Practice on Consultation is carefully monitored, based on the issues raised by stakeholders with regards to poor practice in the past. Experience suggests that departments left to themselves do not always meet the highest standards. The Code is mandatory for all central government departments and this makes it all the more important to have an effective quality assurance mechanism in place, which goes beyond data collection on use of the Code and injunctions to report on its application in departmental annual reports.

The use of independent ad hoc reviews adds an important further dimension to consultation in the United Kingdom. Ad hoc reviews to investigate particular issues (such as the recent Anderson Review on explanatory guidance) seem to have played a major and positive role in the further development of Better Regulation over the last few years. Each review has consulted extensively in drawing up its report. This approach appears to have worked well so far, without the need for guidelines on the way they approach consultation, as exists in some other European countries.²

Common commencement dates are a positive development. The United Kingdom was ahead of other European countries in the introduction of common commencement dates.³ These are fundamentally helpful to business. The presentation to the business community with a set of new regulations in “one shot” may need some management to ensure that that it does not (perversely) contribute to poor perceptions of the government’s success in regulatory management. The EU’s Small Business Act for Europe adopted in 2008 sets out that the European Commission will now introduce common commencement dates and it encourages member states to follow suit.

Recommendation 3.2. The media could be encouraged to make a positive feature of common commencement dates by publicising lists of the new regulations alongside other positive aspects of Better Regulation.

Public communication on regulations

Communication on aspects of the regulatory stock and flow is good, and would be even better with a consolidated database of regulations. There is no consolidated government (or other) register of all primary and secondary regulations, which means that the regulatory stock is not easily identifiable.

Recommendation 3.3. The development by the Ministry of Justice of the statute law database to cover secondary regulations should be encouraged.

Background

Public consultation on regulations

The Code of Practice on Consultation

The United Kingdom has a deeply rooted tradition of general public consultation, based on a flexible framework that sets guidelines for government without going so far as to impose requirements. This can be contrasted with a very different approach in many other European countries, which have more closely structured traditions of consultation that particularly engage the social partners (business and the unions).

The framework is given expression in the Code of Practice on Consultation, which has been in place for eight years. It was first published in 2000, revised in 2004, and has just been revised again in 2008. The Code applies to all central government departments and those agencies which have a close relationship with a parent department. It does not apply to the regulators which have been set up on a more independent footing, although they are encouraged to apply it. Many such regulators have consultation requirements written into their parent law. The Code is adopted by the Cabinet Committee and through this process all departments have committed themselves to follow it. With a few exceptions, such as emergency legislation or tax, consultation takes place in all policy areas and must follow the Code. “Policy area” is not precisely defined: a “case-by-case” approach is adopted, but public justification must be provided if the Code is not applied when it might be expected to apply.

Recent review of the Code of Practice on Consultation

The Code of Practice on Consultation was reviewed in 2008 and a revised version issued as a result. The review generated a number of criticisms which the new Code seeks to address.

Box 3.1. Review of the Code of Practice on Consultation

In 2006 the government launched a review (a consultation exercise in fact) on the Code of Practice on Consultation. The review included a programme of 20 stakeholder events around the United Kingdom to hear views on how the government consults and where improvements could be made. The findings were somewhat negative:

- *Cynicism.* While the introduction of the Code had generally been welcomed and was considered to have led to improvements, some stakeholders considered that when the government consults it has often already made up its mind.
- *Lack of transparency and responsiveness.* It is not always clear from the documentation provided how the government arrived at the stage of publishing a consultation document, nor is it always clear what the government does with the responses and how they are taken into account.
- *Poor accessibility.* Stakeholders usually found out about government consultations through intermediary organisations. Many people asked for one government website where all consultations could be found.
- *Monitoring and capacity.* Monitoring the number of consultations lasting at least 12 weeks in accordance with the Code was seen to be deficient. There were calls for a system of independent, qualitative monitoring of government consultations. Moreover, several respondents thought that government did not currently have the capacity to run high-quality consultation exercises designed around the needs of their audiences.

The new Code of Practice on Consultation

The new Code is based on seven updated criteria (which should be reproduced in consultation documents), supported by more detailed guidance:

- *When to consult.* Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- *Duration of the consultation exercise.* Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible. The BRE estimates that between 75 and 80% of consultations last for at least 12 weeks, and nearly 100% either last for at least 12 weeks or have a ministerial sign-off for a shorter duration⁴.
- *Clarity of scope and impact.* Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- *Accessibility of consultation exercises.* Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- *The burden of consultation.* Keeping the burden of consultation to a minimum is essential of consultations are to be effective and if consultees' buy-in to the process is to be obtained.

- *Responsiveness of consultation exercises.* Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- *Capacity to consult.* Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

The Code notes that a formal, written public consultation will not always be the most effective or proportionate way of seeking input from interested parties *e.g.* when engaging with stakeholders very early in policy development (preceding formal consultation) or when the scope of an exercise is very narrow and the level of interest highly specialised. It explains that there are a variety of other ways to seek input and a website provides information on alternative approaches.⁵ It also underlines that it is not intended to create a commitment to consult on everything, and that deviations will on occasion be unavoidable, provided that departments are open about this when it happens.

