



## Department for Business, Innovation & Skills

### PROTECTION OF SMALL BUSINESSES WHEN PURCHASING GOODS AND SERVICES: CALL FOR EVIDENCE RESPONSE FORM

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 15 June 2015.

#### Your details

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Please tick the box below that best describes you as a respondent to this consultation:

<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 checked="" 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)

## Question 1

### What examples are there of problems with the current arrangements?

#### Comments:

The Society of Chief Officers of Trading Standards in Scotland (SCOTSS) is the professional body representing the lead officers for Scottish Local Authority Trading Standards Services ("LATSS").

In addition to dealing with large numbers of consumer complaints from local residents, LATSS also receive significant numbers of complaints from businesses about purchases they have made ("B2B" complaints). Almost all of these complaints are from MSBs as defined in the Call for Evidence document and most are from micro-businesses with nine employees or fewer. In our view, the absolute numbers<sup>1</sup> of these complaints underestimates the problems encountered by small businesses. However, the scale and variety is sufficient to provide vital data for this Call for Evidence. While there will be other sources of complaint numbers and types – FSB perhaps – we suspect that these sources will be limited. Accordingly, we have taken data from a sample of Scottish LATSS from recent years. The authorities included<sup>2</sup> are both urban and rural, and represent a geographical spread across Scotland to ensure the sample is representative.

The sample totals 3124 complaints. The precise details vary according to local recording requirements but we have a summary of the issues for each complaint, and many of the records have details of the goods or services involved, unfair trading practices alleged and mode of purchase.<sup>3</sup> The Excel spreadsheet at Appendix 1 has the full information. The tables and figures below illustrate some of the findings from the sample of complaints.

**Table 1 – B2B Complaints by Trading Practice**

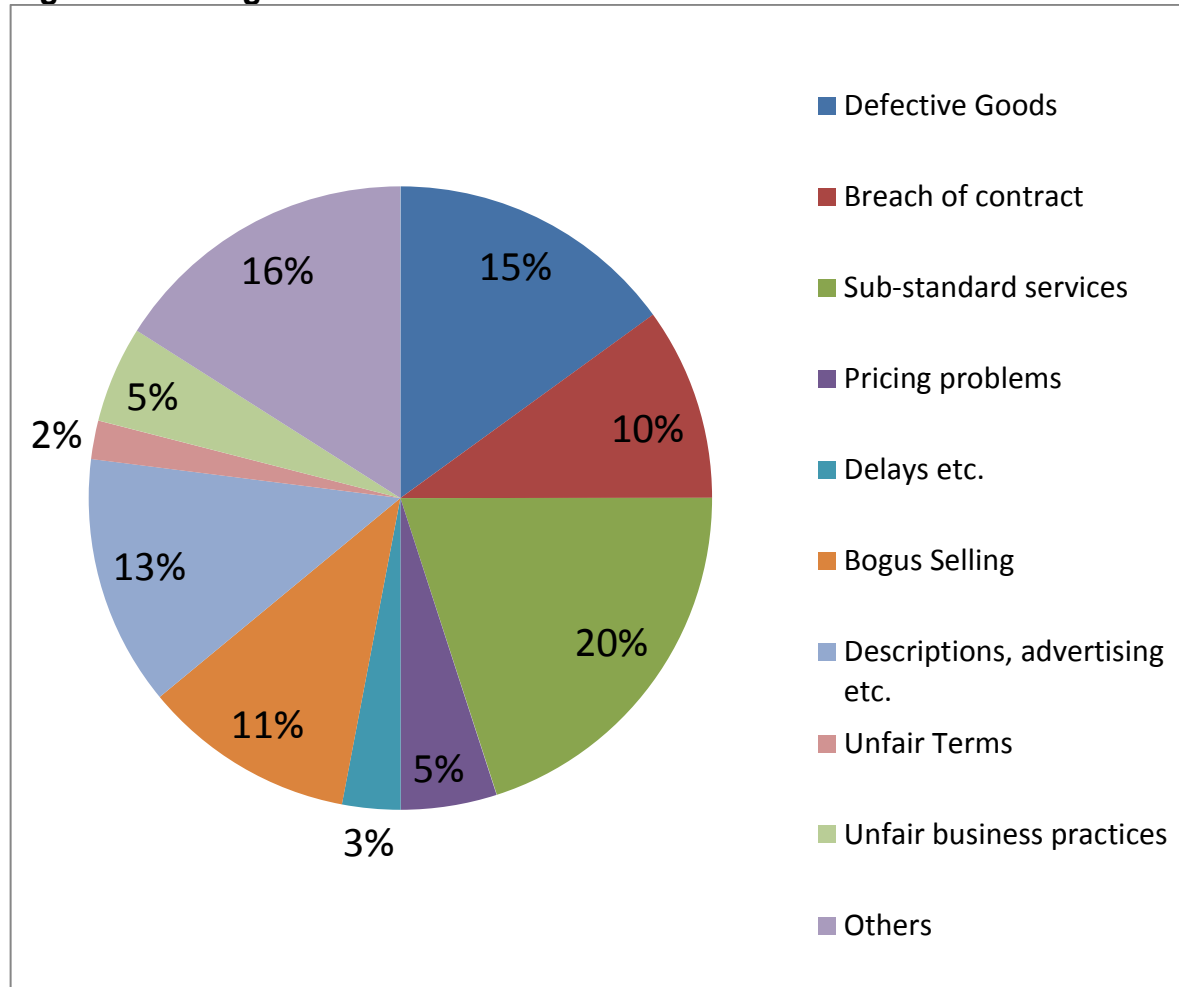
Code	Description	Number	Percentage
01A	Defective Goods	236	15%
01C/02C	Safety	26	1.5%
01D-F	Breach of contract	156	10%
02A	Sub-standard services	314	20%
02D	Customer Services	17	1%
04A-D	Pricing problems	71	5%
05A-C	Delays etc.	53	3%
07A & C	Unsolicited goods	19	1%
07B	High pressure sales	22	1%
07G	Bogus Selling	173	11%
08A-D	Descriptions, advertising etc.	209	13%
08G	Counterfeit goods	14	1%
10A	Unfair Terms	30	2%
12A	Unfair business practices	73	5%

