

## Annex B: Call for evidence: Protection of small businesses when purchasing goods and services response form

### Confidentiality and disclosure of responses

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 00/00/0000

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### Consultation Response

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

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

## Question 1 What examples are there of problems with the current arrangements?

**Comments:** As stated in your consultation document, the law operates on the basis that businesses should be free to enter into contracts on whatever terms they want, provided they are not illegal, or contrary to public policy. The problem with this arrangement is that not all businesses have the same strength of bargaining power, due to: scale, purchasing power and resources of their businesses. This leads to many smaller companies entering into contracts that do not protect their interests. Many of the contracts seek to reduce the MSBs statutory rights, to the extent permissible by law wherever possible. The courts when dealing with UCTA disputes arising between businesses, very rarely find that the exclusion or limitation clauses were unreasonable. In addition UCTA only covers contractual terms that seek to limit or exclude liability. It does not deal with unfair contract terms.

Approximately 80% of our members are MSBs. Many of our MSB members have encountered issues with their contracts as result of the current law. Below is an overview of the types of issues they have experienced.

### Examples

1. **Exclusions/limitations of liability:** We have seen examples of clauses that either seek to exclude or limit the suppliers' responsibility to provide goods that are as described, of satisfactory quality, or fit for purpose. We also see liability caps on the supplier's entire liability under a contract. It is only when a problem arises with the goods or services that the MSB becomes aware of the provisions in their contract.  
  
These rights can be excluded in a contract between businesses provided that the reasonableness test is satisfied. The problem is that the term "reasonable" is dependent on the facts, and therefore the outcome of any court's decision is uncertain. If MSBs were treated in the same way as consumers their statutory rights could not be excluded and would have a stronger basis on which to challenge the supplier.
2. **Cancellation of a service contract:** we have seen clauses in contracts that require MSBs to pay an early termination fee. This is often not clearly set out in the contract.
3. **Automatically renewing contracts:** an example of this is where the contract states that the contract will continue unless terminated by giving 60 days prior written notice before the anniversary of the contract. Many MSBs are not aware of this clause and therefore the contract automatically continues for an indefinite period, until they realise.
4. **Unilateral right of the supplier to change the terms and conditions at any time:** we have come across clauses that enable the supplier to change their terms and conditions at any time.
5. **One sided indemnity clauses:** we have seen clauses in both goods only, services only and mixed contracts that contain one sided indemnity clauses in favour of the larger companies, for example energy suppliers, or telephone and broadband providers.
6. **Legal jargon:** MSBs do not always understand the meaning of terms such as "time is of the essence", "consequential loss", "force majeure" and "indemnity" to name a few. The contracts are not written in plain English and do not draw attention to particularly onerous clauses. If consumer law were to apply to MSBs contracts they would need be written in plain English and

unfavourable terms would need to be highlighted to the MSB prior to entering into the contract. This would also enable MSBs to benefit from any decision of any regulator of consumer law in relation to unfair terms contained in consumer contracts. An example of this is the decision of the Office of Fair Trading took in relation to the term “to the extent permitted by law” which they decided constituted an unfair term on the basis that consumers would not know what it means. The same should apply to MSBs as they do not know what rights they are relinquishing by signing up to such a clause

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

**Comments:** We believe that the problems experienced by our member MSBs show that there is an endemic problem with the system, as MSBs are treated as businesses by legislation and the courts, and yet experience many of the same issues as consumers.

**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)?**

**Comments:** The reason why the current protections do not work is because, generally, the contract is biased in favour of the supplier, which means many of the protections that would otherwise be available to an MSB have been excluded or limited to the extent permitted by law (this includes: Sales of Goods Act, Supply of Goods and Services Act, tort, and common law remedies). Contracts are there for when there is a breakdown in the relationship between the parties. The abstract ideals of: trust, goodwill, supplier reputation and long-term relationships are often eroded by commerciality. The supplier would be prepared to jeopardise the relationship with the MSB to avoid liability. When a problem occurs with a contract each party seeks to protect its own position, especially where in the case of the supplier, the amount of business generated by the MSB is not very significant.

The ability of the MSB to switch supplier is of little help because again the MSB's ability to negotiate or amend the standard terms of a supplier is limited, if not remote. In addition, MSBs may not be able to switch suppliers if there is a restriction in their office.

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

**Comments:** Whether there are any advantages for suppliers with the current system will depend on whether the supplier is an MSB or not.

**1. Companies that are not MSBs trading with MSBs**

The current arrangements favour companies that are not MSB's and creates an imbalance for a number of reasons such as: bargaining power, resources (including access to lawyers). Non-MSBs can afford to have bespoke contracts created that limit or exclude liability to the extent permitted by law and therefore

create an unfair playing field. Essentially the current system unfairly favours non-MSBs.

