

22 July 2021

Competition and Markets Authority

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FSB response letter regarding the draft guidance on the functions of the Office for the Internal Market

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

Functions of the Office for the Internal Market

1. FSB welcomes the creation of the Office for the Internal Market (OIM), as well as its positioning within the Competition and Markets Authority. FSB also endorses the functions of the OIM as outlined in Part 4 of the Internal Market Act 2020 (the Act), which is to advise England and devolved national authorities through the provision of technical advice on the principles of the UK Internal Market. This will ensure convergent approaches are adopted across all four nations.
2. As to how small businesses might be able to benefit from this new structure, FSB suggests that a summary page be produced for the benefit of firms who are unfamiliar with the technical details governing the UK internal market.
3. Given that the OIM will serve an advisory function and will provide technical advice to national authorities, it is important that this advice is easily understood by small businesses. As such, FSB also endorses the decision to keep this guidance under review and to update it periodically to reflect any changes to the legal framework.

Need to act 'even-handedly' in relation to the UK Government and devolved administrations

4. Paragraph 2.3 of the guidance document notes that *"the OIM must have regard to the need to act even-handedly in relation to the UK Government and all devolved administrations"*. The principle of even-handedness is further explored in paragraphs 4.9 and 4.10, but could benefit from further examples as to how this might be achieved in practice.

5. To adopt a truly even-handed approach, the OIM should consult with all four administrations. Having confidence in the consultative process is important for maintaining trust in these proposals. To understand the needs of all four nations, it might also be helpful, wherever a report or advice is being produced, to demonstrate how an even-handed approach was achieved in those circumstances.

Common framework agreements

6. FSB members across all four nations agree the importance of common framework agreements for the proper functioning of the UK Internal Market, however there is a need for further engagement with businesses to understand the impact of these agreements on their day-to-day trading activity. It would be helpful to outline how these agreements will operate alongside the Northern Ireland Protocol.

Enforcement Powers of the OIM

7. The below looks at the enforcement powers that are outlined in *Sections 41 to 43* of the Act: Information Gathering Powers (s.41), General Enforcement Powers (s. 42) and the Power to Impose a Maximum Penalty (s.43).

Section 41: Information Gathering Powers

8. Section 41 allows the OIM to issue written notices requiring a person to provide information to assist with carrying out its functions under Sections 33 to 36 of the Act. Little guidance has been provided as to the substance of these information requests, in particular the volume of documentation that will be required of small firms.
9. Paragraph 5.16 of the guidance document states that the OIM may request information which is immediately within the knowledge of the business as well as that which is not. It is important that a proportionate approach is adopted, one which considers the resource which is available to larger firms who are required to respond to these requests, which most small firms will lack. The guidance, Paragraph 5.18, helpfully alludes to an intention to adopt a proportionate approach where the issuing of deadlines is concerned.

Section 42 and 43: Enforcement Powers and Penalties

10. FSB suggests that the OIM deal proportionality with the issuance of penalties for failure to respond to an information request. At present, the scale of maximum fines which have been proposed are particularly large and would only be appropriate for larger firms. FSB argues that if a small firm (by which we mean with less than 250 employees) were to inadvertently fail to respond adequately to an information request, then the default should be that the small firm does not face a penalty, provided that there is no evidence of the firm having acted in bad faith.

It is perfectly possible that a small business will not have heard of the OIM, or of its powers to request information, which would mean that when a request comes in for information it will naturally be something that a small business owner does not initially understand the significance of.

11. The wording of Section 42, regarding the issuing of a Section 43 Penalty suggests that the OIM will consider whether the business can advance a reasonable excuse defence and will consider, in particular, whether the business had the requisite intention. The implication being that businesses who fail to respond a request, in good faith, will not be subject to a fine. FSB proposes that this be crystalised in the form of an exemption for small businesses, taking into consideration their capacity to respond. A similar approach has recently been adopted by HMRC and has been effective.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague [REDACTED] Senior Policy Advisor, [REDACTED]

Yours sincerely,

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Federation of Small Businesses