<sup>1</sup> Proportions vary but thought to be around 5% of complaints received by Scottish LATSS are B2B

<sup>2</sup> Angus, Dumfries & Galloway, Edinburgh, Highland, Midlothian, Moray, North Lanarkshire, Orkney, Renfrewshire, Scottish Borders, South Ayrshire

<sup>3</sup> Listed percentages are as a proportion of the complaints for which that information is available.

**Figure 1 Trading Practices**



We offer the following observations on the data above:

- The main issues causing problems for these small businesses are similar to those experienced by consumers: i.e. substandard services and defective goods are the most common problems, followed by misleading advertising/trade descriptions, breach of contract and scams (bogus selling)
- Some typical consumer problems do not feature highly on the list, e.g. safety, counterfeiting.
- Issues like poor customer services and harassment are almost non-existent on the list, suggesting these are not priorities for MSB buyers
- Only 1% of the cases were recorded as Unfair Terms. However, if the experience of consumers is a guide, this tends to be an under-reported issue for two reasons: first, often it involves “hidden detriment” as the victim of unfair terms assumes they have to accept them; second, cases involving unfair terms often feature other problems under which the main trading practice record is made.

Table 2 and Figure 2 below show the spread of **product types**.

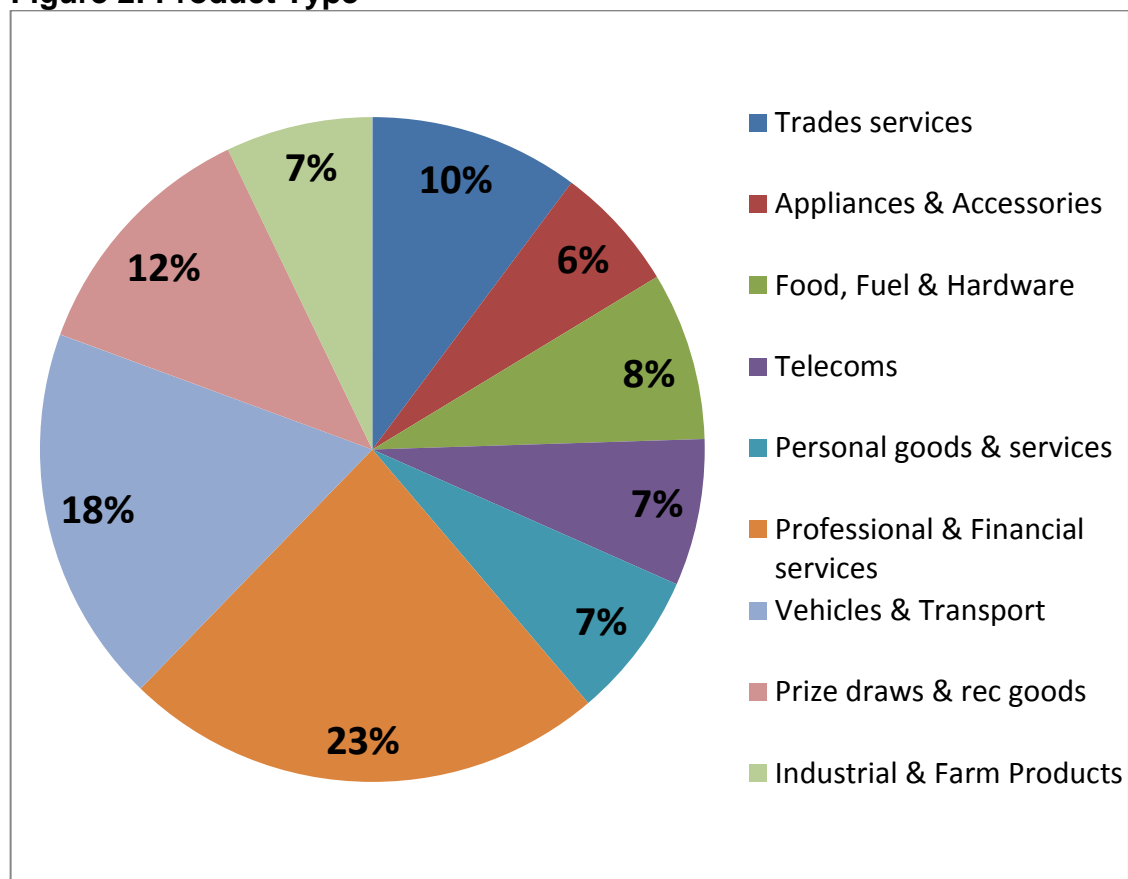
**Table 2**

Code group	Description	Number	Percentage
A	Trades services*	184	10%
A	Appliances & Accessories	109	6%
B	Food, Fuel & Hardware	142	8%
B	Telecoms	132	7%
C	Personal goods & services	120	7%
D	Professional & Financial services**	401	23%
E	Vehicles & Transport	323	18%
F	Prize draws & recreational goods	210	12%
G	Industrial & Farm Products	129	7%

\* e.g. building, joinery, plumbing, electrical, painting, etc.

\*\* e.g. insurance, banking, letting agents, debt collection, solicitors, accountants, etc.

**Figure 2: Product Type**



We offer the following observations about the product types found:

- Nearly 1 in 4 of the complaints involved professional and financial services. This compares with just 9% from a comparable data set of

consumer complaints<sup>4</sup>, demonstrating a clear distinction between B2B and B2C.

- With about 1 in 5 involving problems with vehicles this is a parallel with consumer complaints
- In contrast appliances and accessories are less of a problem for MSBs than for consumers.
- A fairly small but significant proportion involves farm products, a common source of B2B complaint in rural areas.

Unless there has been a breach of relevant legislation for which Trading Standards has an enforcement responsibility<sup>5</sup>, LATSS response to these complaints is limited to advice to the MSB buyer on how the law applies to the situation and to how best to pursue the complaint. Although not involving direct “intervention”, such advice at the least ensures that the enquirer is better informed about their problem, and at best provides a clear avenue for resolution. All Scottish LATSS are committed to helping local business and promoting economic growth through fair trading in a well-functioning marketplace. For this to occur MSBs, like consumers, must be confident in their purchases and able to deal quickly with any problems that arise.

