

Sent via email: OSinfo@ofcom.org.uk

3 October 2024

Dear Sir/Madam,

RE: Online safety information guidance

FSB welcomes the opportunity to provide a response to the above consultation.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

We recognise the need for information gathering for Ofcom in the space of online safety but, there must be a balance between desired outcomes and the ability of small businesses to comply with set measures. We also recognise that as this is a new regime, and that businesses and Ofcom will need to address the information asymmetry that exists between them including impact of regulatory requirements and how that can inform regulatory decisions, and one way of doing this is through information sharing.

However, we ask that this is done with consideration of availability of resources of small businesses, their ability to comply as well as the regulatory environment that they operate in. The amount of regulatory requirements and their complexity such as poor design and inconsistencies continue to pose a challenge for small businesses year on year. Our research shows that small businesses tend to gold-plate their compliance which means that due to uncertainty of requirements and fear of enforcement they over-comply, which can have significant impact on their already stretched resources.¹

Small businesses are also increasingly stretched by the economic environment that they operate in. Our quarterly Small Business Index research for Q2 2024 shows small businesses confidence decreased to -10.8 points. In the previous quarter the net balance of small businesses expecting revenue growth in Q2 2024 stood at 22.1%; however, over this period the net balance of small businesses that reported revenue growth stood at -9.3%.² In addition to this, the net balance of small businesses reporting an increase in operating costs was broadly similar to the last quarter, at 76%, with labour costs becoming the most-cited source of changing business costs for the first time since Q4 2020. This highlights the tough environment that small businesses operate in and we believe that it should be considered before any new requirements are placed on them. However, when it is necessary to impose new requirements, we also ask that small businesses are supported to

¹ FSB and Newcastle University, Navigating the COVID-19 Regulatory Landscape: How small businesses experienced regulations in a crisis, 2022, <https://www.fsb.org.uk/resource-report/navigating-the-covid-19-regulatory-landscape.html>

² FSB report, Small Business Index, Quarter 2, 2024 <https://www.fsb.org.uk/resource-report/small-business-index-quarter-2-2024.html>

comply rather than penalised, and that enforcement action is proportionate and only reserved for the most severe cases.

We have not commented on every section in the consultation, only where we believe that we could provide a valuable view.

*Question 1: Ofcom's general approach to information gathering (Section 3 of the draft guidance)
Do you have any comments on Ofcom's proposed general approach to information gathering, as outlined in Section 3 of the draft guidance?*

We welcome Ofcom's approach to considering whether exercising information gathering powers would be reasonable and proportionate on a case-by-case basis. Small businesses unlike larger businesses have fewer available resources, therefore, they are more likely to be disproportionately impacted by information requests. Careful consideration should be given to any impacts before a request is made. We welcome the guidance includes Ofcom considering feasibility and cost to the stakeholder involved in collating the information, including their size and capacity and the resources required to provide the information in deciding whether to exercise an information gathering power. We also welcome that other potential costs will be considered, for example the cost of appointing a skilled person to conduct a report or carrying out an audit. We agree that there needs to be a balance between burden that is imposed on small businesses and Ofcom's ability to achieve objectives.

With regard to disclosure of confidential information, it is worth noting that small businesses are usually more sensitive in the market than larger ones, meaning that they are more likely to be vulnerable to reputational shocks and have fewer financial reserves. Therefore, small businesses compared to larger ones are more likely to be disproportionately impacted if confidentiality is not granted, for example by having a detrimental impact on their relationship with their suppliers and customers. In addition to this, any financial losses and relationships will take much longer to restore. With that said, it is welcome that Ofcom will allow representations to be made with regard to any confidential information and will try to resolve any objections with regard to confidentiality through constructive dialogue.

*Question 2: Information notices (Section 4 of the draft guidance)
a) Information notices*

Do you have any comments on Ofcom's proposed approach to the process for issuing and responding to information notices.

We agree that the information notice should only be issued when it is necessary and proportionate with regard to the stakeholder and the information that is needed to be gathered by Ofcom. We welcome the Information Registry that has been established to collate and track information requests, and are supportive of this playing a role in helping to reduce burdens on businesses, for example by Ofcom considering notices as part of wider regulatory activity and helping them to inform reasonable deadlines that are given to businesses to respond. Cumulative regulatory burden has long been an issue for small businesses and its continued increase continues to impact small businesses in running their day-to-day operations. Our research shows that two-thirds (62%) of small businesses cite the current domestic regulatory environment to be more of a burden than a benefit to their

business and 22 per cent of businesses report changing business costs due to impact of regulation.³ Many small firms businesses also report reduced profitability as result of having to monitor, understand and comply with regulatory demands.

