

Department for Business Innovation & Skills: Protection of Small Businesses when Purchasing Goods and Services: Call For Evidence (March 2015)

Consultation response from the Centre for Competition Policy

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This consultation response has been drafted by Professor Amelia Fletcher, who retains responsibility for its content.

The Centre for Competition Policy (CCP)

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Response to BIS Call for Evidence on Protection of Small Businesses when Purchasing Goods and Services

1. I recognise that the BIS Call for Evidence is directed primarily at small businesses themselves and that BIS is interested in collecting further information on the types of problems they face as buyers of goods and services. I support this process and hope it generates useful evidence that will enable BIS to judge more robustly the relative pros and cons of extending consumer protections to small businesses.
2. I do not have additional direct evidence to provide on this topic, and this response is intended as a brief follow-up to the report on this issue that my co-authors and I completed in 2014 for the Federation of Small Businesses (FSB).¹
3. I am grateful to FSB for giving me advance sight of their response, which refers to our report. I can confirm that FSB have represented our report fairly. I also agree with the FSB's proposals, and support the FSB's focus on micro-businesses, for which I think the arguments are most strongly in favour of legal protections that are aligned with those for individual consumers.
4. I would, however, go beyond the FSB's current proposals in one area. If sufficient evidence of relevant detriment is found, I would urge BIS to consider seriously the extension of general consumer law to cover micro-business customers. In preparing this brief response, I have considered the examples of consumer harm that the FSB has collected through its own small-scale call for evidence addressed to its members in the Wessex region. While the number of responses to this call was relatively small, a rich set of issues arises. If these cases are representative of the wider population of micro-businesses, then the inferred level of detriment may well justify extension of the relevant consumer protection legislation to such firms.
5. Specifically, the FSB examples provide evidence which is relevant to the question of whether the Government should extend to micro-business customers (a) the consumer protection rules relating to *unfair contract terms* that exist within the Consumer Rights Bill (CRB) and (b) the provisions around *misleading and aggressive sales practices* that exist within the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). (I note that the CPRs were not included within the scope of this Call for Evidence. It is not clear why this is the case, and it may be a missed opportunity. To the extent that evidence arises through the current process that relates to misleading or aggressive sales practices, I would urge BIS to reconsider this.)

a) Examples of unfair contract terms

In a number of the FSB examples, contracts were unexpectedly long or contained complex cancellation procedures, and included significant penalties for early termination. Individual consumers would have protection against such clauses under the CRB. Action has also been taken by the authorities (under the existing unfair contract terms consumer legislation) in respect of such terms in consumer contracts (for example by the Office of Fair Trading in relation to gym contracts).²

¹ Fletcher et al (2014), "Small Businesses As Consumers: Are They Sufficiently Well Protected?", http://competitionpolicy.ac.uk/documents/8158338/8264594/fsb+project_small_businesses_as_consumers.pdf.

² <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/health-contracts/>

Businesses have no such protection. Moreover, it may be expected that small businesses have more need than consumers to sign up to such ongoing service contracts (e.g. for payment card machines, advertising services, photocopier leasing, workplace hygiene services etc.). Thus they are potentially at even greater risk than individual consumers of such abuse through unfair contract terms.

It is worth emphasising that these sorts of contracts, which unfairly tie in customers to a particular supplier, can also be bad for competition, since they limit the extent of customer switching. Ofcom and Ofgem have addressed exactly these sorts of clauses in respect of small businesses in telecoms and energy. The FSB evidence demonstrates that they also occur in unregulated sectors, with little to no protection available for small business customers, despite their vulnerability to such practices.

b) Examples of misleading sales practices

- *Hidden ('drip') pricing*

In a couple of the FSB examples, customers were not made aware upfront of some of the core charges that they would need to pay as part of the service. Again, action has been taken against exactly this sort of 'drip pricing' in consumer markets under the CPRs, for example around payment card surcharges on airline tickets.³ Enforcement action in this area is intended partly to protect customers but partly also to facilitate truly effective competition - competition that occurs on the actual realised prices customers pay, not on the unrealistically low upfront prices. Experimental work also finds that hidden pricing deters search on the part of customers, which can further harm competition.⁴

It is far from clear why micro-business customers should not have the same protections as individual consumers against such drip pricing. If they do not, there are risks not only to those micro-business customers but also to effective competition in the relevant Business to Business markets.

- *Misleading advertising*

In a number of the FSB examples, customers were severely - and probably deliberately - misled as to what they were buying, but had no effective comeback when the misrepresentation became apparent. Again, individual consumers would be protected against such a practice, and in particular would have some comeback in terms of the ability to claim redress.

Micro-business customers do not benefit from the same protections. While the EU is apparently revisiting the Misleading and Comparative Advertising Directive, which specifically covers Business to Business transactions, it is not currently planned that the protections would come close to matching those available for individual consumers.⁵

³ <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/>

⁴ "The Impact of Price Frames on Consumer Decision-Making", OFT 2010, http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/OFT1226.pdf

⁵ http://ec.europa.eu/consumers/consumer_rights/unfair-trade/false-advertising/index_en.htm.

6. In a number of the FSB examples, business customers complained that they were unable to claim redress for a loss of business suffered as a result of poor quality or delayed work by a supplier. While it is clear that these businesses have suffered harm, I recognise that the issues around consequential loss are finely balanced. Enhanced rights for business customers to claim consequential loss could potentially create significantly increased costs on the part of their suppliers. As such, while supporting the FSB's general arguments for better redress processes for micro-businesses, I do not think the case has yet been made for small businesses to have a right to claim for consequential loss, and would not currently recommend changes to legislation that would allow this, without a more detailed assessment of likely impact.
7. Finally, given the rich results from the FSB's small call for evidence, I strongly support the FSB's suggestion that – unless sufficient evidence is collected through the current call for evidence to develop a clear picture of the extent of harm across the economy - BIS should commission further empirical survey work in this area. This will better enable BIS to gain a full and fair picture of the scale of the issues involved and thereby gain a more robust evidence base on which to form a judgement as to the pros and cons of further legislation in this area.