**Question 2**      **Are these problems one-off examples, or are there problems which suggest trends, or structural issues, in certain sectors?**

**Comments:**

Some of the problems encountered appear to be rare and not suggesting any structural problems. However, our data suggests that in other areas trends do exist. For example, about 1 in 4 of the complaints involve financial or professional services, a much higher proportion than with consumer complaints and reflecting an area of concern for small businesses. A smaller but still significant number (7%) involve industrial or farm products, central to the businesses affected. We think these are trends specific to the B2B sector.

Conversely, some of the other prominent goods and services types are in line with consumer experience, such as problems with vehicles and trades services.

**Question 3**      **Why are these problems not resolved through market mechanisms or current protections (including, for example: the ability to contract; trust, goodwill and supplier reputation or long-term supplier relationships; or the ability to switch supplier)?**

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<sup>4</sup> A sample of 18,060 complaints received by Trading Standards in one part of Scotland.

<sup>5</sup> e.g. the Business Protection from Misleading Marketing Regulations 2008 or the Weights and Measures Act 1985

### Comments:

We do not have a complete answer to this question. However, the experience of Scottish LATSS point to some important reasons. One is that B2B problems often involve a micro-business buying from a large company, where typically there is no opportunity to negotiate terms, trust and goodwill are irrelevant and switching may be problematical. This is the same in principle as a consumer purchase but without the protections enjoyed by a consumer.

A second reason is that the intent of the seller can be disreputable, ranging from mildly misleading and dubious practices to organised scams. This illustrates that MSBs need advice, information and assistance to avoid being misled or scammed and that appropriate enforcement mechanisms must also exist where required. The Business Protection from Misleading Marketing Regulations 2008 ("BPRs") enable Trading Standards to make an important contribution to this.

### Question 4      **What examples are there of advantages with the current arrangements?**

#### Comments:

We think that there are two main advantages:

- MSBs are not subject to cancellation and information provisions when **selling** online to other businesses. We discuss this at Q33 below.
- Broadly our position is that there should be some extension of rights to MSBs. However, we think that the arguments for retaining the current situation – freedom and flexibility to contract – have some validity when the buyer and seller are both MSBs and in particular **when the seller is a micro-business**.

### Question 5      **Are these advantages one-off examples, or are there advantages which are ongoing, or which occur in certain sectors?**

### Question 6      **What features of the current arrangements are most beneficial to MSBs?**

#### Comments:

See above and Q33 below.

### Question 7      **What features of the current arrangements are most costly to MSBs?**

#### Comments:

No comments.

**Question 8**

**How familiar are MSBs with the current arrangements, as described in Section 2?**

**Comments:**

Trading Standards officers are in regular contact with a wide range of local MSBs, both in terms of advising and assisting their compliance when selling and dealing with their buying complaints. Levels of knowledge vary widely, but it seems reasonable to suggest that in general the level of knowledge of contract and related laws tends to be lower the smaller the size of the business. This is unsurprising. These are at times complicated legal provisions which are difficult to apply. Micro-businesses rightly concentrate on production and distribution of quality product, marketing and interacting with customers. They do not have legal teams or easy access to detailed legal advice. Often, their LATSS provides an important source of advice and direction. As far as possible, the law should be streamlined to make it easy to understand and in plain English as much as is feasible. We note that this was one of the key objectives of the Consumer Rights Act and we would propose a similar approach to revising the laws for B2B contracts.

**Question 9**

**With examples, what types of MSB are affected by any issues identified with the current arrangements, in terms of their size (by employee number and turnover), the nature of their business activity and location of their business?**

**Comments:**

Several of our other answers (see for example Q1 and Q33) address these points. We do not have detailed information on employee numbers, turnover, etc. Perhaps this data could be systematically collected by LATSS in future? A standard format could be devised and volunteer LATSS across the country could record the information and submit to BIS for collation at a later point. Alternatively, subject to Data Protection and resource issues, SCOTSS would be happy to investigate how those businesses that have recently made complaints could be surveyed to collect relevant data.

**Question 10**

**What types of transactions are affected with possible reference to the goods or services purchased, the frequency of purchase, the size or volume of purchase, the characteristics of the seller?**

**Comments:**

See Q1 above and the full list in the Spreadsheet at Appendix 1.

