



Department
for Business
Innovation & Skills

LATE PAYMENT

Challenging grossly unfair terms
and practices

FEBRUARY 2015

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Late Payment: challenging grossly unfair terms and practices

Late payment remains a serious issue for businesses, especially small businesses. Evidence shows that small and medium businesses are owed a total of £39.4 billion, and small businesses are waiting for an average of £38,200 in overdue payments. This has a damaging knock-on effect on small businesses' ability to manage their finances and plan for growth, and pushes late payment down the supply chain, potentially affecting many more firms.

The Small Business, Enterprise and Employment Bill currently before Parliament is making changes to improve the prompt payment reporting, and discussions are underway to strengthen the Prompt Payment Code.

This document sets out the thinking around how to provide business representative bodies with additional powers to challenge grossly unfair contractual terms and practices as set out in the 2011 EU Late Payment Directive. The Department is seeking views on how these changes could be best implemented.

We are also seeking views of how to, if at all, better define "grossly unfair" in relation to late payments in UK law.

Subject to the views expressed, the Government may subsequently decide to make consequential changes to the UK's statutory framework.

The proposals in this paper cover the law applying in England, Wales and Northern Ireland. The Scottish Government will work with stakeholders to identify how this can be taken forward in Scotland.

Issued: 3 February 2015

Respond by: 9 March 2015

Enquiries to: Natalie Sterman, 0207 215 5231, latepayment@bis.gsi.gov.uk

This consultation is relevant to: business representative bodies and SMEs

1. Foreword from Matthew Hancock



Late payment continues to be a serious issue for small businesses. Coming from a small business background myself, I know how late payments can cause serious cash flow problems and delay payments further down the supply chain. Small businesses can even go insolvent if payment is substantially delayed.

The Government is taking forward a package of measures to tackle the issues of late and prompt payment. I am pleased that measures included in the Small Business, Enterprise and Employment Bill, currently before Parliament, are making the necessary legislative changes to help change the current payment culture.

Alongside the legislative changes, we are also strengthening the Prompt Payment Code, making it a beacon of best practice, to ensure that those businesses that are signed up to the Code receive the recognition they deserve as responsible and fair businesses who pay their suppliers promptly and on time. Equally, I intend to make clear which businesses do not adhere to the Code, and, if they fail to meet the standards, are removed as quickly as possible.

While these are important steps to help create a shift in the current payment culture, there remain examples where larger businesses will deliberately delay payments to the detriment of smaller businesses.

The 2011 EU Late Payment Directive gave business representative bodies the power to challenge “grossly unfair” contractual terms and practices. While representative bodies in the UK already have the power to challenge some contract terms and practices, I am now looking to expand these powers to better tackle unfair terms and practices and level the playing field between large and small businesses. In addition, I am seeking views as to whether we ought to better define “grossly unfair” in UK law. This document sets out our thinking on how to best implement this change. I welcome all your views on this important matter.

MATTHEW HANCOCK

Minister of State at the Department for Business, Innovation and Skills

2. Executive Summary

1. Late payment is a serious issue for businesses, especially small businesses. Evidence shows that small and medium businesses are owed a total of £39.4 billion, and small businesses are waiting for an average of £38,200 in overdue payments¹. This has a damaging knock-on effect on small businesses' ability to manage their finances and plan for growth. In addition, late payment by one company pushes the problem down the supply chain, potentially affecting many more firms.
2. The Late Payment of Commercial Debts (Interest) Act 1998 and subsequent regulations created a statutory framework in the UK for tackling late payment. The legislation's key provisions are:
 - Businesses are entitled to charge interest of 8% above the Bank of England Base Rate for any late payment;
 - Administration costs for chasing late payment can be claimed by business, on a sliding scale depending on the size of the debt;
 - Payment contracts must not infringe on a business's right to claim interest and administration costs for late payment;
 - Mandatory 30 day payment terms for transactions with public authorities;
 - Maximum 60 day payment terms between businesses, unless they agree longer terms and this is not grossly unfair to the supplier.
3. The 2000 EU Late Payment Directive recognised that "*heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payments. These problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses*".² It therefore introduced a right to claim interest in the event of late payments and to reasonable compensation, as well as a maximum payment term (subject to exceptions).
4. The Directive also gave representative bodies the power to challenge certain contract terms and practices deemed "grossly unfair" on behalf of small businesses. This power was transposed into UK law with the 2002 Regulations to the Late Payment Act in relation to terms that seek to "*oust or vary the right to statutory interest*" following a late payment.
5. In 2011, the recast EU Directive extended these powers to allow representative bodies to challenge all contractual terms or practices with regards to late payment considered "grossly unfair" on behalf of any business. We are seeking views on how to clarify our transposition of this broader power.
6. In particular, we are seeking views on:

