

Protection of Small Businesses when purchasing goods and services

Call for Evidence

June 2015

Final **Response from the BRC (British Retail Consortium)**

Contact

Graham.wynn@brc.org.uk

Introduction

The BRC represents the interests of the vast majority of retailers in the UK – online, offline, in town centres and out of town.

Retail is a very clear example of an industry where large, medium and small operators can co-exist, complementing each other to fulfil consumers demands.

We welcome the Government's decision to publish this call for evidence in order to collate the necessary information upon which to make objective policy decisions. It is really important any change in the status of Micro and Small businesses is supported by a robust evidence base that such a change will benefit the economy as a whole and there will not be any unintended consequences as a result.

It is likely that this change will have an effect on the retail sector in that micro and small businesses purchase goods from retailers. There are some goods that are not available from retailers – normally plant, machinery, or equipment essential to the operation of the business such as cash registers, filling machines, injection moulding machines, shop fittings, etc. There are others that could be purchased from specialised equipment suppliers or wholesalers, but will also be available in identical format from retailers (possibly in smaller sized packs), finally there will be items that are intended for domestic use but will be purchased by the small business for use in their trade or profession.

As a consequence the purchase of items for use by small businesses is complicated – the goods may be intended for commercial use, or may be intended for domestic use, and the intention of the contracting parties may not be clear at the point of sale. This could result in goods being acquired where they are suitable for the intended use (because the commercial use is not dissimilar to domestic use), could be unsuitable for commercial use (they are not fit for the purpose of repeated or excessive use in the commercial environment) or the goods are prohibited from being used in the commercial environment (e.g. domestic furniture being used in commercial environment, or domestic weighing equipment being used for trade purposes).

We await with interest the conclusion of the call for evidence, to see what examples come to light where there are issues for Micro and Small businesses, and in which sectors. The feeling in retail is this is not a problem - transactions with micro and small businesses are happening and in general are not causing issues.

The Sale of Goods Act (as amended) in the main extends to all buyer and seller contracts – some aspects are qualified for Consumer transactions, but in the main the Act applies to transactions. In business to business transactions the terms and conditions can limit liability. In retail this currently tends not to happen or if it does terms and conditions are a "light touch", limiting liability for commercial losses. As a consequence the current retail situation works well.

It is worthy of note that whilst there are some retail businesses that have a large market share in certain retail sectors, the vast number of retailers are themselves medium and small businesses.

Any change to the current regulatory framework that includes retail should ensure that the following points are considered

- In retail, it is surely implied that all transactions are for the sale of domestic goods to consumers, unless the contrary is explicitly agreed between the parties.
- The question of the fitness for purpose of the goods – do the goods remain of satisfactory quality, durable and fit for purpose if purchased by or used by a micro or small business
- Legal standards remain applicable for example where legislation or standards make a clear differentiation between domestic or commercial use in a trade or business.
- Retailers are as a consequence not exposed to additional liabilities for direct or consequential losses
- Onerous obligations are not placed on retailers to establish just exactly who they are contracting with, or to take exhaustive or onerous steps to alert purchasers to the implications of the buyers status as an MSB..
- The appropriateness of consumer remedies - in particular repair- to small business users – it may not adequately meet the small business's needs – they may need the product available immediately.

Question 1

What examples are there of problems with the current arrangements.

Response

This is an absolutely critical question, it is important that there is a clear evidence base that demonstrates that micro and small businesses (MSBs) are suffering due to the current legislative framework and how it operates.

This is perhaps an opportunity for representatives of MSBs to give evidence of those examples.

We do not see this as a problem – the Government should take an approach that buyers and sellers are free to contract on the terms they choose to do business on, and business (all businesses) would expect to have the necessary level of professional diligence to operate under these circumstances.

The issue of cost is interesting – if you buy from a B2B supply business on business terms the cost is often greater – and it is possible to buy the same goods from a general retailer cheaper, but on B2C terms. The additional cost covers the additional risks associated with business use (durability, returns and after sales care policies, liability coverage etc). Perhaps the government should be looking at suppliers in the B2B market to ensure there is fair dealing as far as SMEs are concerned rather than looking at making MSBs transactions always B2C.

