Experts in Business

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FSB Response to the Reforming Competition and Consumer Policy consultation

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the Government's consultation on Reforming Competition and Consumer Policy consultation.

FSB is a non-profit making, grassroots and non-party political business organisation that represents 160,000 members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.9 million small businesses, micro businesses and the self-employed.

SME's make up 99% of all businesses in the UK and make a significant contribution to the economy. Therefore, a market that is built on effective competition and fair practices for businesses and consumers will drive innovation, growth and productivity. In this response we will argue that smaller businesses should be offered more protection in the market and should be offered many of the same protections as consumers. Small businesses, in comparison to large businesses, do not have the same resources, and therefore are likely to behave and face similar issues as individual consumers when they buy products and services, and engage with suppliers. For example, small businesses do not have the expertise to select appropriate products and similarly, are not able to negotiate better deals by exploiting their bargaining power in the market, like bigger businesses do. This is especially true for micro-businesses (those with fewer than 10 employees).

The weak position that small and micro-businesses find themselves in, leaves them vulnerable to unfair business practices, particularly online, which there should be more protection from. These include fake reviews or in the case of businesses exploiting other businesses product or QR codes to drive traffic to their websites, and therefore, generating significant business revenue from it. This has a detrimental impact on competition in the market, can really disadvantage smaller businesses who are already overstretched. This is why we propose that BEIS should use this opportunity to ensure that the law doesn't just protect consumers from unfair practices, but also protects micro businesses and start-ups in the context of B2B transactions. We argue that a pro-competition approach would help to rebalance the market, drive market benefits and help promote growth and competition.

The coronavirus pandemic has accelerated digitalisation and increased online sales activity – a trend which is expected to continue in the coming months and years. FSB research concerning the effectiveness of e-commerce platforms for SME trading, found that the three primary problems experienced by smaller firms when trading on digital marketplaces are malicious and fake reviews (21%), sudden changes to trading terms and conditions (19%) and infringement of intellectual property rights (13%).[1] These challenges are also a result of unfair competition practices.

[1] FSB report (2019) 'Destination Digital: How Small Firms Can Unlock the Benefits of Global E-commerce'

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For reasons outlined above, we also propose that any ADR provisions should also be reasonable, affordable and proportionate for SMEs to access. Any disputes that are raised in B2C but, also B2B transaction cases should enable a fair and accessible resolution to disputes arising from unfair practices. Our research found that only 8% of small businesses use ADR to solve disputes and 72% of small businesses face late or no payment disputes, which can have a knock-on effect on their ability to grow and innovate.[2] We believe that an effective and accessible dispute resolution system for SMEs will benefit the UK economy.

Finally, we would also like highlight issues surrounding the increasing regulatory burden for businesses. The cumulative burden of regulatory requirements for small businesses has a considerable impact on their ability to grow and innovate, and therefore impacts ability to participate in the market on a fair and level playing field. For the same reason, some small businesses may have some difficulty in complying with regulations because of lack of resources. This should be considered by advisory bodies and enforcers, who then should aim together with small businesses to aid compliance in the future. From a wider perspective, any principles adopted as part of the regulatory framework should also work in Northern Ireland perspective to mitigate any differences in regulations.

Our response to this consultation is based on some of the key issues we have outlined above. We have chosen to respond not to every question in this consultation but, rather those where we have a stronger view or offer a unique perspective.

Competition

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

Yes.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

In principle, we do not oppose the government providing more detailed and regular strategic steers to the CMA as it would remain non-binding. However, given that they would need to explain would need explain any diversion from the steer, careful thought and consideration should be given to the impact on their independence.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

We do not agree with giving power to the CMA that requires businesses to participate in implementation trials for the purpose of allowing the CMA to test and trial how best implement its remedies, as this could potentially act as additional burden on smaller businesses. However, should the government choose to implement this an exemption should be placed on SMEs on trials of this kind.

Consumer Rights

Q30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

[2] FSB report 'Tied Up: Unravelling the dispute resolution process for small firms'

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Yes, we agree with the description of a subscription contract set out in Figure 8.

Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?
Q32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?
Q33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?

We agree with the government's proposal to clarify pre-contract information requirements for subscription contracts for traders, including that the consumer must actively choose the contract with autorenewal or rollover. This would enable consumers and small businesses that often act as consumers to make more effective choices and therefore, contribute to more a more effective market. However, with regard to enforcement we believe that it should be proportionate to the business size. A typical small business is unlikely to have a dedicated compliance team, or in the case of micro businesses or sole traders, where one person is responsible for every function of the business. For the same reason, any amendment to the websites, communication or processes will take considerable time and incur additional costs for small businesses therefore, they should be offered some flexibility when complying. There should also be a considerable implementation period, and clear guidance and communication of the changes to the wider business community.

Q34. Should the reminder requirement apply where (a) the contract will auto-renew or roll over, at the end of the minimum commitment period, onto a new fixed term only, or (b) the contract will auto-renew or roll-over at the end of the minimum commitment period.