¹ www.bacs.co.uk/Bacs/DocumentLibrary/UK_companies_face_a_late_payment_burden_of_%c2%a346.1_billion.pdf

² 2000/35/EC - eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:200:0035:0038:EN:PDF

- Who might be covered by a representative claim (individual businesses, or groups of businesses);
 - Which organisations can bring a claim;
 - Options for dispute resolution; and
 - The resources available to bring a case.
7. We are also consulting on whether to further refine the definition of “grossly unfair” payment practices. Building on precedent in other jurisdictions, we could legislate to provide indicative criteria that the Courts could take into account when assessing whether a practice is unfair. This could include consideration of when there is a disparity in bargaining power between the parties involved.
 8. Subject to the views expressed, the Government may subsequently decide to make consequential changes to the UK’s statutory framework.
 9. The Late Payment of Commercial Debts (Interest) Act 1998 applies to the whole of the UK. However, responsibility for amending the Act in order to implement the Late Payment Directives has been split between England, Wales and Northern Ireland on one hand and Scotland on the other. Following publication of this paper the Scottish Government will work with stakeholders to identify how this can be taken forward in Scotland. The proposals would cover the law applying in the other parts of the UK.

3. How to respond

10. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.
11. The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/late-payment-challenging-grossly-unfair-terms-and-practices> (until the consultation closes). The form can be submitted online/by email or by letter or fax to:

Natalie Sterman
Prompt Payment Team
Department of Business, Innovation and Skills
3rd floor, Piccadilly Gate
Store Street
Manchester
M1 2WD
Tel: 0207 215 5231
Email: latepayment@bis.gsi.gov.uk

12. You may make printed copies of this document without seeking permission.
13. Other versions of the document in Braille, other languages or audio-cassette are available on request.

4. Confidentiality & Data Protection

14. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
15. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

5. Help with queries

16. Questions about the policy issues raised in the document can be addressed to:

Natalie Sterman
Prompt Payment Team
Department of Business, Innovation and Skills
3rd Floor, Piccadilly Gate
Store Street
Manchester
M1 2WD
Tel: 0207 215 5231
Email: latepayment@bis.gsi.gov.uk

17. The consultation principles are in Annex 1.

6. The proposals

Introduction

18. Late payment is a serious issue for any business, but especially small businesses. In July 2014, BACS reported that 60% of UK small and medium sized businesses were experiencing late payments. Their research shows quite clearly that small and medium sized businesses were being forced to carry the larger debt burden of £39.4 billion, with the average small business waiting for £38,200 in overdue payments.³
19. This is backed up by research conducted by representative bodies. According to the Federation of Small Business's (FSB) 2014 member survey⁴, 51% of their members had experienced late payment within the last 12 months. Late payment volumes had increased over the past few years, rising from £18 billion in 2008 to £35 billion in 2012, in part due to the economic climate but also a wider cultural trend of large companies' approach to their cash-flow. Their research shows in 2011, 125,000 businesses were almost put out of business by late payment, and in 2008, 4,000 closed as a direct result.
20. Furthermore, in December 2014, a survey conducted by the Institute of Directors (IoD) found that 66% of their SME members had had issues with getting timely payment of an invoice, with damaging knock-on effects on their plans for growth and managing their finances. Late payment by one company pushed the problem down the supply chain, potentially affecting many more firms.⁵
21. The IoD said in response, "Business is all about negotiation, and both sides of a deal want to get the most favourable terms, but when big companies deliberately delay payment it has serious consequences. Small and medium sized businesses employ over 14 million people in the UK, making up half of the economy, so it's very worrying that late payment is a problem for so many."

