



Department
for Business
Innovation & Skills

CONSULTATION

Protection for micro businesses
in non-regulated sectors

MARCH 2016

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Protection for Micro Businesses in non-regulated sectors

Summary

The Government is consulting on issues faced by micro businesses (including sole traders) when purchasing goods and services from other businesses in non-regulated sectors, in (i) negotiating contracts, and (ii) being aware of their current protections – and how to use them – if there are issues with goods and services purchased. This consultation seeks to explore whether micro businesses have sufficient support and protection in these areas, under existing and pending measures, or whether further protections would be beneficial.

This consultation follows on from the “Protection of Small Businesses when Purchasing Goods and Services Call for Evidence” (referred to in this consultation as the “Call for Evidence”), published by the previous Government; the subsequent announcements made by HM Treasury, and the response to the Call for Evidence from BIS.

Issued: 16 March 2016

Respond by: 9 June 2016, 23:59.

Enquiries to:

Graham Pepper, Business to Business Team, Department for Business, Innovation and Skills, 1 Victoria Street, London SW1H 0ET

Tel: 0207 215 3773

Email: graham.pepper@bis.gsi.gov.uk

This consultation is relevant to: Micro Businesses, Sole Traders, business who supply to micro business, organisations that represent business.

1. Foreword from the Minister for Small Business, Industry and Enterprise



Micro businesses and sole traders are vital to the UK economy. There were over 5 million of these businesses at the start of 2015, that's 95% of all private sector businesses in the UK with total employment of 8.5 million and combined annual turnover of around £672 billion.

The Government is committed to supporting these businesses to establish, grow and prosper, and to making sure they are not at a disadvantage in the UK marketplace. The responses received to the 2015 Call for Evidence on "Protection of Small Businesses when Purchasing Goods and Services" in non-regulated sectors raised concerns that micro businesses may be particularly vulnerable, so we are keen to ensure that these smallest businesses have appropriate support and protections.

In November 2015 HM Treasury published 'A better deal: boosting competition to bring down bills for families and firms'. This document provided a blueprint for ambitious action to increase competition in our economy – bringing down bills for families and firms while creating the conditions for businesses to thrive. It sets out concrete steps the government is taking to increase consumers' disposable income and create competitive business conditions for firms. One element of this was a commitment to consult on whether further protections are needed for the smallest businesses in non-regulated sectors.

The Government is therefore now launching this consultation. We are interested in receiving as wide a range of views as possible, so we can further understand the current situation and hear suggestions and views on the potential options for improvement.

Rt Hon Anna Soubry MP

Minister for Small Business, Industry and Enterprise

2. Executive summary

2.1 The Government is consulting on issues faced by micro businesses (including sole traders) when purchasing goods and services from other businesses in non-regulated sectors, in (i) negotiating contracts, and (ii) being aware of their current protections – and how to use them – if there are issues with goods and services purchased. This consultation seeks to explore whether micro businesses have sufficient support and protection in these areas, under existing and pending measures, or whether further protections would be beneficial.

2.2 This consultation follows on from the “Protection of Small Businesses when Purchasing Goods and Services Call for Evidence” (referred to in this consultation as the “Call for Evidence”), published by the previous Government¹; the subsequent announcements made by HM Treasury², and the response to the Call for Evidence from BIS³.

Definition of a micro business

2.3 For the purposes of this consultation, we are defining micro businesses as businesses with 0-9 staff (this includes sole traders).

2.4 A statutory definition of micro businesses is being established through the Small Business, Enterprise and Employment Act 2015 and Regulations to be made under that Act. This will define micro businesses as businesses with a staff headcount of under 10, and a turnover or balance sheet total at or below a certain threshold. These thresholds are themselves based on a definition in EU Commission Recommendation 2003/361/EC⁴.

2.5 If any further protections were to be introduced, we would draw on this definition (although the detail of the thresholds to be applied would need to be considered). In responses to the Call for Evidence, concerns were raised about difficulties in identifying a micro business, and also about the appropriateness of using a headcount threshold without also taking into account the financial position. We would welcome views on whether financial thresholds should be used when deciding whether a business would be covered by any further support or protections for micro businesses, or whether this would be an unnecessary complication.

Scope of the Consultation

2.6 This consultation follows issues raised through the Call for Evidence. A number of respondents to that exercise raised concerns about perceived inequalities in bargaining positions between micro business purchasers and larger suppliers. In particular, there were concerns about micro businesses’ ability to negotiate effectively and to access and

¹ “Protection of Small Businesses when Purchasing Goods and Services Call for Evidence”, published on 24 March 2015.

² “A Better Deal: Boosting competition to bring down bills for families and firms”, published on 30 November 2015

³ Protection of small businesses when purchasing goods and services: Government response to the Call for Evidence”, published on 2 February 2016

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF>

understand their legal rights. Therefore these areas are the central focus of this consultation, and we suggest potential options that could address them.

2.7 Given that the responses to the Call for Evidence highlighted that micro businesses are particularly vulnerable, this consultation focusses specifically on that group.

2.8 Three options are set out in Part 3 of this consultation document, and these are listed below. The Government is not putting forward a preferred option at this stage.

- The planned Small Business Commissioner, whose functions will include providing information on current rights for micro (and other small) businesses;
- Guidance (which could be statutory) for businesses when supplying micro businesses; and
- Requiring businesses to provide pre-contract information when supplying micro businesses.