## **2. MSB trading with other MSBs**

There are no advantages to MSBs with the current arrangement. Without having clear cut rights it is difficult to suggest that our members take a gamble and use the court system, especially where the costs of pursuing a claim may be disproportionate to the value of the claim and where the outcome is uncertain due to not having clear cut rights enshrined by statute

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

**Comments:** Please see our answer to the question above. We do not believe there are any advantages with continuing with the current arrangements for MSBs.

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

**Comments:** We do not think that the current arrangement is any way beneficial to MSBs as it fails to protect them for the reasons described in our answers above and elsewhere in our response to your consultation.

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

**Comments:** We believe the following issues prove most costly to MSBs:

1. one sided exclusion/limitation of liability clauses;
2. unfair terms, such as making time not of the essence, which are not covered by the current arrangement as MSBs are not treated as consumers;
3. trading on the supplier's terms rather than the MSBs own terms and conditions without realising because the supplier's term and conditions superseded the MSB's terms and conditions as result of the doctrine of the battle of forms;
4. not knowing what the terms of the contract are because they have not been provided, or because they have been incorporated by reference, e.g. on the back of an order form, in small print, stating something along the lines of: "subject to our terms and conditions which are available upon request";
5. any oral representations made by supplier before the contract is entered into are excluded. Only fraudulent misrepresentations cannot be excluded but these types of misrepresentations are very hard to prove.

### **Question 8 How familiar are MSBs with the current arrangements, as described in Section 2?**

**Comments:** As a generalisation our member MSBs' are not very familiar with them. They only become aware of the limited protection provided under the current arrangements when they experience a problem and seek advice from us on what their options are. It is then that they realise that the law and justice are out of alignment.

**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:** The issues identified above are experienced by micro and small businesses alike and are not so much dependent on size but on resources, time, and volume of orders, especially as a small businesses may only just meet threshold to be placed in this category.

However, the extent to which they are affected may differ as some small businesses may be large enough to warrant having specialists to deal with certain aspects of the business, such as reviewing the terms and conditions to ascertain the risk to the business. Micro businesses often require their staff to be a jack of all trades and specialists in none, and place their core business needs first, due to time constraints.

**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:** The types of transactions which are affected include but are not limited to the following:

- Purchase of printers/copiers: contracts for these items are usually entered on three to five year leases
- Telephone lines, mobiles and broadband: two year term
- Accounting packages compliant with HMRC requirements: ongoing as difficult to change provider/packages
- Banking: ongoing as too time consuming to change
- Water, gas, electricity: generally too time consuming to change and put off from changing because of the constant phone calls to get a better contract
- Insurance (this includes employer's liability insurance, product and public liability insurance, professional indemnity, vehicle insurance): These are entered into yearly. It is extremely time consuming to renew because of the paperwork involved and the amounts required to operate.

**Question 11** What has been the effect on the terms of trade for the MSB when making the purchase (or purchases) in question?

**Comments:** MSBs generally are unable to pass on the risks because they would not be able to be competitive. In addition as stated elsewhere they assume if they want the product or service they have to accept the contract as is, and often do not read them. Therefore the MSBs terms and trade rarely reflect the risks they are being required to take on.

**Question 12** What indirect effects have there been on MSBs, for example, in

### **consequential impacts on trade or competitiveness?**

**Comments:** The greatest impact is the time it takes to make the purchases, and this means time away from the MSBs core business. There are other issues such as staffing, running an office, and dealing cashflow which are of greater priority to MSBs.

There is insufficient time to get comparable quotes and MSBs therefore MSBs probably spend more on these purchases than other businesses would. The most difficult one to change provider with is insurance as this needs to be renewed yearly and generally obtain a short notice period in which to renew by, so shopping around becomes difficult.

Some MSBs may if they are able to will have a contingency in place, not all are able to do this, and it is often not based on an analysis of the terms and conditions and risks associated with them. It is often based on how much they can afford to ring fence. It is therefore unlikely to cover their full exposure.

As they do not either read or even where they read the terms and condition they do not necessarily understand the implications of what they are agreeing to, and therefore the risks are not factored into their pricing. If they were to understand and try to factor in the risks they would put customers off and would price themselves out of the market. This is why MSBs need the Government to intervene and extend the definition of consumer to MSBs when they are being supplied goods or services by a larger company.

### **Question 13 What other losses has the MSB suffered, for example, in time taken to resolve a problem (please quantify where possible)?**

**Comments:** The types of loss our members have experienced has included the following:

- time and cost in resolving the dispute with the client and supplier
- having to pay compensation, often without being able to recover it from the supplier
- damage to the business relationship with the client, loss of business with the customer who may be providing the opportunity to work on more than one project
- bad publicity, which includes no repeat business, bad reviews and not receiving recommendations which MSBs often rely on.