The Late Payment Act and the Late Payment Directives

22. The Late Payment of Commercial Debts (Interest) Act 1998 created a statutory framework in the UK for tackling late payment. This was amended in August 2002 (when the 2000 EU Late Payment Directive was transposed into UK law) and again in March 2013 (when the 2011 EU Late Payment Directive was transposed into UK law). The legislation's key provisions are:
- Businesses are entitled to charge interest of 8% above the Bank of England Base Rate for any late payment;

³ www.bacs.co.uk/Bacs/DocumentLibrary/UK_companies_face_a_late_payment_burden_of_%c2%a346.1_billion.pdf

⁴ www.fsb.org.uk/policy/assets/publications/fsb-member-survey-2013-uk.pdf

⁵ www.iod.com/influencing/press-office/press-releases/two-thirds-of-smes-are-suffering-from-late-payment-finds-new-iod-survey

- Administration costs for chasing late payment can be claimed by business, on a sliding scale depending on the size of the debt;
- Payment contracts must not infringe on a business's right to claim interest and administration costs for late payment;
- Mandatory 30 day payment terms for transactions with public authorities;
- Maximum 60 day payment terms between businesses, unless they agree longer terms and this is not grossly unfair to the supplier.

23. In practice, there remains an imbalance of power between large and small businesses whereby the larger business can extract more favourable payment terms from their smaller suppliers. Smaller organisations are often reluctant to enforce their rights or refuse changes to contract terms, leaving them potentially vulnerable to unfair treatment and exploitation. Such behaviour can be difficult to challenge, let alone resolve, without outside help.

24. For this reason, the 2000 EU Late Payment Directive⁶ required EU Member States to introduce:

“provisions whereby organisations recognised as, or having a legitimate interest in representing SMEs, may take action according to the national law concerned before the courts or before competent administrative bodies on the grounds that the contractual terms drawn up for general use are grossly unfair [...], so that they can apply appropriate and effective means to prevent the continued use of these terms”.

25. The 2002 Late Payment of Commercial Debts Regulations⁷ amended the Late Payment Act 1998 to allow representative bodies to bring proceedings in the High Court on behalf of SMEs where the standard terms purport *“to oust or vary the right to statutory interest in relation to qualifying debts”*. The High Court would then be able to grant an injunction against the use of a contractual term which was grossly unfair to stop its further use.

26. In 2011, the re-cast Late Payment Directive⁸ was amended to introduce:

*“provisions whereby organisations **officially** recognised as representing **undertakings**⁹ or **organisations with a legitimate interest in representing undertakings** may take action according to the national law concerned before the courts or before competent administrative bodies on the ground that the **contractual terms or practices** are grossly unfair [...], so that they can apply appropriate and effective means to prevent the continued use of these terms”.*

27. The re-cast Directive thereby expands the power to all businesses, rather than just SMEs. It also covers all contractual terms or practices deemed “grossly unfair” in relation to late payment, rather than just those terms drawn up for general use.

⁶ 2000/35/EU - eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:200:0035:0038:EN:PDF

⁷ www.secola.org/db/2_20/gb_ums2.pdf

⁸ 2011/7/EU - eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0007&from=EN

⁹ Article 2(3) of the Directive defines “undertakings” as *“any organisation other than a public authority, acting in the course of its independent economic or professional activity, even where the activity is carried out on behalf of a single person”*.

28. Following a consultation¹⁰, the 2013 Late Payment of Commercial Debts Regulations¹¹ further amended the Late Payment Act of 1998 to transpose the re-cast Directive but did not widen the powers of representative bodies to reflect the changes in the Directive. Some representative bodies have argued that this is a weakness of the 2013 Regulations.
29. Part of the problem is that “grossly unfair” remains an area open to interpretation. The 2000 and 2011 EU Late Payment Directives both provide a broad outline but no concrete definition exists in UK law. We believe that one reason for this is that “grossly unfair” with regards to payment terms varies from sector to sector. For example, what may be considered “grossly unfair” in the retail sector may not be considered as such in the construction sector.
30. By making it easier for disputes around contractual terms and practices to be taken to court, the courts would have an increased opportunity to decide whether terms and practices should be considered “grossly unfair” and whether to prohibit their future use. In the longer term, this could increase the amount of case law created, which would help clarify the meaning of “grossly unfair” for the wider business community.
31. We realise that there are a number of benefits to expanding the power as outlined in the Directive, but it also poses some challenges. With this paper, we want to discuss how this power could be best introduced to ensure we successfully help tackle bad practice.