2.9 The current legislative framework for supply of goods and services to businesses (including micro businesses) reflects a long-standing principle that businesses may generally agree, and be bound by, whatever contractual terms they wish (see Part 2 for further detail). Any change to this principle, or other requirements for business, would require careful consideration. We need to consider both the potential benefits and the costs or disadvantages of any options, and whether they would provide the right commercial incentives for both micro business purchasers and their suppliers. This consultation will provide important information to assist Government in forming any final policy options.

2.10 The issues being considered here are “business-to-business” issues, in the sense of one business transacting with another in non-regulated sectors. The Government recognises that business-to-business issues are very wide ranging and that businesses act as both purchasers and as suppliers. We therefore welcome views on where any of the potential options may have an impact on businesses supplying a micro business purchaser, as well as on the micro business purchaser.

2.11 Any future change to rights of micro businesses could potentially impact on both reserved and devolved areas of policy responsibility across the UK’s four nations. We would welcome evidence and contributions from the Devolved Administrations, businesses and business associations, and other interested stakeholders in Scotland, Wales and Northern Ireland.

Regulated Sectors

2.12 This consultation only seeks views on protections for micro businesses in non-regulated sectors, it does not extend to regulated sectors nor does it cover lending to businesses. The Financial Conduct Authority launched a discussion paper on 15 November 2015 on the wider protections afforded to small and medium sized businesses under its rules. This discussion paper closes on 18 March 2016 and can be found here: www.fca.org.uk/news/dp15-07-sme-approach.

2.13 The Government has also announced that it will ensure greater focus on the needs of small businesses in regulated sectors through the Policy Statements it gives to Ofgem and Ofwat, which give guidance on their policy priorities. The Government will ask the regulators to look at giving small businesses further protections, e.g. to protect them from mis-selling, ensure more transparent prices and to make switching easier. Beyond energy and water, the UK Regulators Network (UKRN) is considering the protections needed by the smallest businesses across regulated sectors as part of its work in 2016.

Content of the Consultation

2.14 In the following sections, we explain (i) the areas of most concern identified from the Call for Evidence, and (ii) the current statutory framework which applies to micro businesses in relation to the sale and supply of goods and services, as this provides the background to the issues explored in this consultation. We then explore and seek views on how the potential options identified could be beneficial to micro businesses; as well as potential disadvantages and costs they may present.

3. How to respond

3.1 Please complete the response form at page 24 of this document and post or email this to the addresses below. You can also respond online via Citizenspace at the following link: <https://bisgovuk.citizenspace.com/enterprise-directorate/protection-for-micro-businesses-in-non-regulated-s>. We are interested in receiving submissions from any interested parties, individual firms and their representatives, trade bodies, research and academic organisations and others with experience of analysis in this area. We are keen to receive submissions which are supported by the inclusion of robust and clear evidence to support any views offered.

3.2 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

3.3 The consultation response form is available electronically on the consultation page: www.gov.uk/government/consultations/protections-for-small-and-micro-businesses-in-non-regulated-sectors (until the consultation closes). The form can be submitted online/by email or by letter or fax to:

Graham Pepper
Business to Business Team
Department for Business, Innovation and Skills
1 Victoria Street, London SW1H 0ET

Tel: 0207 215 3773
Email: graham.pepper@bis.gsi.gov.uk

You may make printed copies of this document without seeking permission.

BIS consultations are digital by default but if required printed copies of the consultation document can be obtained from:

Graham Pepper
Business to Business Team
Department for Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

Tel: 0207 215 3773

Email: graham.pepper@bis.gsi.gov.uk

Other versions of the document in Braille, other languages or audio-cassette are available on request.

4. Confidentiality and data protection

4.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). There is also a statutory Code of Practice issued under section 45 of the FOIA with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

4.2 If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

5. Help with queries

5.1 Questions about the policy issues raised in the document can be addressed to:

Graham Pepper
Business to Business Team
Department for Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

Tel: 0207 215 3773

Email: graham.pepper@bis.gsi.gov.uk

The consultation principles are in Annex B.

6. Background

Why are we running this consultation?

6.1 This consultation follows on from the Call for Evidence the previous Government ran in 2015, 'Protection of Small Businesses when Purchasing Goods and Services'. This Call for Evidence ran from 24 March to 30 June 2015 and invited views on whether the current legislative framework regarding the sale and supply of goods and services to micro and/or small businesses sufficiently protected them. It was an open exercise, with no options or views expressed by Government. One of the aims of the Call for Evidence was to obtain evidence of the potential impacts – both costs and benefits – of applying certain consumer protections, in particular those in the Consumer Rights Act 2015, to micro and/or small businesses.

6.2 The Government Response to this Call for Evidence was published on 2nd February 2016. It concluded that further work was needed before Government could decide whether or not to reform the existing legislative framework in non-regulated sectors.

6.3 The Call for Evidence received 30 responses which were evenly split between those who considered the current arrangements were sufficient and those who felt that smaller businesses, in particular micro businesses, required greater protection. The Government response document can be viewed at:
<https://www.gov.uk/government/consultations/purchasing-goods-and-services-protection-of-small-businesses>

Why are we focusing on particular issues?

6.4 An overriding concern raised through the responses to the Call for Evidence was that micro businesses may be particularly vulnerable. For this reason, this consultation and the following paragraphs focus on micro businesses.