Other public consultation tools and processes

These include:

- BERR's Enterprise Directorate maintains a Small Firms Consultation Database of nearly 4 000 small businesses, willing to work with officials on Better Regulation (including EU) matters. A range of methods is deployed to reach out to SMEs. They can be invited to take part in informal discussions in person or on the phone; attend a focus group or test panel; or respond to targeted consultations about proposed new regulations.
- Impact assessment guidance also sets ground rules for government consultation in the context of applying the process.
- The "Compact" (an agreement between the government and the third [voluntary] sector) promotes good consultation practices in this area.
- The Code draws attention to related initiatives which link up with local government, including the « Central-Local Government Concordat », which sets out how central and local government should co-operate and consult with each other.
- The extensive use of independent *ad hoc* reviews, especially in recent years, to address large policy areas that require attention (for example the Hampton review on enforcement, or the Davidson review on management of EU-origin regulations, and the recent Anderson review on explanatory guidance).

Parliamentary consultations

The parliament has also become engaged in important consultation exercises on Better Regulation, via the work of its Committees specialised in regulatory issues (for example the recent report of the House of Commons Regulatory Reform Committee on the BRE and Better Regulation policies). These reviews collect oral and written evidence from a wide range of stakeholders, including from other countries.⁶

Use of e-Government for public consultation

All departments put their consultation exercises on a departmental web page and can receive responses electronically. Some consultations allow people to respond directly on line.⁷ There is an Internet link⁸ to the vast majority of government consultations and work is underway to develop a comprehensive online tool providing access to all central government consultations.

Public communication on regulations*Accessibility of regulations*

A number of databases of information on regulations are available, and much of the data is free. Search facilities vary with the database. Reflecting the complexity of UK regulations, none of the databases are comprehensive. The Ministry of Justice is extending the statute law database which will (when complete) cover regulations (both primary and secondary) in current form *i.e.* including subsequent amendments.⁹ In many areas of the law guidance is produced on how to comply and this aids accessibility (Chapter 6).

Box 3.2. Availability of regulations

The Office of Public Sector Information (OPSI) provides free Internet-based access to all primary laws and important secondary regulations dating back to 1987 and in the form it was first published. Much of this is free. The documents are placed on the Internet within 24 hours of their publication in printed form. There are bound volumes of the acts and statutory instruments for each year, published chronologically. www.opsi.gov.uk/stat.htm.

A number of departments and non-governmental organisations issue guides to sections of the legislative stock.

The BRE produces a summary of new or updated regulations, including links to more detailed information. In October 2007, guidance was produced with the help of business to support the changes taking effect on common commencement dates. This was distributed to business with the help of business and professional organisations. For April 2008, this information reached around 1m businesses. BRE will be publishing a code of practice to improve the quality and timeliness of the guidance (see: www.berr.gov.uk/files/file46951.pdf). The guidance is produced twice a year, when departments outline any changes to their regulations on the Business Link website (see: www.berr.gov.uk/files/file46951.pdf).

The House of Commons sessional statistics keep a record of the legislation that they have considered (www.publications.parliament.uk/pa/cm200708/csession/1/108.htm#a30). This only includes legislation subject to parliamentary scrutiny (*i.e.* it excludes about two-thirds of all statutory instruments). Public and private bills are also available on the parliament website.

Databases (publications, on line and CD ROM based) are also available on subscription from a number of commercial entities (Butterworth, LexisNexis).

Clarity of regulations

There is no specific policy requiring “plain language” drafting of regulation. The BRE’s impact assessment guidance requires that “guidance [to regulations] should be as short, simply expressed, and jargon-free as possible”.

Common commencement dates

Common commencement dates are two dates each year (6 April and 1 October) on which new domestic legislation is introduced into the United Kingdom.¹⁰ The aim is to provide business and stakeholders with greater clarity and awareness about forthcoming regulatory changes, helping them to plan and budget for new measures and to reduce costs. Common commencement dates only apply to departmental regulations and they do not apply to EU-origin regulations.

Notes

1. Procedures for rule-making (Chapter 4); codification (Chapter 5); appeals (Chapter 6).
2. Sweden, for example, makes extensive use of standing as well as *ad hoc* committees to consult. These committees are subject to a government ordinance which sets out standards for consultation.
3. They have now been followed by the Netherlands.
4. Over the lifetime of the consultation codes the BRE (and its predecessor the RIU) have asked departments to submit data annually on consultations. Departmental annual reports are also required to include a section on their consultations, and compliance with the Code of Practice on Consultation.
5. www.peopleandparticipation.net.
6. The Regulatory Reform Committee collected 23 written memoranda, as well as oral evidence, and made visits to three European countries, for its report.
7. An example of good practice is the e-consultation page of the Department for Children, Schools and Families at www.dcsf.gov.uk/consultations/. The site is complete and easy to navigate. Open consultations are on the front page, and closed ones in the archives and results section. The Code of Practice is up to show that the Department is following this. The FAQ page is updated according to the questions that are asked. It is also possible to register to receive information and to be warned of new consultations issued by the department. The process itself is well guided. There are also fields which allow the consultee to address an issue not raised by officials. When applicable, consultation issues have the corresponding (first draft) impact assessments. Other relevant documents may be posted, depending on how far the proposal has travelled in the legislative process. An example is the School Admissions Consultation, where draft codes have been produced for consultees.
8. www.info4local.gov.uk.
9. www.statutelaw.gov.uk.

10. Common commencement dates do not apply to all new regulations. Exempted are regulations connected to new EU regulations; regulations implementing new EU directives; air navigation orders; road closure orders; changes to welfare benefit; any other regulations that have no impact on business. They do not have to be observed by departments in certain circumstances: emergencies (for example involving public or animal safety or health); anti-avoidance measures necessitating urgent closure of loopholes; measures which remove significant risk or detriment from business; instances where the costs of timing a measure to meet a common commencement date would be wholly disproportionate to public funds and /or business; and orders which commence other regulation on a common commencement date.