Giving powers to representative bodies to challenge “grossly unfair” terms and practices

The current situation

32. Representative bodies currently have the power to challenge terms or practices on behalf of SMEs which seek to oust or vary the right to interest resulting from a late payment. This is narrower than outlined in the 2000 and 2011 Late Payment Directives. We feel that, given this situation, it is right to clarify how this measure is transposed into UK law.
33. Expanding the power to allow representative bodies to challenge any terms or practices deemed “grossly unfair” in relation to late payment for any business is a change to existing legislation. We have heard mixed views about how much this might be used. On the one hand, in response to the BIS consultation *Building a Responsible Payment Culture*¹², feedback was unsupportive of third parties getting involved in late payment disputes. On the other, some stakeholders have informally reported that they have been approached by numerous businesses asking them to intervene on their behalf. In most cases, the usual routes to challenge a dispute have failed to produce any results and asking a representative body for help was a last resort.
34. Launching a significant challenge against a larger firm, especially as a small business, can be daunting. There is a significant risk of damaging the business relationship and losing

¹⁰ www.gov.uk/government/consultations/consultation-on-implementing-directive-2011-7-eu-on-combating-late-payment-in-commercial-transactions

¹¹ www.legislation.gov.uk/uksi/2013/395/contents/made

¹² www.gov.uk/government/consultations/late-payment-of-finance-building-a-responsible-payment-culture

supplier status. A lack of resource and in-house expert knowledge could also result in a business just writing off any debt or costs - getting legal advice in itself could prove more expensive than the cost of the late payment. Simply a lack of cheap and accessible support to navigate a complex legal case or understanding of the legal environment could stop a challenge being raised. This leaves smaller businesses vulnerable, and continues to give larger firms the majority of the playing power.

35. We would like to better understand demand for this measure and the circumstances under which businesses have taken, or would take, advantage of representative bodies acting on their behalf in the case of late payment disputes.

Questions

- 1) [If you are an SME, or a representative organisation for SMEs] How often do you think SMEs have suffered from being exposed to grossly unfair payment terms in the last 12 months, as a percentage of their contracts?
- 2) [If you are a large business or a representative organisation for large businesses] How often do you think large business have suffered from being exposed to grossly unfair payment terms in the last 12 months, as percentage of their contracts?
- 3) Have you noticed an increase in the use of terms and practices that could be considered grossly unfair in the last 12 months? If yes, what tend to be the circumstances?

Businesses:

- 4) Would you classify yourself as a micro, small, medium or large business?
- 5) Have you ever approached a representative body for help to resolve disputes about terms and practices that oust or vary your right to statutory interest following a late payment?
 - a. If yes, under what circumstances and, what was the outcome?
 - b. If no, why?
- 6) Would you every approach a representative body for help to resolve disputes about grossly unfair payment terms and practices above and beyond those related to statutory interest?
 - a. If yes, under what circumstances?
 - b. If no, why?

Representative bodies:

- 7) Have you ever been approached to challenge grossly unfair late payment terms and practices, i.e. terms that oust or vary the right to statutory interest, on behalf of a business?

- a. If yes, how many times have you been called upon to help in this way in the last 12 months?
 - b. Was the business a SME or a large business?
 - c. What were the circumstances?
 - d. What was the outcome?
 - e. If applicable, which court did this end up in?
 - f. What was the average cost of the cases taken to court on behalf of an SME or large business in the last 12 months?
 - g. What is a rough breakdown of the cost for example legal cost staff costs etc?
 - h. Does this differ between a case representing a SME or representing a large firm?
- 8) Have you been made aware of any cases where the contract terms and practices could be deemed grossly unfair but have not been able to do anything about it?
- a. If yes, how many cases were there in the last 12 months?
 - b. Were they a large business or a SME?
- 9) Do you think the cost or resources needed will be significantly different if required to act on behalf of a business for grossly unfair payment terms?