- Question 11** What has been the effect on the terms of trade for the MSB when making the purchase (or purchases) in question?
- Question 12** What indirect effects have there been on MSBs, for example, in consequential impacts on trade or competitiveness?
- Question 13** What other losses has the MSB suffered, for example, in time taken to resolve a problem (please quantify where possible)?

**Comments:**  
No comments.

- Question 14** Or, what additional benefits has the MSB enjoyed as a result of the current arrangements, either as a purchaser, or as a supplier?

**Comments:**  
See Q4 above.

- Question 15** What types of problems are occurring with purchases? For example, are any issues identified mainly about problems of redress, i.e., refund or remedy?
- Question 16** Or are they about disputes over contract terms, or related to unequal bargaining positions between two parties?

**Comments:**  
See Q1 above and Appendix 1.

- Question 17** What other type of problem might there be, if not related to remedy or contract?

**Comments:**  
See Q1 above.

- Question 18** To what extent do MSBs negotiate contract terms as against accepting standard terms and conditions?

**Comments:**  
We do not have detailed information on this issue but consistent anecdotal evidence from Trading Standards officers across Scotland suggests that most purchases made by MSBs, and micro-businesses in particular, are made from much large companies. Accordingly, there is seldom any real opportunity to negotiate terms and that standard conditions must be accepted on a “take it or leave it” basis. We think that the situation such business buyers are in is very similar to that of a consumer.



- Question 19** To what extent do contracts for sales and supplies to MSBs tend to limit liability for breach of statutory protections regarding goods and services, or other breaches of contract?
- Question 20** Do MSBs struggle to make effective purchasing decisions?
- Question 21** If so, what are the reasons?
- Question 22** How do MSBs approach different purchasing decisions? For example, do they approach the purchase of core items and non-core items differently?
- Question 23** Do MSBs believe they have sufficient information when entering a contract with a larger supplier?
- Question 24** If so, what steps can MSBs take to ensure this is the case?
- Question 25** If not, what types of information, and to what extent, are MSBs lacking?
- Question 26** Does the ability of MSBs to make effective purchasing decisions differ depending on the type of purchase?
- Question 27** If so, how and for which types of purchases?
- Question 28** How are the current arrangements reflected in the business models of suppliers, both other MSBs and larger firms?
- Question 29** Would different rights and remedies for MSBs affect the business models of suppliers, both other MSBs and larger firms?
- Question 30** Would it be costly for suppliers to distinguish between MSBs and other customers?
- Question 31** How would firms supplying MSBs respond to changes in the rights of MSBs?

**Comments:**

We have chosen not to comment on Q 19-31 as we think these are matters on which only affected businesses can comment effectively.

- Question 32** What might the benefits be of applying any of the consumer protections set out in Part 3 to MSBs?

**Comments:**

See detailed comments under Q33

- Question 33** We are interested in views, with supporting evidence, on any of the protections – in responding, these need not be considered as a package. The key protections are set out in Part 3, but in summary these are:

- **rights and remedies in relation to contracts for goods;**
- **rights and remedies in relation to contracts for services;**
- **rights and remedies in relation to contracts for digital content;**
- **terms limiting liability for key protections being automatically non-binding;**
- **right to challenging certain terms as unfair;**
- **requirements to provide certain information before a contract is made;**
- **right to withdraw from distance and off-premises contracts.**

### **Comments:**

#### **Rights and Remedies in relation to contracts for Goods**

In terms of the rights of businesses when buying goods, we do not propose any changes. The “default position” is that implied terms such as description and satisfactory quality *do* apply to MSB purchases. We think that the current option – subject to UCTA limitations – of explicitly contracting out some matters is a sensible option, particularly in terms of contracts *between two small businesses*. We do have some concerns about sales from large companies to MSBs (especially micro-businesses), but in terms of sale of goods rights we do not propose any changes. Rather, we suggest unfair terms-based remedies to these concerns, see below.

In terms of remedies, however, we do think there is scope for change. As discussed above, we think that many of the problems encountered by small businesses are similar to those experienced by consumers, and that micro-businesses in particular are often closely analogous to consumers when buying from large companies. Therefore, the same reasons that led to consumer remedies being changed can be applied to MSBs. We think that as a minimum the pre October 2015 consumer remedies (i.e. specific provision for repair and replacement, reverse burden of proof for 6 months, etc.) should be applied to MSB purchases. We also think that close consideration should be given to extending further and applying the full Consumer Rights Act remedies to MSBs, in particular micro-businesses, i.e. early right to reject, only one repair/replacement, etc.