### **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:** When the MSB is the purchaser there are no benefits to the current arrangement.

Where the MSB is the supplier to other businesses they enjoy freedom to enter contracts on whatever terms the parties agree including the ability to apportion risk between the parties. Although, in the case of MSBs this is limited because the larger companies will generally require their standard terms of business to apply.

### **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?**

**Comments:** The main issues are about redress. An example of this is that where there is a problem with the goods/equipment purchased the supplier/manufacture will generally supply a replacement part for free but the MSB is expected to sort out the logistics with their customers and bear the costs of attending site at their expense, generally without proper redress (which would include being compensated for all the losses incurred by the MSB).

MSBs are often required to provide personal guarantees when purchasing goods, such as IT equipment. This often means that MSBs will be put off from making such purchases and question how essential the item is their business. Entering into a personal guarantee defeats the object of being a company limited by guarantee.

**Question 16** **Or are they about disputes over contract terms, or related to unequal bargaining positions between two parties?**

**Comments:** The majority of issues that arise relate to contract terms and the unequal bargaining position between the two parties.

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

**Comments:** The main problems our MSB members experience relate to remedy and/or the contract.

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

**Comments:** On the whole, MSBs tend to accept standard terms and conditions. There are a number of reasons why this may be the case:

1. they believe that standard terms cannot be negotiated;
2. they may have accepted the standard terms inadvertently through placing an order, and on the back of the order, it stated that the suppliers terms and conditions apply;
3. they may have been provided with a copy of the contract but not signed them and thought this meant they were not bound by terms. However, through their conduct they have accepted the terms.

**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?**

**Comments:** The statutory protections in relation to goods and services are generally limited to the extent permissible by law. The contract often contains one sided termination rights, and the ability to deliver goods late without accepting any liability.

**Question 20 Do MSBs struggle to make effective purchasing decisions?**

**Comments:** To generalise MSBs make good decisions in relation to products relating to their core business. The problem is the terms they are bound by.

In terms of purchasing non-core business items they are generally not as effective.

Where MSBs make one off purchases, for specialist items, they tend to be bound by terms generally biased in favour of the supplier, and which are unlikely to allow the MSB to withhold money in the event of a defect. In addition the warranties start from the date of delivery and run out long before the project is completed and final defects which is extended long past the 12 month duration of the warranties. MSBs, therefore, bear the cost of any repairs as the supplier's manufacturer warranty would have run out.

**Question 21 If so, what are the reasons?**

**Comments:** In relation to core products they understand the industry and will take the time to obtain better prices.

**Question 22 How do MSBs approach different purchasing decisions? For example, do they approach the purchase of core items and non-core items differently?**

**Comments:** Please see our answer to question 20 above.

**Question 23 Do MSBs believe they have sufficient information when entering a contract with a larger supplier?**

**Comments:** MSBs do not have sufficient information when entering into contracts with larger suppliers. MSBs should be provided with the same information that consumers are now required to be provided with under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This should include all the terms and conditions that form part of the contract as this would enable MSBs to make more informed decisions and where they are not provided the necessary information the contracts should not be enforceable as with consumers.

**Question 24 If so, what steps can MSBs take to ensure this is the case?**

**Comments:** There is nothing MSBs can do; as they are busy in providing services or goods, and dealing with their clients and do not have time to chase the contract and any additional information required. This is one of the reasons why the law needs to change to address these issues.



**Question 25** If not, what types of information, and to what extent, are MSBs lacking?

**Comments:** We have answered this question under question 23 above.

**Question 26** Does the ability of MSBs to make effective purchasing decisions differ depending on the type of purchase?

**Comments:** As stated elsewhere it is a question of whether the MSB is purchasing a core business item or not. Generally time is an essential commodity. Therefore, any purchases outside of their core business, take valuable time away from the core business are generally done in a hurry so as not to affect their businesses.

**Question 27** If so, how and for which types of purchases?

**Comments:** Please see our answers elsewhere in the consultation.

**Question 28** How are the current arrangements reflected in the business models of suppliers, both other MSBs and larger firms?

**Comments:** Non-MSBs have terms that enable them to take as little risk as possible without falling foul of the law. Generally they will have bespoke agreements drafted by a law firm or equivalent.

MSBs tend to create their own terms and conditions which may not necessarily comply with the law or protect their interests sufficiently.

**Question 29** Would different rights and remedies for MSBs affect the business models of suppliers, both other MSBs and larger firms?

**Comments:** It could affect the relationships as the risks would need to be factored into their prices, unless they could find a way of insuring against the additional risks.

As stated elsewhere the consumer protections should not apply where MSBs are trading with each other, otherwise this will have a detrimental effect on their businesses, which could include insolvency.