Representative claims

36. It is important to note that challenges made by a representative body would only apply in business to business late payment disputes, not business to consumer disputes.
37. When the Government originally consulted on the transposition of the 2000 Directive, it proposed that representative claims should be defined as
- “Claims made by, or defended by, a representative or representative organisation on behalf of a group of individuals who may or may not be individually named in a situation where an individual would have a direct cause of action”.*
38. This definition ensured that only group action cases may be brought forward by a representative body. However, given that the Directive was originally written to support SMEs, it could be argued that any time a single business is subjected to a terms or practices that could be deemed “grossly unfair” in line with the Directive, they should have the backing of representative bodies to challenge these as soon as possible, with or without group action.
39. Further, the ability to take action on behalf of a single business is arguably particularly important given the unwillingness of many companies to step forward against a dominant

supplier. This means that there might be significantly fewer cases brought if this right of action were limited just to groups of individual businesses.

40. We also propose that representative bodies should only be able to challenge cases of grossly unfair terms and practices on behalf of their members. As is similar with union cases, non-members would nonetheless benefit from related rulings against unfair contract terms and practices.
41. Based on discussions with stakeholders, we understand that an SME might prefer to remain anonymous when challenging a larger company on their contract terms and practices for fear of jeopardising the business or supplier relationship.
42. Whilst sympathetic to these concerns, this does raise complex procedural legal issues. In terms of anonymity from the public, in general, all court proceedings are subject to the principle that they are to be held in public: the parties are named in pleadings and judgments, and each party's name can be given in both newspapers and law reports in accordance with the common law principle of open justice. Departures from this principle occur only in very specific circumstances and are dealt with on a case by case basis. Lord Neuberger MR summarised the position clearly in *Practice Guidance (Interim Non-disclosure) Orders [2012] 1 WLR 1003* when saying "*derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional.*" Previous examples of where anonymity has been granted have been with respect to cases concerning serious criminal offences. Any SME wishing to explore this further would need to seek independent legal advice.
43. As far as anonymity between parties is concerned (that is to say a claimant SME remaining anonymous from a defendant larger company whether as part of a group action or individually) the UK legislative framework does not permit this. To do so would require an amendment to existing legislation. Given the principles of open justice and the need to provide both parties in a case with full access to the allegations made, the Government does not believe that it would be appropriate to make an exception in this instance.

Questions

10) Should representative bodies be able to take action on behalf of

- a. individual businesses;
- b. groups of individual businesses; or
- c. both?

11) Do you agree that representative bodies should only be able to take action on behalf of members rather than non-members as well?

How to define “representative bodies”

44. The 2011 Directive states that “*organisations officially recognised as representing undertakings or organisations with a legitimate interest in representing undertakings*” may challenge grossly unfair terms and practices. We feel that representative bodies most closely fit this description: in UK law, a representative body is defined as “*an organisation established to represent the collective interests of small and medium-sized enterprises in general or in a particular sector or area*”¹³. The Confederation of British Industry (CBI), FSB, ICM and FPB are just some who would appear to match this definition. As well as engaging with businesses on their strengths and weaknesses, these organisations also lobby for policy changes on behalf of their members with the aim of improving the business environment.
45. In practice, a representative body will always have the right to apply to a Court to seek to have a payment term deemed grossly unfair. Doing so would, amongst other things, require it to demonstrate that it was a representative body for the purposes of the Directive. It would then be for the Court to decide whether the body was a representative body or not. If yes, then the case could be heard.
46. In order to make it easier and quicker for action to be taken, we propose to try and pre-empt this step. We could do this by drawing up an indicative list of officially recognised representative bodies who could take representative claims in cases where late payment terms or practices might be “grossly unfair”. We would then draft our legislation to clarify that those representative bodies on the official list would be deemed to be representative bodies for the purpose of the Directive – meaning they would not need to prove this in court. We suggest that this list is published and maintained by the Secretary of State, rather than be defined in law.
47. To ensure that appropriate organisations are included in the list, we propose that such organisations should write to the Department setting out why they wish to be considered representative bodies able to challenge unfair payment terms and practices. In deciding whether to write, such organisations might wish to consider:
- How they could demonstrate their representativeness over their area
 - Whether they had sufficient and accessible resource to be able to represent businesses in terms of late payment disputes
 - Their track record in working on late payment contractual terms and practices issues
48. Representative bodies will be under no obligation to take forward requests for representation. Instead, they will be able to choose which cases to take forward, if any.
49. Over time, this list would need to be updated. This might occur when a new organisation applies to be added to the list, or when a representative body decides they no longer have the resource to be able to represent businesses in this way. We propose that this list ought to be reviewed at regular intervals.