Question 2

Are these problems one off examples, or are there problems which suggest trends, or structural issues in certain sectors

Again this relies on the evidence from MSB member responses as to issues they have encountered –are they one off arguments with sellers or sector wide “discrimination”; refusal to do business with MSBs or only doing business on limited terms. Are any limitations illegal because they are unfair contract terms or legal but relatively “unfair” to the SME?

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.)

We would advocate that the retail market currently works well, the application of the Sale of Goods Act to all contracts gives a sound basis for retail transactions, allowing healthy relationships between buyers and sellers in B2B contracts where the two parties know they are transacting on a B2B basis.

We are not aware of there being widespread difficulties where the seller is unaware that the buyer is a business, and where there are any issues these are usually resolved quickly.

Question 4

What Examples are there of advantages with the current arrangements.

The advantages of current arrangements is it is relatively simple – the assumption that unless the contrary is made clear, all contracts in retail are B2C, and there is an assumption relating to

- Fitness for purpose, durability and satisfactory quality based on domestic use

- Technical compliance is to domestic standards
- Liability is limited to domestic loss, not commercial loss

It therefore avoids the need for parties to negotiate particular terms on all contracts, but the seller can set out certain terms and conditions with regards to B2B transactions.

Question 5

Are these advantages one-off examples or are there advantages that are ongoing, or which occur in certain sectors?

We can only respond on the basis of the retail sector that the advantages are on-going.

Question 6

What features of the current arrangements are most beneficial to MSBs

In the retail sector the biggest benefit is that MSB retailers are not exposed to liability claims from businesses that purchase from them.

If an MSB had to apply consumer liability to MSB business transactions, they would have to spend more time in discussions regarding fitness for purpose and satisfactory quality if goods are returned as allegedly non-compliant, and potentially face claims for damages, in particular consequential loss, which could include commercial loss, which of course would be greater than the loss incurred by a domestic user.

Question 7

What features of the current arrangements are most costly for MSBs

If goods are purchased for use by a business and fail, the business loses the use of that item, as would a consumer, however the implications for a business are more significant – it could mean loss of income.

A business would hopefully have identified this risk in advance and taken steps to mitigate that risk (e.g. having a backup unit, an insurance policy that provides a replacement immediately, or contracting with a supplier on the basis that a replacement product would immediately be provided.) These steps do not appear onerous for a small business but could potentially add cost.

If they have not then they need to return to the seller and seek a remedy under sale of goods legislation. This may be made difficult if the fact they are a business is a factor – it may lead to delays due to proving the fault, or even an outright refusal to accept liability.

It is however important that if the small business is deemed to be consumer, it might expedite the issue of the seller accepting responsibility but it may not lead to better outcome if the remedy offered is that mandated in consumer law - a repair or replacement of like for like.

The small business may benefit from purchasing under a commercial contract with a guarantee of immediate replacement.

Question 8

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

A micro or small business is still a business so is best placed to apply professional diligence when sourcing the tools of their trade – purchasing decisions need to be driven by an understanding of fitness for purpose of the product in the context of the use they will put it to.

If the product fails the buyer will have at least the same knowledge as the average consumer (everyone will buy products for their own use and will have at some stage encountered a problem with a purchase) but whether they will understand the nuances of their business purchase and the effect that has on their rights is less clear.

The potential scenarios that the MSB needs to understand are.

MSB buys professional product for use in their business, and it is defective

MSB buys domestic product for use in their business and it is defective

MSB buys domestic product and it is not defective but fails due to commercial use

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?

.

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.

Here are some examples of retail transactions of a B2B nature that we are aware of.