#### **Rights and Remedies in relation to contracts for Services**

Some of the services provisions in the Consumer Rights Act in effect codify principles already well-established in common law, especially in Scotland. We think that these elements should be applied to MSB buyers in statutory form. One other CRA provision *does* potentially significantly extend consumers’ rights, i.e. the right that services must comply with relevant information given by the trader. Applying this to MSBs purchases is more controversial and we can see both sides of the argument: whereas the reasons for applying this to consumer sales are well-founded and could equally apply in many B2B sales, it could be seen as a step too far,

especially given the prevalence of B2B services contracts involving two MSBs (unlike goods which we think are mostly bought from big companies), where more freedom to contract and a continued element of “buyer beware” may be appropriate. We suggest that this option should not be rejected out of hand but needs careful consideration: we hope that the Call for Evidence will produce useful data and opinions to inform this evaluation.

In terms of remedies, we support the extension of the new consumer remedies to B2B contracts involving MSB buyers. These remedies codify common law and give options which we think are both legally just and practical.

Case Study 2 at Appendix 2 gives a real-world example of services B2B.

### **Rights and Remedies in relation to contracts for Digital Content**

We have a straightforward view regarding digital content: we think that the consumer provisions should be applied in full. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (“CC (ICAC)”) and now the Consumer Rights Act introduce the important concept of “digital content” into consumer law. This clears up the long-standing confusion as to the status of electronic material: i.e. is it goods, services, both or neither? If this is not applied to B2B purchases then the confusion will continue. Further, the consumer remedies for digital content are fair and reasonable and take into account the nature of the product. We do not think there is a sustainable argument for failing to apply these rights and remedies to MSB purchases. See Case Study 3 at Appendix 2 for an illustration of this.

### **Terms limiting liability for key protections being automatically non-binding/ Right to challenging certain terms as unfair**

We think that some change is required regarding unfair terms. We do not think that the UCTA “reasonableness test” provides enough protection, especially with regard to micro-businesses buying from large companies, which is the most common scenario for a B2B complaint to Trading Standards. Although the reason given by MSBs for raising a complaint with Trading Standards is seldom unfair terms per se, when dealing with such enquiries officers often realise that there are terms and conditions that would not be appropriate in a consumer purchase. We think unfair terms in B2B contracts – as indeed in consumer contracts – is an area of widespread “hidden detriment”, buyers of all kinds think they just have to accept the terms. Of course, at the moment, MSB buyers – subject to the reasonableness test if relevant – **do** have to accept such terms. We think that some B2B terms do create a “significant imbalance” in rights and obligations, especially where seller is large and buyer very small, for example terms that: that limit liability, impose high penalty charges, restrict other commercial activity. Therefore, we think that MSBs should be able to challenge standard terms as unfair. We also recognise that it may not be appropriate to apply all the issues in the “Grey List” to B2B and that detailed work in assessing this must be carried out. However, whatever the final decision on a B2B grey list, we would stress that the assessment of whether

B2B terms are unfair should prominently take into account the status of the buyer and seller. So, in some circumstances, a term judged unfair in a contract between a multi-national and a micro-business may not be judged so when used in a contract between two micro-businesses. We recognise that our proposals are not without challenges and would require detailed work to implement. We propose that the Government take this forward as a specific piece of work requiring detailed consideration.

See Case Study 1 at Appendix 2 for an example of B2B unfair terms.

**Requirements to provide certain information before a contract is made/  
Right to withdraw from distance and off-premises contracts.**

While we think that several of the purchase rights and unfair terms provisions should be extended to MSB purchases, we do not have a clear position supporting extending the information and cancellation provisions from CC(ICAC). Our tentative view is that it may not be appropriate to apply these consumer protection provisions to B2B due to disproportionate negative consequences for small businesses when selling. Many successful e-Commerce micro-businesses have sprung up in both urban and rural parts of Scotland in recent years. Imposing onerous information requirements and – crucially – “no-fault” cancellation provisions may create unacceptably high burdens for these sellers, and cancel out benefits achieved by strengthening MSB protections when buying.