¹³ www.secola.org/db/2_20/gb_ums2.pdf

50. Alternatively, we could opt not to have a list at all. In that case, every time a representative body wanted to take a case it would need to prove to the Court that it was representative for the purposes of a grossly unfair late payment issue.

Questions

12) Do you agree with our proposal to have an indicative list of representative bodies?

13) As a representative body, would you self-nominate yourself to represent businesses in this way?

14) Do you agree with our proposal that the list should be regularly reviewed?

Representing members without going to Court

51. We anticipate that representative bodies might use their new power to seek improved terms for their members without necessarily going to Court. For instance, they might contact a company on behalf of their members in order to challenge certain payment terms or practices, and ask them to consider changing them. If the company does not do so, then the representative body would need to decide whether to follow this up with a legal action.

Question

15) [For representative bodies] Would you be more likely to use the threat of taking a company to court than actually take them to court?

a. If yes, how often might you do this? What would your decision be based on?

b. If yes, are you able to give an indication of the financial benefits of doing so for you and the members you are representing?

Court hearings

52. In both Directives, representative claims may be brought before the courts or “competent administrative bodies”. While there may be a case for why cases ought to be heard before a tribunal or be taken to a sector or professional body, we feel that the best way to help clarify the definition of “grossly unfair” would be to take this before the courts. The reason for this is that it presents an opportunity for case law to develop. The common law system in the UK is based on judicial precedent. In general, this means that lower courts follow decisions made by higher courts and are thereby bound by decisions of higher courts. Further, judicial precedent demands that cases are determined in the same way when the facts of the case are materially and substantively the same.

53. Another possible advantage of pursuing matters through the courts is the number of remedies available, to be utilised where appropriate. For example, issuing an injunction against the business with grossly unfair terms, ordering them to end the practice, would send a message to others that such terms or practices will not be tolerated.

54. Some stakeholders have asked that claims are held in different courts depending upon the size of the case to keep the cost of the proceedings proportionate to the case. This is theoretically possible. Representative bodies wishing to take forward a claim will need to get legal advice as to the appropriate court in which to commence proceedings. However, upon application it will be for the court to decide which court the case ought to be allocated to, taking into consideration criteria such as the financial value of the case, its complexity and trial time estimates.

Questions

16) Do you have any comments on our proposals regarding court hearings?

Winning and Losing a Case

55. Given that the majority of representative bodies are fee-paying member organisations, we feel it would be appropriate for representative bodies to cover the cost of any representative claims they choose to take forward. A representative body would be under no obligation to take forward all requests; they would be able to pick and choose the cases most likely to be successful, if any.
56. The general principle is that the successful party in litigation will usually be awarded costs against the losing party. That is to say, if a representative body as a claimant in case, were to win a claim on behalf of a SME, the general position is that it would receive its costs of the litigation from the defendant. However, the court retains a wide discretion and can order otherwise depending on the circumstances.
57. The principal remedy for breach of contract is damages. Therefore, in addition to costs, if the court considers it appropriate, it may make an award of damages to the injured party to compensate for any loss suffered. The general principle is that damages are payable by the unsuccessful party to the successful party, subject again to the Court's discretion. The representative body and the SME will need to determine how any award of costs will be split.
58. Similarly, if a representative body lost a case the general principle is that it would be liable to pay the defendants' costs of the litigation.

Questions

- 17) [For representative bodies] How often might you take a case to court? What would the decision be based on?
- 18) [For representative bodies] What do you think would be the resource requirement of representing a business in terms of grossly unfair terms? How would this change in terms of representing a large firm or a SME?
- 19) [For representative bodies] How do you think the resource requirement may differ with the different options of where a case can be heard?
- 20) [For representative bodies] Do you have the necessary resources to handle these cases?

21)[For representative bodies] Would you consider increasing your membership fees to reflect the provision of this service? If so, by how much would the membership fees increase?

Definition of grossly unfair payment contractual terms and practices

59. The Late Payment Act 1998 provides (Section 4 subsection (7A)) three specific aspects to consider when deciding what is “grossly unfair”:

- anything that is a gross deviation from good commercial practice and contrary to good faith and fair dealing,
- the nature of the goods or services in question, and
- whether the purchaser has any objective reason to deviate from the 60-day payment term.