The reminder requirement should apply where (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only.

Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?

The traders should be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin.

Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

Yes.

Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

Yes, we agree with the proposal to make cancelling subscriptions as clear, and simple as possible for the consumer.

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Q42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?
Q43. What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?

We believe that government should add (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services to the unfair practices list.

Small and micro businesses are already at a disadvantage in the market as they often exhibit the same behaviours as consumers, both in terms of the way that they make purchasing decisions and with their ability to negotiate better deals. In comparison to larger businesses, they lack resources and the bargaining power in the market, and this why we would like to see appropriate pro-competition provisions to support small businesses, and in particular micro businesses and start-ups to succeed.

Further, as increasingly more consumers shop online we believe that unfair practices should also apply to B2B as well as B2C transactions, bringing it in line with some other European countries. This would allow small businesses that have been unfairly treated by competitors to file for compensation, which we believe would act as a deterrent to those who would normally act maliciously. One example of a practice that is currently unfair, but where businesses do not receive protection, is when a business mis-uses another business's unique product codes to drive traffic to the website of a competitor product. This is because product codes and QR codes are not currently protected by equivalent IP rights, and therefore can be exploited by competitors in an unfair manner. This should be rectified.

Q45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?

Yes, we agree that the government should add traders offering or advertising to submit, commission or facilitate fake reviews to list of unfair practices.

Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?
Q49. Are there perverse incentives or unintended consequences from our existing consumer law?
Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?

We believe that existing consumer law could be further strengthened for smaller businesses and in particular, micro businesses and start-ups for protection against unfair, aggressive and anti-competitive behaviour in the market. We would like to see protections for B2C transactions and agreements also expanded to B2B agreements and transactions. This would entitle smaller businesses to seek compensation for any unfair practices identified.

The unintended consequences of not including B2B transactions as well as B2C transactions, is that many smaller businesses will be further disadvantaged in the market by competitors that

choose to exploit their market standing. Smaller businesses often behave like consumers in terms of their access to resources and information that helps them to make decisions in the market and therefore, should be treated as such. This unbalance in the market will lead to distortions and at worst can lead to smallest market participants being pushed out.

In terms of regulatory burden, we have not had chance to pick through the list of every regulation that affects business, but we would offer the following principles:

- Where possible, a regulatory approach should not be the default policy response.
- Where regulations are imposed, the number of regulatory requirements (actions that a business must take to comply) must be minimised.
- Unless there is a strong case to the contrary, small businesses should be excluded from regulatory requirements.
- Where small businesses must be included within scope of new regulatory requirements, then the approach taken to enforcement must be one of supporting the business to comply.

Consumer Law Enforcement

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

Yes.

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

Yes, we agree that applying proportionality in terms of the proposed turnover based penalties would incentivise compliance for larger businesses. However, we would also like to highlight that for small businesses, consideration should be given to the circumstances that may have impeded the business to comply with information gathering powers, as well as the size of the business. This means that if there is no evidence of the small businesses having acted in bad faith then they should not have to face a penalty. Small businesses do not have dedicated compliance teams and may not initially understand the significance of the information requested. Therefore, additional support and guidance in relation to helping to understand information gathering powers should be issued to small businesses who have not been able to comply.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?
Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?
Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

In principle, we do agree that the government should make business participation in ADR mandatory in the motor vehicle and home improvement sectors. Our research shows that only a small amount of firms are current using ADR as a means of dispute resolution, and if that

available on an affordable and accessible scale then then we would be in favour of ADR being mandatory. However, we would like to highlight that ADR system provided should be accessible as well as providing a diverse amount of options in order to support the needs of small businesses in their rights to a fair dispute resolution process.

We would also like to point out that some of the small businesses already have ADR provisions in place through trade bodies, therefore should the mandatory provisions be adopted we would hope that these would be included in the approved list of providers. This would help to keep the costs associated as low as possible for small businesses.

We believe that it would be appropriate for the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis. This would allow greater flexibility for small businesses to choose appropriate provisions dependant on their sector, amount of complaints and resources, the best option for resolving disputes.

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

We believe that in principle charging a nominal fee to the consumer, and adopting a lower limit on the value of cases would help ensure that only cases where a consumer is serious about their claim are considered.

Q71. How can government best encourage businesses to comply with these changes?

In the case of small businesses, in order for the government to encourage businesses to comply with these changes they should provide clear and easily accessible guidance, as well as work with small businesses on compliance with any additional regulatory requirements imposed by said changes.

Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?

No, we do not believe that the business guidance currently provided by advisory bodies and public enforcers fully meets the needs of businesses. We believe that providing information in easy to use hubs such as gov.uk and working through intermediaries like FSB will help better communicate any changes to small businesses.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague [redacted], on [redacted]@fsb.org.uk.

Yours sincerely,

[redacted]

[redacted]
Federation of Small Businesses