Product	Use	Frequency of use	Buyer	Frequency of purchase	Seller
Fitted Kitchen	Installation in let accommodation	Used by occupants all day every day	Independent property developer	Once per property	DIY retailer
Tables and chairs	Use in a small restaurant	Frequent during opening hours	Small Restaurant	Once	General retailer
Washing Machine	Washing table cloths/dish cloths	Once a day	Small children's nursery	Once	General retailer
Food	Resale in a café (e.g bread used to make sandwiches)	Consumed as acquired	Small café	Regular (daily)	Supermarket
Computer	Record/book keeping	Frequently	Small business	Once	General retailer
Printer	Printing invoices	Frequently	Small business	Once	General retailer
Vacuum cleaner	Cleaning floors	All day every day	Cleaning business	Once	General retailer
Vacuum cleaner	Clearing up dust	Daily	Small builder	Once	General retailer
Hair Clippers	Hair clipping	Daily	Hair dresser	Once	General retailer
Lighting	Fitting out a small restaurant	Frequently during opening hours	Small restaurant	Once	General retailer
Power tools	Building work	Frequently	Builder	Once	General retailer
Paint	Painting	Consumed	Bought by builder	Frequently	DIY retailer

		as acquired	(under direction of customer)	(for each job)	
Pressure Washer	Pressure washing items	All day every day	Car valeting	Once	General retailer
Shelving	Display of stock	All day every day light use	Small retailer	Once	General retailer
Weighing equipment	Assessing postal rates	Daily use	Small retailer	Once	General retailer

Question 11

What has been the effect on the terms of trade for the MSB when making the purchase or purchase 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)

Question 14

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

We are conscious that of the millions of transactions that occur in retail every year, a number are made by MSBs. There is no evidence that these transactions stand out as being exceptional in the way problems are resolved – generally speaking if the item is faulty large businesses have no issues in offering an appropriate remedy.

Question 15

What types of problem are occurring with purchases? For example are any issues identified mainly about problems of redress i.e. refund or remedy?

As indicated elsewhere the experience in retail is that the right to a remedy such as repair or replacement is often not compromised, particularly if the item had an inherent fault that would have occurred regardless of whether the use was domestic or commercial (durability or excessive use was not an issue)

One remedy that is available in consumer transactions (in fact is the highest in the hierarchy of remedies) is that of repair, however this may not be fit for purpose for businesses (who are likely to require the replacement of the item so they can immediately continue with their commercial activities)

The choice in consumer transactions as to the appropriate remedy sits with the seller, so it is likely in these circumstances treating the MSB as a consumer will not offer any additional benefit to the MSB buyer.

Question 16

Or are they about disputes over contract terms, or related to remedy or contract?

In retail it is unlikely for contract terms to be an issue in “over the counter” purchases.

Question 17

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

As indicated elsewhere in the call for evidence, the most likely issue where problems occur is the extent of any consequential loss

- Inability to provide a service because the goods (the tools of the trade of the service provider) are unavailable due to a fault, and consequential loss of business
- Inability to let a property due to delays in delivery of goods or installation of a fitted kitchen (leading to loss of rent income)
- Damage to a third parties property due to defective goods being used during the provision of a service
- Loss of data or information on a laptop computer relating to the business due to a fault with the laptop

Question 18

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

In general in over the counter retail transactions, MSBs always accept standard terms, and never negotiate.

Question 19

To what extent do contracts for sales and supplies to MSB tend to limit liability for breach of statutory protection regarding goods and services, or other breaches of contract?

Contracts for over the counter sales are unlikely to be weighted with such clauses, it's the nature of retail that there will not be written contracts for casual purchases, and potentially not even for more enduring “big ticket” purchases e.g. white goods. Clearly if there is a more evolved contract e.g. a B2B trade counter relationship, there is greater opportunity to include terms and conditions that limit liability or require additional action on behalf of the seller e.g. the obligation to provide proof of fault in all cases.

Question 20

Do MSBs struggle to make effective purchasing decisions?

In a small business it's likely they have a clearer idea of what they want. The issue may be decisions being made on arbitrary criteria e.g. the table and chairs look nice for the café, no clue if they are fit for purpose, and a lack of understanding of what to do if things go wrong.