6.5 Those responses to the Call for Evidence which favoured greater protections highlighted a perceived unequal bargaining position between micro business purchasers and larger suppliers. In particular, concerns were raised that micro businesses may face difficulties in negotiating effectively and driving hard bargains, due to the potentially limited scale of their purchases and to having less time and resources to devote to purchasing decisions. There was a concern that some suppliers may not present key contract terms to a micro business when agreeing a sale, unless pressed to do so. Some respondents considered that micro businesses were unaware of, or did not understand, their legal rights when buying goods and services. There were also concerns raised that micro businesses face proportionally higher opportunity costs in exercising their rights – in terms of the cost of time spent away from core business activities and the cost of using courts or alternative dispute resolution providers.

6.6 Respondents who were opposed to greater protections highlighted the increased costs and burdens to business that further regulation would generate, together with difficulties in identifying a micro business when contracting. These responses also drew attention to the fact that micro businesses act as suppliers, as well as purchasers, so any changes made in relation to dealings with micro business purchasers could impact adversely on this group.

6.7 In relation to the consumer rights set out in the Call for Evidence, whilst there was some support for applying these consumer rights in full to micro businesses, generally there was recognition that applying all of the specified consumer rights would not be appropriate. In particular, it was considered important that businesses can agree appropriate limitations of liability when dealing with other businesses: consumer law does not allow certain liabilities to be excluded or limited when a business sells to a consumer. The view was expressed that the nature of consumer law and of consumer transactions differs from the nature of business transactions. Some responses emphasised that businesses currently have important flexibility as to the deals they may agree, including the redress to be provided if goods or services are substandard. It was felt that mandating the remedies required for consumers might not reflect the best interests of micro business purchasers nor of their suppliers.

6.8 The responses raised concerns which merit further investigation, as well as some potential costs and impacts to be avoided. For these reasons, this consultation focuses on the issues of (i) contract negotiation, including being aware of and challenging key terms if unfavourable; and (ii) awareness and use of legal protections if there are issues with goods and services purchased.

The current legislative framework on business-to-business supplies of goods and services

6.9 One of the key issues identified through the Call for Evidence was that micro businesses may not be clear about the current protections they have when they purchase goods and services, including how they can get redress. Based on the Call for Evidence responses, this consultation is not inviting views on changing these existing protections, since a particular issue raised, and which we are seeking to address, was a lack of awareness of the existing protections. However, the existing protections are summarised below, with further information in Annex D, as background for those responding.

6.10 The contract laws of UK jurisdictions are based on the idea that parties should be free to enter into a transaction on whatever terms they wish, provided their agreement is not illegal or contrary to public policy. This is the principle of freedom of contract. However, there are some longstanding exceptions to this principle, to address areas of unfairness or imbalance: for example, a party can potentially set aside a contract if they entered into it on the basis of fraud or duress. These principles are applied by the courts rather than being set out in legislation. Legislative controls over certain areas of contractual relationships also limit freedom of contract to some extent.

6.11 The main pieces of legislation governing contracts under which micro businesses purchase goods and services are:

- Supply of Goods (Implied Terms) Act 1973 This applies to contracts for hire-purchase of goods;
- The Unfair Contract Terms Act 1977 (“UCTA”) This provides protection in relation to contractual terms which seek to limit or exclude liability. It does not regulate the fairness of all terms of contracts;

- The Sale of Goods Act 1979 This applies to sales of goods in exchange for money, including conditional sales where the purchaser pays in instalments and only obtains ownership of the goods when the final payment is made, although the purchaser may use the goods in the meantime; and
- The Supply of Goods and Services Act 1982 This applies to supply of services, hire of goods and transfers of goods other than sales, e.g. barter or exchange of goods for something other than money and work and materials contracts where goods are supplied as an incidental part of a contract for work or services.

6.12 These current arrangements do not include rules relating specifically to purchases by micro businesses. Rather, the current arrangements apply to contracts governed by laws of the UK jurisdictions under which any business purchases from another business.

6.13 Together, the current arrangements provide micro businesses with:

- Rights when buying goods, or contracting for goods under other transactions (such as hire, hire-purchase);
- Rights when contracting for services; and
- Protection from unreasonable exclusions or limitations of liability in contracts.

6.14 A business may exclude or limit their liability to other business, including liability for the statutory rights regarding goods and services referenced above, if this is made clear in the contract between them. This may be done by including an exclusion or limitation of liability clause in the contract. Such a clause must comply with UCTA (see Annex D), otherwise it would not be binding.

Other relevant Government initiatives

6.15 The Government is legislating to establish a Small Business Commissioner, to enable small businesses (including micro businesses) to resolve disputes and avoid future issues with larger businesses which they supply or sell from. Option one below explains the ways in which the SBC will offer assistance in relation to the issues identified in this consultation.

7. Consultation questions

7.1 This consultation is an opportunity to gain views and information to further explore the issues identified in the Call for Evidence: that micro businesses may face difficulties in negotiating with suppliers, and may not be clear about the current protections they have when they purchase goods and services, including how they can get redress.

7.2 We have identified three options to address the issues:

- The planned Small Business Commissioner whose functions will include providing information on current rights for micro (and other small) businesses;
- Guidance for businesses (statutory or otherwise) when supplying to micro businesses; and
- Requiring businesses to provide pre-contract information about key terms when supplying micro businesses.