We note Ofcom's intention to issue information notices in draft form to stakeholders to ensure that they are appropriately worded and sufficiently clear for the recipient, and so they can respond within the proposed timeframe, which will include allowing appropriate time to comment on data or information regarding the notice as well as practicality of providing information within the proposed timeframe. We ask that what is deemed as an appropriate timeframe is set on a case-by-case basis and with consideration on business size and ability to comply. As we have mentioned before small businesses are likely to have less resources at their disposal than larger ones, they are unlikely to have specialised teams dedicated to help with information gathering and their automated systems which collate specialised reports may also be less sophisticated, which means the process can in some cases take longer. We ask that if an extension is required and a small business owner gets in touch with an appropriate reason for an extension, that they should be helped to comply rather than penalised for the delay.

b) Requiring a test

Do you have any comments on our proposed approach to information notices that require recipients to perform a test?

We would welcome consideration of resources and ability of businesses to perform a test, with consideration of the relevant software or technology that a firm may be using and its ability to perform more sophisticated tests. With that said, we would also welcome proposed parameters to be set within the draft notice, with enough time allowed for comment, to help ensure that smaller businesses are able to comply.

c) Remote viewing

Do you have any comments on our proposed approach to Remote Viewing Information Notices? For example, to the factors that we may take into account when considering whether to issue a Remote Viewing Information Notice.

As we have mentioned above, we would welcome if resources and ability of small businesses to comply are considered. We are also supportive of Ofcom's consideration of using remote viewing instead of more formal audits or inspections where possible, as well as consideration of any technical or operational limitations.

d) Coroner Information Notices

Do you have any comments on our proposed approach to issuing Coroner Information Notices for the purpose of responding to requests for information by investigating authorities in connection with an investigation or inquest into the death of a child?

³ FSB report, Escaping the Maze: How small businesses can thrive under the British Columbia regulatory model, 2021, <https://www.fsb.org.uk/resource-report/escaping-the-maze.html>

No.

e) Naming a senior manager

Do you have any comments on the section relating to naming a senior manager who is in a position to ensure compliance with an information notice?

We recognise that this will only be used where necessary to clarify responsibility, however, it is worth noting that a senior manager in a small firm is very likely to be the business owner, so consideration should be given to their ability to comply in light of other regulatory demands as well as impact on ability to run the business, when setting any requests and their associated timeframes.

Question 3: Skilled persons' reports (Section 5 of the draft guidance)

Do you have any comments on our approach to skilled persons' reports? This might include when we might decide to require a skilled person's report, and the typical process that we propose to follow.

No.

Question 4: Interviews (Section 6 of the draft guidance)

Do you have any comments on the section of guidance dealing with the power to require an individual to attend an interview?

We are supportive of the fact that if a service has failed in their obligations, then they should be allowed an opportunity at interview to answer questions and provide an explanation. It is noted that a reasonable time will be allowed between issuing a notice to interview and conducting the interview, and that is expected to be least seven calendar days unless there is any specific urgency. We would ask that unless there is urgency including risk of harm that the length of time between issuing a notice and the interview is longer than seven days where possible, as small businesses will need time to prepare and gather appropriate information alongside running their business. A small business owner is unlikely to have any legal representation, primarily due to the associated costs, so it is likely that they will be compiling all the needed information as well as preparing for the interview without any external help therefore, additional time could be beneficial in allowing them to prepare.

We welcome Ofcom's consideration of whether an interview could be best conducted virtually, in particular in relation to the costs and time involved in travelling which can be particularly prohibitive for a small business owner. It would be beneficial if businesses were also able to request a virtual interview if this is something that is preferred, particularly in less contentious cases and where the business owner is co-operative.

Question 5: Entry with or without a warrant (Section 7 of the draft guidance)

Do you have any comments on our proposed approach to entry either with or without a warrant? This might include the typical process and our interpretation of the requirement to have regard to the Home Office's code of practice on powers of entry.

No.

Question 6: Audit (Section 7 of the draft guidance)

Do you have any comments on our proposed approach to the power for Ofcom to carry out an audit to assess compliance?

No.

Question 7: Consequences of failure to comply with an information power (Section 8 of the draft guidance)

Do you have any comments on the potential consequences of a failure to comply with any of the information gathering powers covered in the draft guidance? This might be either on breaches that may be subject to enforcement action by Ofcom, or those that may constitute criminal offences.

We would ask that any enforcement action is proportionate and is only used for the most severe cases, and where businesses have acted in bad faith. It was noted above that Ofcom will consider size and ability of the stakeholder in compliance with information notices, we would also like resources to be considered in relation to enforcement and in particular as businesses familiarise with themselves with the new regulatory regime. Small businesses where possible should be helped to comply in the first instance, and to help this, guidance together with illustrative examples should be produced to help ensure that businesses are able to respond to information notices and, appropriate support should also be given if they need it following receipt of a notice.

Question 8: Additional comments

Do you have any other comments on the draft guidance?

Please provide any information or evidence in support of your views.

No.

Yours sincerely,

Neil Sharpley
Policy Champion, Home Office and Ministry of Justice Policy Units
Federation of Small Businesses

For further information please contact:

██████████
██████████
Federation of Small Businesses
3rd Floor, 10 Dean Farrar Street, Westminster, SW1H 0DX