Question 21

If so what are the reasons?

See above

Question 22

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

This is probably more a question of availability of the products – a cash register is a core item but not available from retailers so you have to go to specialist suppliers, buns and sausages are core in a café, but are available from supermarkets as well as catering suppliers.

Question 23

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

This is an interesting question, as in normal retail (consumer) transactions, specific information is mandated, so would be available to the MSB customer as well. If the MSB looks to make a purchase on a B2B basis with a trade supplier this may not necessarily be available.

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 purposes?

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?

Yes – any process adds cost. For a single large general retailer, even if it adds 30 seconds to all transactions it could add £7.5 million to the annual costs of the business in question

So if all customers were asked a question “are you a business purchaser?” costs would be added, further time would be required to be allocated if the answer was yes and further discussions/negotiations were required.

This would frustrate regular domestic customers, whose transactions may be delayed.

There are examples where retailers can segregate business purchasers from domestic purchasers e.g. offering specific commercial arms where business purchases can buy items on commercial terms (for example delayed payment terms, discounts for bulk buys).

A specific example would be “trade counters” at DIY stores where business purchasers can set up accounts and buy on commercial terms.

There is an additional complication with regards to very small businesses i.e. people who make money from their hobby – make goods or provide a service for a financial return, but don’t consider it to be their business. This is a well-worn path in some sectors – people who deal in second hand cars “as a hobby” but sell sufficient cars for the law and the regulators to view themselves as a trader rather than a private seller.

The same could be applied to a number of other service providers or suppliers of goods where their status is ambiguous.

This is perhaps an unintended consequence of the proposal – the transactional status of these operators will be simplified – they will be treated by the law as “consumers” rather than businesses, which may cause complications with regards to the assessment of other legal matters e.g. their liability for taxation, or their liability for trading law where it is critical if they are operating in the course of a trade or business or as an individual “private seller”.

Any POS requirements would compromise the objective of many retailers to cut down on clutter in store (and customers will never read it) and it creates a "red tape" requirement - an onerous obligation on both small and large retailers to display a notice likely to hit MSBs hard as another duty imposed by the Government. As we have said, it is implied from the context that a retail store is selling to domestic purchasers.

Question 31

How would firms supplying MSBs respond to changes in the rights of MSBs

They would

- Review their policy and decide does the business want to contract with MSBs if there is increased liability.
- Establish how the interaction at point of sale is managed – is there a need to ask further questions of customers to determine if they are domestic consumer or MSB – consideration will need to be given to additional checks that will be required to validate if an MSB is indeed an MSB.

Question 32

What might the benefits be of applying any of the consumer protections set out on part 3 to MSBs

Question 33

We are interested in view, 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

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?

This would definitely be an option – if the seller found it necessary to question the purchaser as to their status as a purchaser or their intentions for use, it is possible that the seller would exercise their option not to react to the offer to buy with an acceptance in order to limit liability.

Currently where a business purchaser approaches the seller and it is clear they are a business purchaser the buyer could be directed to the commercial arm of the business – to set up an account at the trade counter for example.

If MSBs are to be always treated as consumers this option would not be available and the transaction would have to be declined. The small retailer would therefore have to approach non retail commercial suppliers/wholesalers, however even in these transactions, a question would remain as to whether the buyer, the MSB, would always have the same rights as a consumer even if purchasing in a B2B environment.

Question 35

If problems arise, to what extent are MSBs also suppliers and what are the costs to MSBs as suppliers of extending consumer protection to SMBs.

As indicated previously MSBs will be suppliers – in retail there are a number of shops that will qualify under the proposed definitions as MSBs, therefore will find their MSB customers will be afforded the same rights as consumers.

MSBs in retail are across the whole spectrum – small grocery shops, specialist food outlets (butchers, bakers, chocolatiers, farm shops, vintners, sandwich shops, fast food shops), Hardware DIY stores, pet shops, music shops, card shops, so offer both specialist interest retailing as well as competing with larger businesses. In addition the Government should consider other sectors aligned with retail where there are a significant number of transactions between MSBs e.g. the second hand car trade, antiques and collectables, artisan and craft goods.