7.3 We are seeking responses and evidence on:

- The benefits, or otherwise, of introducing guidance (statutory or otherwise) that businesses should have regard to when supplying micro businesses; and
- The benefits, or otherwise, of requiring businesses to provide pre-contract information about key terms when supplying micro businesses.

7.4 These are not final government policy proposals. The responses to the Call for Evidence raised the main areas of concern, but further evidence is needed on the cost/benefit analysis of each option.

7.5 This consultation is designed to gather views to inform policy decisions, including deciding whether any action is appropriate.

Costs and Benefits

7.6 When responding, please bear in mind the need to balance both the potential costs and benefits, to micro businesses and other businesses. Where possible, please include evidence of the benefits and costs currently experienced as well as for the options set out. Evidence of this nature could be wide ranging, from anecdotal evidence of individual problems, to documented evidence of on-going disputes, to cases of legal action. It may also include examples of how micro and/or other businesses benefit currently, for example, in allowing a supplier to offer a wider choice or lower prices, or for micro businesses to make discounted purchases. We are therefore interested in all types of evidence - both in terms of costs and benefits

7.7 We recognise the difficulties that some micro businesses may have in providing evidence, particularly detailed evidence. We found from the earlier Call for Evidence that some submissions tended to be anecdotal, theoretical or high level. We wish to support respondents in responding to this consultation and can arrange meetings with stakeholders, to help obtain as wide a range of views as possible.

Consultation Responses

7.8 When responding to this consultation, it would be highly useful to receive evidence that is both of a quantifiable and qualitative nature.

7.9 Quantifiable evidence could include details relating to the type of micro business affected (nature of business activity, turnover, location), the types of purchases made, the value of the transactions and the costs to the business. Micro businesses operate across the whole economy, but problems may exist only in some sectors, or in some locations. If issues arise in relation to particular transactions, the type and value of transactions will help us determine the scale of any problem and how this option may seek to remedy this. We are interested in direct effects, such as on the price paid, on other terms of the deal, or in terms of the time taken to resolve any problems, which could otherwise have been spent more productively. We are also interested in indirect effects, such as consequential impacts on trade.

7.10 Qualitative evidence could include examples of issues experienced concerning micro businesses' unequal bargaining positions; their awareness or understanding of current protections and options for redress; and their ability to challenge unfavourable terms in negotiations or awareness of the implications of these.

7.11 The following are the main options we have identified as ways to address the issues covered. Anyone responding should feel free to raise other points, however, if they think they are relevant. In responding it would be particularly helpful if you could supply any underpinning evidence, examples, case studies or estimates to help illustrate your points. Any quantitative evidence would be particularly welcomed.

Option One:

The Small Business Commissioner's general advice and information function, which will include providing information on current rights for micro businesses.

7.12 Through the Enterprise Bill, currently before Parliament, the Government will establish a Small Business Commissioner (SBC) to enable small businesses to resolve disputes and avoid future issues with larger firms that they deal with. The Commissioner will provide general advice and information to help small businesses better understand their rights, including about purchasing goods and services. The general advice and information can cover dispute resolution and contract principles.

7.13 The Commissioner will also direct small businesses to appropriate services, for example existing independent advice services, approved alternative dispute resolution (ADR) providers or (where relevant) the Commissioner's own complaints handling function. The Commissioner's complaints handling function will consider complaints by small business suppliers about payment issues with larger businesses that they supply. In relation to small businesses' supply relationships with public authorities, the Commissioner can direct and give information about public bodies that can assist in resolving an issue, such as a regulator or ombudsman.

7.14 Through its general advice, information and directing function, the Small Business Commissioner will encourage small businesses to resolve disputes and preserve important commercial relationships by reaching mutually satisfactory arrangements, without the need to go to Court. The Commissioner will build the confidence and capabilities of small businesses to assert themselves in contractual disputes and negotiate more effectively, and ultimately avoid disputes arising.

7.15 This new service will be valuable in relation to the issues raised in the Call for Evidence about small businesses being unaware of their legal rights if there are issues with goods or services purchased, and of ways to seek redress. By helping small businesses to build their knowledge of contractual principles, it will also be relevant to the issue of micro businesses lacking confidence in negotiating and having limited buying power to drive hard bargains. The Commissioner's services will be available to small businesses, including micro businesses and sole traders.

7.16 In particular, the Government sees the following benefits of the SBC in relation to the issues identified in the Call for Evidence:

- The SBC will provide a central contact point for micro (and small) businesses, and direct them to relevant advice and information on their supply relationships with larger businesses;
- Through using the Commissioner's general advice and information services, micro businesses will enhance their knowledge of contractual principles, negotiation practice and potential issues that could arise when contracting with larger businesses, thereby becoming more expert in these areas as well as increasing awareness of existing protections;
- The Commissioner will help micro businesses resolve disputes more quickly and at lower cost and in ways that may preserve commercial relationships, by providing general advice and information, and directing small businesses to appropriate services. It will build their awareness of options for dispute resolution.
- Micro businesses that are more informed will potentially make better contracting decisions, leading to more successful outcomes for all involved;
- The Commissioner is being set up to promote a change in how businesses deal with each other, and have real impact.

Questions

Q.1 Subject to the Enterprise Bill being enacted, we will develop a user-friendly site for the Commissioner's general advice and information. The advice and information will cover points useful to small (including micro) business, for their dealings with larger firms. Please provide your views on the kinds of advice and information, or any particular areas, that would be helpful for micro businesses through this site.