However, we are persuadable on this issue and do not think change should be rejected out of hand. We note the experiences of small business buyers in Case Study 4 (attached), who would clearly have benefited from having cancellation rights.

**Question 34**      **Alternatively, is there evidence that regulating MSBs with consumer legislation might have unintended consequences, e.g., chilling effect on the willingness of firms to enter contracts or costs associated with their being less flexibility in contracts etc.?**

**Comments:**

The answer given to Q33 above contains some discussion of “pros and cons”. Perhaps the most difficult issue is our proposal regarding unfair terms. We recognise that this could have unintended negative consequences in terms of the selling activities of MSBs. Interference with the freedom to contract between MSBs could be problematical. However, on balance, given the reality that most B2B purchases are little different from a consumer buying on standard T&Cs, we think the changes would be beneficial. One of way of minimising unintended consequences may be to limit the extension of these buying rights to micro-businesses.

**Question 35**      **If problems arise, to what extent are MSBs also the suppliers and what are the costs to MSBs as supplier**

## **of extending consumer protection provisions to SMBs?**

### **Comments:**

We recognise the importance of considering carefully the fact that MSBs are also sellers and this is discussed at various points above. In terms of the actual costs to businesses, we do not have detailed data on that.

**Question 36**      **Are there any benefits or costs of having rights for MSBs aligned with those for consumers but not with other businesses?**

**Question 37**      **What other approaches could the Government take to protecting MSB rights?**

**Question 38**      **Does an extension of rights need to be applied on a universal basis, i.e., equally to all MSBs?**

**Question 39**      **Or should it be targeted at micro businesses only, or other specific types of MSB?**

### **Comments:**

We think that there is a meaningful distinction between large businesses and MSBs as defined in this Call for Evidence. We think that in many situations the MSB buyer is analogous to a consumer buyer, especially when purchasing from a large company. Given that, we think that some change is necessary to redress the balance. Our preferred options are laid out under Q33 above. We recognise that attempting to distinguish between different types of business will present problems and challenges. Some commentators will bemoan the apparent arbitrariness of the difference between 9 and 10 or between 49 and 50 employees (if those are the definitions used). However, we think that the problems are surmountable and that borderlines between definitional differences are inevitable and nothing new.

We think that there is a particularly strong case for extending the rights of micro-businesses. There is a big difference between an individual businessperson who employs no one and a 49-employee company. We propose the extension of many provisions to all MSBs. **However, if this proposal is rejected, then we would stress the need to give particular attention to the position of micro-businesses and consider extending rights to them only.**

**Question 40**      **Should any additional protections apply to certain types of transaction only?**

### **Comments:**

We think this is probably a complication too far and the evidence from our cases does not point towards this option.

**Question 41**      **How is the option to limit liability in the current arrangements used? Is it a useful option?**

**Question 42**      **How would MSBs – and their suppliers – react if the option to limit liability was removed in all purchases?**

**Comments:**

We do not think that trade would be seriously affected and that pragmatic business people would adapt to the new provisions. However, we recognise that the main evidence and views on these questions will come from business.

**Question 43**      **What impact on enforcement might there be if any of the consumer rights set out in Part 3 were applied to MSBs?**

**Comments:**

“Enforcement” can have two meanings in this context. One is the enforcement of their rights by businesses in civil courts. Broadly, we think that the new rights would work positively in two ways prior to any formal enforcement of rights through court action: many sellers would respect the new laws and comply; when sellers do fail to comply, businesses can use the new rights to negotiate a satisfactory outcome with the implied threat of court action being initiated if necessary. In terms of formal court action, some of the new rights should be fairly straightforward to apply; others will cause legal complications and difficulties, as discussed above.

The second meaning of “Enforcement” is action taken by law enforcement agencies against non-compliances. Given that there is no proposal to create an injunctive system for B2B civil breaches analogous to the Enterprise Act, then the changes we propose will have little effect on enforcement by Trading Standards. As discussed above, LATSS’s main role is to advise small local businesses of their rights and how to deal with their complaint, rather than any kind of direct intervention. The BPRs will remain key to the work of LATSS but are not affected by these possible proposals.

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 ☒



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