**Question 30** Would it be costly for suppliers to distinguish between MSBs and other customers?

**Comments:** It is probably less costly for non-MSBs to distinguish between consumers and non-consumers, than it is for MSBs, as non-MSBs are probably in a better position to spread the costs.

Any businesses trading with consumers (including MSBs) are required to have terms and conditions that comply with the current law, namely CCR and as from October the Consumer Rights Act as well.

**Question 31** How would firms supplying MSBs respond to changes in the rights of MSBs?

**Comments:** They may not respond too well. However, MSBs are having to deal with new consumer law which imposes hardship on them, such as the increased period in which a consumer can cancel a contract. Please see our answer to question 34 for a fuller response.

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

**Comments:** It would enable MSBs to have information prior to entering the contract. Any onerous terms would need to be pointed out.

**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:** As stated in our answer to question 34 MSBs need to have the same protection as consumers; otherwise when an MSB is trading with a consumer they will not be able to recover certain losses where the supplier further up the chain is responsible for the problem. An example of this is that goods are presumed to have been defective when delivered if a defect is discovered within the first six months. In addition it will be out of kilter with the staged rights.

By extending the consumer rights contained in CRB to MSBs many of the problems outlined in our responses elsewhere will be addressed.

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

**Comments:** This is a potential problem. However, the alternative is that MSBs bear the entire risk of the new consumer legislation (meaning the Regulations and the Consumer Rights Act). They have to have their contracts amended in order to take into the new rights consumers have. But for the existence of the MSBs acting intermediaries, the larger companies would be selling directly to the consumers and would then to have comply with the new legislation. If the new legislation is not mirrored in the terms and conditions between MSBs and suppliers then the full risk of items not being delivered on time or damaged will be borne by the MSB which is

not proportionate. As stated elsewhere in our response MSBs have little negotiating power and therefore it is unlikely they can rely on contracts to help them in this regard. Therefore, the legislation needs to intervene to help them by extending the definition of consumer to include MSBs.

**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:** It would be extremely costly to MSBs as they would be required to bear the entire risk for:

1. storing the goods during the cancellation period, which can prove costly
2. cost of returning the goods to the supplier/manufacturer;
3. cost of having someone available to carry out the service where the service is to be performed after the cancellation period;
4. cost of having return any defective goods to supplier/manufacturer, especially where the MSB does not have the reciprocal right to recover the costs in their contract with the supplier/manufacturer.

These are all additional costs that MSBs cannot afford.

When it comes to MSBs supplying to another MSB or SMB the additional protections available to a consumer should not apply on the basis that the parties concerned have the same or similar bargaining strength and resources. If you were to allow this to apply to this contractual relationship then it would have a detrimental effect on MSBs that are supplying goods and/or services.

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

**Comments:** As stated in our responses elsewhere there are many benefits in having the rights for MSBs aligned to those of consumers. Please see our answer to question 34 in particular.

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

**Comments:** Bearing in mind the importance of MSBs to the economy; the only other alternative is to exempt MSBs from the requirement to comply with the CCR CRB, and consumer law generally, on the basis that it will cause economic hardship, which could result in many more MSBs becoming insolvent. However, if this is not possible then the exemption should apply to MSBs that are a member of a trade's body/association that require a certain professional standard to be met in order to be a member.

In addition to the rights being discussed for MSBs; they should have an ombudsman or an adjudicator to decide on disputes regarding their additional rights. There should be a set fee and set timeframe to enable and encourage MSBs to enforce their rights.

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

**Comments:** It should be applied equally to all MSBs otherwise it will get too complicated.

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

**Comments:** Please see our answer to the above question.

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

**Comments:** The protections set out in the consultation should apply to all transactions between MSBs and non-MSBs that would apply to a consumer.

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

**Comments:** If you are supplier supplying to a business then it is highly effective as you know what your risks are and can price for those risks. However, as discussed above if you are receiving the goods and/or services then this is likely to be more problematic, as you will be losing rights you are not aware of and will not have factored in those risk to your business model.

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

**Comments:** It probably affects suppliers more as they are more exposed. There is potentially more risk with the supplier because if the goods are faulty they can cause all sorts of damage that may extend beyond the purchase price.

However, where an MSB is supplying to another MSB the transaction should be considered as a business to business relationship and not a business to consumer relationships as both have the same or similar bargaining position. It would be detrimental to an MSB supply to another MSB to have to take into account the additional protections available. It could mean that MSBs will no longer be able to trade, as the market may not accommodate the increase in prices necessary to take into account the risks that cannot be excluded or limited.

**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:** Applying the consumer rights contained in the CRB to MSBs should make it easier for MSBs to enforce their rights because CRB sets out a comprehensive set of rights. In addition MSBs would be able to approach the Competition and Markets

Authority to take action against suppliers who breach CRB if it affects the collective interests of consumers which would include MSBs.

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 ☐