Option Two:**Guidance for businesses when supplying micro businesses.**

7.17 Under this option, guidance would be published for businesses to have regard to when dealing with micro businesses. Whilst the precise content of any such guidance is obviously yet to be determined, the purpose could be to inform businesses of concerns relevant to micro business - such as the benefits of making key contract terms clear - so that these can be highlighted and taken into account when negotiating and entering into contracts with businesses in this group. The guidance could either be statutory - and thus mandatory - or non-statutory, to establish best practice. The guidance could include advice on simplifying contracts and/or negotiations; and routes for addressing dispute resolution.

7.18 The Government sees the following advantages to this option:

- Businesses would have a reference document to consult when supplying to micro businesses;
- If statutory, businesses would have to consider it when supplying to micro businesses, ensuring that micro businesses are treated fairly;
- The guidance could act as a reference document if any disputes arose relating to areas covered within it;
- Guidance would highlight good practice and further understanding of issues that micro businesses may face;
- Would enable micro businesses to feel more confident when negotiating contracts and seeking redress if necessary.

7.19 Disadvantages to this option could include:

- Having regard to guidance could place extra burdens on contracting parties;
- Further requirements, such as regard to statutory guidance, when contracting could make companies less likely to contract with micro businesses;
- Guidance would need to be comprehensive and kept up-to-date, or run the risk of being ineffective.

Questions

Q.2 Do you support the introduction of guidance for businesses when contracting with micro businesses?

Q.3 Please comment on the potential advantages and disadvantages of option 2.

Q.4 Do you feel that any guidance should be statutory or more general, good practise in nature?

Q.5 Do you have any examples where the presence of statutory guidance has or would have assisted in resolving an issue (please give further details)?

Q.6 What specific areas would you find it useful to see any guidance cover in relation to contracting with micro business?

Q.7 Do you feel that having regard to statutory guidance would place particular burdens on contracting businesses, both micro and other (please give further details)?

Option Three:

Requiring businesses to provide pre-contract information when dealing with micro businesses.

7.20 The Consumer Contract Regulations require a trader to give or make available to a consumer certain information about a proposed contract, in a clear and comprehensible manner, before the consumer is bound by the contract. This includes the main characteristics of the goods or services, the price (or means of calculating this) and relevant charges and details of the trader. If the information is not provided or is not complied with, the trader is in breach of contract. In most cases this means the consumer can claim damages, although in some cases they may be able to terminate the contract. Further details of the Consumer Contract Regulations are set out in Annex E.

7.21 This option would require similar pre-contract information to be made available when businesses were seeking to enter into a contract with a micro business.

7.22 The Government see the following advantages to this option:

- Micro businesses would understand the key terms before entering into a contract;
- Key terms must be communicated in a comprehensible manner, which should help micro businesses with limited resource or experience to understand what they are signing up to;
- Key details or arrangements may not be onerous to provide;
- There would be less possibility of confusion, which should reduce the need to seek redress at a later stage, from the contracting parties;
- Key contract information, including price and payment terms, would be clearly stated before contracts were signed;
- Discussions around key contract terms could take place before committal from either side;
- May encourage negotiation and make micro businesses feel better able to challenge terms proposed.

7.23 Disadvantages to this option could include:

- Micro businesses would still need to be aware of all contract terms, and not just those in the pre-contract information;
- Having to provide pre-contract information could place extra burdens on businesses contracting with micro businesses;
- Providing pre-contract information when contracting could make businesses less likely to contract with micro businesses.

Questions

Q.8 Do you support requiring businesses to provide pre-contract information to micro businesses?

Q.9 Please comment on the potential advantages and disadvantages of option 3.

Q.10 What would be the main costs if this option were to be implemented, and who would be bear them?

Q.11 Please comment on the types of contracts where pre-contract information should and should not be made available. For example should there be a threshold contract value above which pre-contract information must be made available, and below which it is not required? Or are there any types of contracts where pre-contract information is not appropriate?

General

Q.12 Do you have any views on where any of the potential options detailed above may have an impact on businesses supplying a micro business purchaser, as well as on the micro business purchaser?

Q.13 Do you have further views or evidence of the issues faced by micro business purchasers, or their suppliers, in (i) negotiating transactions and (ii) awareness and use of their current legal rights if goods or services are substandard?

Q.14 Are there any other comments or suggestions you would like to make about the issues covered in this consultation?

7.24 As mentioned at para 1.3 - 1.4 in this document, a statutory definition of micro businesses is being established, under the Small Business, Enterprise and Employment Act 2015 and Regulations to be made under that Act. This defines micro businesses as businesses with: a headcount of staff less than 10, and a turnover or balance sheet total of an amount less than, or equal to, a certain threshold. If any further protections were to be needed in this area, we would propose broadly to draw on this definition (although the detail of which thresholds should be applied would need to be considered).

Q.15 Do you feel that financial thresholds would be helpful to define a micro business that would be covered by any support or protections in relation to purchasing goods or services; or would this unduly complicate the definition in this context?

8. What happens next?

8.1 Following the closing date of this consultation, the responses will be analysed and a Government Response document published within three months of the consultation closing date.

Annex A: List of consultation options and questions

Option One: The Small Business Commissioner's general advice and information function, which will include providing information on current rights for micro businesses.