All sorts of reasons characterise them, specialist knowledge and customer service, specialist product (with small volume demand), catering for local geographic or demographic needs, matching a particular location (a small shop on a railway station where a supermarket would not be feasible)

The buyers from these shops may well be consumers with special interests but may also be other special interest businesses – an example would be a small shop selling catering supplies to small catering firms or cake makers – possibly even people that don't consider themselves a business (sell their creations for income but don't consider this to be a business but rather a hobby)

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

It is a possible conclusion that the current arrangements are adequate (MSBs are protected by virtue of the Sale of Goods Act), so the status quo can be maintained.

This could be bolstered by activity to clarify to MSBs what rights they have and guidance to retailers with regards to the limitations on liability that exist with commercial purchases and allow market forces to come into play (i.e. economic operators look at the commercial offering to characterise themselves from competitors through a specific offering tailored for MSBs)

The Government could also look at how unfair contract terms are applied to B2B transactions, to ensure any limitations on liability or impositions on MSBs with regards to invoking their rights are fair.

Question 38

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

It would certainly be simpler if they were.

Question 39

Or should it be targeted at micro businesses only, or other specific types of MSB.

This still creates difficulties by making it potentially onerous to establish if the buyer is a business and how big or small they are – how can a micro business prove they are a micro business?

Question 40

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

Question 41

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

Yes – in the current regime the option to limit liability is useful and in retail not often used and when it is used with a light touch.

Typical example is limiting liability to the replacement/repair of goods or the refund of the purchase price, but no liability for any commercial loss incurred (the implication being that normal consequential loss i.e. the loss that would be incurred by a domestic customer would be accepted)

Question 42

How would MSBs and their suppliers – react if the option to limit liability was applied to all purchases?

Question 43

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

Clearly if MSBs were treated as consumers, this opens up the possibility of enforcement action being taken against sellers that sell to MSBs.

The obvious two matters that require consideration are how the Consumer Protection from Unfair Trading Regulations and Consumer Protection Act would be applied.

CPRs

The effect on the definition of the “average consumer” by the inclusion of MSBs needs to be considered, an argument is that a business purchaser is not “the average” consumer. The contrary argument is that if they are buying something that is not part of their normal business activities (e.g. an insurance broker buying a fridge and kettle) their activity is arguably the same as a consumer (they have little or no expertise in the field of electrical appliances so rely on the consumer information available to inform their purchase decision).

The use in this case may be the same as domestic use, but may not be – the kettle may be used to make tea for clients all day and therefore receive excessive use compared to the domestic environment – the business purchaser should consider this when making their purchase so is not, it could be argued, acting as an average consumer.

It may well be that the status quo of protection of businesses from miss-selling by other businesses is better served by the existing regulatory regime of the Business Protection from Misleading Marketing Regulations 2008

Consumer Protection

This is a more difficult discussion as the safety of a product is judged bearing in mind a number of factors, including how the product is going to be used and who by.

Excessive use by a number of people could compromise the products performance (its correct maintenance, its durability etc.)

In particular consideration needs to be given to products where the regulator regime clearly differentiates between domestic and commercial use of the product – the example that best illustrates this is the Furniture and Furnishing (Fire) (Safety) Regulations, where the provisions apply to domestic furniture and furniture used in let accommodation, not to furniture used in business premises.

This could lead to an issue with a consumer contract where the goods are not used in a domestic environment.

Another example that illustrates the point is the one of weighing equipment – weighing equipment sold by a retailer is sufficient for use in the home but may actually be illegal to use for trade by a business (e.g. for weighing commodities sold by reference to weight). A “consumer” sale could lead to a trading offence. Clearly this could happen currently a trader buying a domestic weighing machine, but the concept of MSBs being able to contract as consumers may dissuade the trader from making appropriate enquires with traders that supply weighing machines for the trade.