Q.1 Subject to the Enterprise Bill being enacted, we will develop a user-friendly site for the Commissioner's general advice and information. The advice and information will cover points useful to small (including micro) business, for their dealings with larger firms. Please provide your views on the kinds of advice and information, or any particular areas, that would be helpful for micro businesses through this site.

Option Two: Guidance for businesses when supplying micro businesses.

Q.2 Do you support the introduction of guidance for companies when contracting with micro businesses?

Q.3 Please comment on the potential advantages and disadvantages of option 2.

Q.4 Do you feel that any guidance should be statutory or more general, good practise in nature?

Q.5 Do you have any examples where the presence of statutory guidance has or would have assisted in resolving an issue (please give further details)?

Q.6 What specific areas would you find it useful to see any guidance cover in relation to contracting with micro business?

Q.7 Do you feel that having regard to statutory guidance would place particular burdens on contacting companies, both micro and other (please give further details)?

Option Three: Requiring businesses to provide pre-contract information when dealing with micro businesses.

Q.8 Do you support requiring businesses to provide pre-contract information to micro businesses?

Q.9 Please comment on the potential advantages and disadvantages of option 3.

Q.10 What would be the main costs if this option were to be implemented, and who would bear them?

Q.11 Please comment on the types of contracts where pre-contract information should and should not be made available. For example should there be a threshold contract value above which pre-contract information must be made available, and below which it is not required? Or are there any types of contracts where pre-contract information is not appropriate?

General

Q.12 Do you have any views on where any of the potential options detailed above may have an impact on businesses supplying a micro business purchaser, as well as on the micro business purchaser?

Q.13 Do you have further views or evidence of the issues faced by micro business purchasers, or their suppliers, in (i) negotiating transactions and (ii) awareness and use of their current legal rights if goods or services are substandard?

Q.14 Are there any other comments or suggestions you would like to make about the issues covered in this consultation?

Q.15 Do you feel that financial thresholds would be helpful to define a micro business that would be covered by any support or protections in relation to purchasing goods or services; or would this unduly complicate the definition in this context?

Annex B: Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

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

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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

Tel: 020 7215 1661

Email: angela.rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see section 5, page 9, 'Help with queries').

Annex C: Protection for Micro Businesses in non—regulated sectors response form

The consultation is available at: www.gov.uk/government/consultations/protections-for-small-and-micro-businesses-in-non-regulated-sectors

The closing date for responses is Thursday 9 June 2016 at 23:59.

Please return completed forms to:

Graham Pepper
Business to Business Team
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Tel: 0207 215 3773

Email: graham.pepper@bis.gsi.gov.uk

Or respond online via Citizenspace: <https://bisgovuk.citizenspace.com/enterprise-directorate/protection-for-micro-businesses-in-non-regulated-s>

Please be aware that we intend to publish all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 9 (section 4, 'Confidentiality and data protection') of the consultation for further information.

If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☐

Comments: [Click here to enter text.](#)

Your details

Name:

Organisation (if applicable):

Job title (if applicable):

Address:

Telephone number:

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

Questions

Option One: The Small Business Commissioner's general advice and information function, which will include providing information on current rights for micro businesses.

Question 1 Subject to the Enterprise Bill being enacted, we will develop a user-friendly site for the Commissioner's general advice and information. The advice and information will cover points useful to small (including micro) business, for their dealings with larger firms. Please provide your views on the kinds of advice and information, or any particular areas, that would be helpful for micro businesses through this site.

Comments:

Option Two: Guidance for businesses when supplying micro businesses.

Question 2 Do you support the introduction of guidance for companies when contracting with micro businesses?

Comments:

Question 3 Please comment on the potential advantages and disadvantages of option 2.

Comments:

Question 4 Do you feel that any guidance should be statutory or more general, good practise in nature?

Comments:

Question 5 Do you have any examples where the presence of statutory guidance has or would have assisted in resolving an issue (please give further details)?

Comments:

Question 6 What specific areas would you find it useful to see any guidance cover in relation to contracting with micro business?

Comments:

Question 7 Do you feel that having regard to statutory guidance would place particular burdens on contacting companies, both micro and other (please give further details)?

Option Three: Requiring businesses to provide pre-contract information when dealing with micro businesses.

Question 8 Do you support requiring businesses to provide pre-contract information to micro businesses?

Comments:

Question 9 Please comment on the potential advantages and disadvantages of option 3.

Comments:

Question 10 What would be the main costs if this option were to be implemented, and who would be bear them?

Comments:

Question 11 Please comment on the types of contracts where pre-contract information should and should not be made available. For example should there be a threshold contract value above which pre-contract information must be made available, and below which it is not required? Or are there any types of contracts where pre-contract information is not appropriate?

Comments:

General

Question 12 Do you have any views on where any of the potential options detailed above may have an impact on businesses supplying a micro business purchaser, as well as on the micro business purchaser?

Comments:

Question 13 Do you have further views or evidence of the issues faced by micro business purchasers, or their suppliers, in (i) negotiating transactions and (ii) awareness and use of their current legal rights if goods or services are substandard?

Comments:

Question 14 Are there any other comments or suggestions you would like to make about the issues covered in this consultation?

Comments:

Question 15 Do you feel that financial thresholds would be helpful to define a micro business that would be covered by any support or protections in relation to purchasing goods or services; or would this unduly complicate the definition in this context?

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

Annex D: Current legislative framework for supplies of goods and services to micro businesses

Goods – sales under Sale of Goods Act 1979 (“SoGA”)

When a micro business buys a good from another business (micro or otherwise), it means they have entered into a contract with that other business, as the supplier of the goods. Under the SoGA there are rules that form part of the contract, which suppliers must abide by (subject to a valid limitation or exclusion of liability – see the section on UCTA below).

Key rights or ‘implied terms’

The SoGA says that the goods sold must be as described, of satisfactory quality and fit for purpose. Fit for purpose means both their everyday purpose, and also any specific purpose that the micro business made known to the supplier at or before the time of purchase. Goods sold must also match any samples and any description by which they are sold, e.g. in a brochure. The SoGA also says that the supplier must have the right to sell the goods. Further, the goods must not be subject to undisclosed third-party claims, nor should the micro business’s use of the goods be disturbed by anyone with rights over the goods unless the micro business is made aware of such rights before buying.

These requirements form the “implied terms” of a contract. They have effect in addition to any other requirements in terms directly agreed between the parties, which are known as “express terms” of the contract (subject to any valid limitation or exclusion of liability – see below). If the good sold does not meet the requirements set out above, then the supplier is in breach of contract and the micro business, as purchaser, has a claim under the SoGA.

Remedies

The main remedies available are to reject the goods; terminate the contract and receive a refund; or to claim damages.

Reject/Refund

If the goods are not of satisfactory quality or fit for purpose and do not match their description or sample, the micro business can generally terminate the contract and get a refund, provided it rejected the goods before it is deemed to have ‘accepted’ them. This means they must be rejected within a reasonable time after purchase; or that the micro business has not intimated that they are accepted; or done something inconsistent with the supplier’s ownership, e.g. altering the goods.

Damages

To claim damages means to claim financial compensation which a court can order one party to pay to the other. The micro business can seek damages if they have accepted the goods; or they may choose to seek damages instead of rejecting the goods (if it wants to keep them but to be compensated for where the goods fall short of requirements). In some cases, the micro business may seek damages as well as rejecting the goods for a refund, if they have suffered loss which goes beyond the price paid for the goods. Generally, an

award of damages for breach of contract is intended to compensate the injured party for loss suffered. The level of damages awarded will depend on the specific circumstances and the term which the supplier has breached. Typically, damages would cover the estimated loss directly resulting from the breach, in the ordinary course of events.

There are legal tests to be satisfied for a micro business to recover damages: a micro business can only recover damages for loss which was caused by the breach (of the implied term) and which was sufficiently foreseeable; and the micro cannot recover for loss which they could reasonably have acted to limit or mitigate. A micro business does not have a legal right to have the goods repaired or replaced by the supplier, unless the parties have agreed this in their contract. However if the micro business has the goods repaired or buys a replacement, they are likely to be able to recover the cost of doing so through damages, unless this is unreasonable.

The micro business has six years to take a claim to court for breach of the above requirements regarding goods in England, Wales and Northern Ireland; five years in Scotland.

Other supplies of goods – Supply of Goods and Services Act 1982 (“SGSA”), Supply of Goods (Implied Terms) Act 1973 (“SGITA”)

Goods may be supplied under contracts other than sales – for example, hire, hire-purchase, under a contract for work and materials or payment-in-kind. Such contracts are not covered by the SoGA, but by the SGSA (hire, barter, work and materials) and SGITA (hire-purchase). For these types of transactions, equivalent rights apply to those for sales contracts: terms are implied in the contract that the goods are as described, of satisfactory quality and fit for purpose, and that they match any sample. Terms are also implied that the supplier has the right to supply the goods and they are not subject to undisclosed third-party claims (other than the rights of the owner, in relation to hired goods).

As with sales contracts, the remedies for breach of these rights are rejection and termination of contract, and/or damages. However, for goods contracts other than sales, these are wholly ‘common law’ remedies, meaning that the remedies are not specified in legislation but apply as a result of case law. Therefore, the concept of ‘acceptance’ described above does not apply. Instead, there is a common law concept of affirmation, meaning the right to reject the goods is not lost before the buyer is aware of the fault. The buyer may in theory therefore be able to reject goods for longer under a hire-purchase contract than a sales contract.

The micro business has six years to take a claim to court for breach of the above requirements regarding goods in England, Wales and Northern Ireland; five years in Scotland.

Services

The term ‘services’ covers a wide variety of work. From a small repair job, to the installation of solar panels, to major building work – all this type of work involves a micro business entering into a contract with a supplier. The SGSA implies into contracts for

services that the work will be carried out with reasonable care and skill⁵ (again, subject to valid limitation or exclusion of liability). The SGSA also requires that services will be carried out in a reasonable time (if there is no specific time agreed); and for a reasonable charge (if no price was set in advance).

What is 'reasonable' will depend on the circumstances, but it is an objective standard. So, for example, the level of care and skill which a business should show in performing a service would usually be that of a reasonably competent service provider in the relevant field, unless the provider had held themselves as having a particularly high level of skill or experience in which case a higher standard would be reasonable.

Remedies

If the requirements above are not met – for example, the supplier did not use reasonable care and skill so the service was poor – the micro business may be able to claim compensation. If the breach was very severe – that is, if the micro business could show that the workmanship was so poor that it got no benefit from it – the micro may be entitled to terminate the contract and get a refund, although this is less readily available than when buying goods.

The micro business does not have a legal right to ask for remedial work to be carried out or ask for work to be undone (unless agreed in the contract), although they may seek to negotiate this. The micro business could have remedial work done by a third party and is likely to be able to recover damages to cover the cost of this (as above).

The micro business has six years to take a claim to court for breach of the above requirements regarding services in England, Wales and Northern Ireland; five years for breach of common law implied terms in Scotland.

Unfair Contract Terms Act 1977 (“UCTA”)

UCTA provides protection in relation to contractual terms which seek to limit or exclude liability. It does not regulate the fairness of all terms of contracts. There are also legislative controls on the fairness of contract terms more generally (not only terms which limit or exclude liability), but these apply only to business-to-consumer contracts.

Under the UCTA, the protections in SoGA, SGSA, SGITA regarding goods being of satisfactory quality and fit for purpose, and conforming with a description or sample, can be excluded in contracts between businesses, but this is subject to a reasonableness test⁶. Liability for breach of the protection that a service should be performed with reasonable care and skill can also be limited or excluded, subject to the reasonableness test. The protection in SoGA, SGSA and SGITA that the supplier must have the right to sell (or otherwise transfer) goods cannot be excluded or limited: a term seeking to exclude

⁵ In a contract for the supply of a service in Scotland, the implied terms are found in the common law not in SGSA, although there are parallels between the terms implied at common law for Scotland and those under the SGSA.

⁶ In Scottish law, the test under UCTA is whether it was “fair and reasonable” to incorporate the exclusion or limitation clause into the contract. In substance, the tests are very similar, so for brevity this document refers to the reasonableness test.

or limit liability for this is automatically non-binding. There is an exception in relation to hire, in which case the reasonableness test must be met.

If a contract between businesses is on one party's standard terms, that party can only exclude or limit liability for a failure to perform their contractual obligations if the reasonableness test is met. This covers terms seeking to exclude or limit liability for breach of contract or which seek to allow a party to perform the contract substantially differently than reasonably expected or not to perform at all. A term to exclude or limit liability for damage to property caused by negligence must also satisfy the reasonableness test. Liability cannot be excluded or limited for death or personal injury caused by negligence.

The reasonableness test is met if the term was a fair and reasonable term to include in the contract, based on the circumstances that the parties did or should reasonably have known or contemplated when the contract was made. If a clause seeks to limit a party's liability to a particular sum then, in considering whether that term meets the reasonableness test, the court must consider in particular the party's resources and how far they could insure against the liability.

UCTA sets out factors for the court to consider, where relevant, in deciding whether a term is reasonable which seeks to limit or exclude liability for the statutory rights regarding goods. This does not prevent the court from considering other factors too. The factors are:

- The strength of the bargaining positions of the parties taking into account alternative suppliers available to the purchaser;
- Whether the customer received an inducement to accept the term, e.g. were they given the opportunity to pay a higher price without the exclusion or limitation clause;
- Whether the customer knew or ought reasonably to have known of the term and whether such terms are in general use in a particular trade;
- Where the exclusion or limitation of liability relates to non-performance of a condition whether it was reasonable to expect compliance with the condition to be practicable;
- Whether the goods were made or adapted to the special order of the customer.

Enforcement

The rights explained above are "private rights". This means the micro business can itself exercise their rights against the supplier. It may sue the supplier for breach of contract if the rights in relation to goods and services are breached, and can challenge the reasonableness of an exclusion or limitation of liability clause in the courts.

Annex E: Pre-contract information requirement for consumer contracts

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the “CCRs”)⁷ require a trader to give or make available to a consumer certain information, in a clear and comprehensible manner, before the consumer is bound by the contract. This includes:

- the main characteristics of the goods or services;
- the price (or means of calculating this) and relevant charges;
- the duration of the contract or conditions to terminate the contract;
- arrangements for payment, delivery and performance;
- details of the trader;
- where applicable, the trader’s complaints handling policy and/or existence and conditions of after-sale customer assistance, after-sales services and commercial guarantees ;
- a reminder that the trader has a legal duty to supply goods which conform to the contract; and
- where applicable, details of cancellation rights which apply to certain consumer transactions.

For on-premises sales (in a shop or at a regular market stall, for example), information only needs to be given if not clear from the context. There are more extensive information requirements for distance contracts (such as online or telephone sales) and off-premises contracts (typically, contracts concluded in a location that is not the trader’s business premises) than for on-premises contracts.

If the information is not provided or is not complied with, the trader is in breach of contract – in most cases this means the consumer can claim damages although in some cases they may be able to terminate the contract. Under the Consumer Rights Act 2015, the consumer will have a right to recover costs incurred as a result of information which is incorrect or is not complied with, up to the price paid under the contract. If certain information about costs and charges is not provided, the consumer is not bound to pay the costs or charges. If a trader entering into an off-premises contract fails to give notice of the right to cancel, they commit a criminal offence.

Enforcement

Trading Standards services may be able to seek an injunction ('interdict' in Scotland) from a court to secure compliance with the CCRs. If there is a breach on a scale which harms

⁷ SI 2013/3134

the collective interests of consumers, regulators such as the Competition and Markets Authority are also able to take action.



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Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

Email: enquiries@bis.gsi.gov.uk

BIS/16/49