The meaning of “grossly unfair” will depend on the specific facts of each case.

60. Feedback from stakeholders indicates that it is difficult to know what this means in practice. We are therefore considering whether to enhance the definition. Irish legislation¹⁴ for example includes additional indicative criteria that the courts could consider when determining whether a term or practice is grossly unfair. This includes (but is not limited to):

- strength of the bargaining positions of the supplier and purchaser;
- good commercial practice;
- nature of the goods or services concerned;
- whether the purchaser had any objective reason to deviate from the Irish Regulations;
- whether the supplier received an inducement to agree to the term;
- whether the supplier knew (or ought to have known) of the existence; and
- the extent of the term.

61. The Irish Regulations are drafted in such a way that the Court has wider range of options it can consider when dealing with late payment cases. The Court could either consider all criteria; just a few criteria; or just one criteria.

62. Given the importance that imbalances of power in contractual relationships can play in causing late payment, we are particularly interested in views on the first criteria: “strength of the bargaining positions of the supplier and purchaser”.

¹⁴ European Communities (Late Payment in Commercial Transaction) Regulations 2012 – SI No 580 of 2012

Questions

- 22) Do you think we should follow the Irish approach, and add additional indicative criteria to the UK definition of grossly unfair?
- 23) If we adopt such criteria, should consideration be given to “the strength of the bargaining positions of the supplier and the purchaser”? Are there any other criteria that are particularly important?

Devolution

63. The Late Payment of Commercial Debts (Interest) Act 1998 applies to the whole of the UK. However, responsibility for amending the Act in order to implement the Late Payment Directives has been split between England, Wales and Northern Ireland on one hand and Scotland on the other. The Scottish Government are responsible for adopting any legislation necessary to implement the Late Payment Directives in Scotland and therefore, may choose not to introduce any changes to their existing legal framework on Late Payments as a result of this discussion paper. Following publication of this paper the Scottish Government will work with stakeholders to identify how this can be taken forward in Scotland. The proposals would cover the law applying in the other parts of the UK.

Closing remarks

64. These changes are happening at a time of considerable change in the statutory framework around prompt payment issues. The Small Business, Enterprise and Employment Bill¹⁵ currently before Parliament is making changes to improve the prompt payment reporting, and discussions are underway to strengthen the Prompt Payment Code¹⁶. This is another reform to support small businesses. Ultimately, these should give smaller businesses a voice to enable them to challenge unfair and unethical treatment.

¹⁵ services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html

¹⁶ www.promptpaymentcode.org.uk/

7. Consultation questions

Giving powers to representative bodies to challenge “grossly unfair” terms and practices

The current situation

- 1) [If you are an SME, or a representative organisation for SMEs] How often do you think SMEs have suffered from being exposed to grossly unfair payment terms in the last 12 months, as a percentage of their contracts?
- 2) [If you are a large business or a representative organisation for large businesses] How often do you think large businesses have suffered from being exposed to grossly unfair payment terms in the last 12 months, as percentage of their contracts?
- 3) Have you noticed an increase in the use of terms and practices that could be considered grossly unfair in the last 12 months? If yes, what tend to be the circumstances?

Businesses:

- 4) Would you classify yourself as a micro, small, medium or large business?
- 5) Have you ever approached a representative body for help to resolve disputes about terms and practices that oust or vary your right to statutory interest following a late payment?
 - a. If yes, under what circumstances and, what was the outcome?
 - b. If no, why?
- 6) Would you every approach a representative body for help to resolve disputes about grossly unfair payment terms and practices above and beyond those related to statutory interest?
 - a. If yes, under what circumstances?
 - b. If no, why?

Representative bodies:

- 7) Have you ever been approached to challenge grossly unfair late payment terms and practices, i.e. terms that oust or vary the right to statutory interest, on behalf of a business?
 - a. If yes, how many times have you been called upon to help in this way in the last 12 months?
 - b. Was the business a SME or a large business?
 - c. What were the circumstances?
 - d. What was the outcome?

- e. If applicable, which court did this end up in?
 - f. What was the average cost of the cases taken to court on behalf of an SME or large business in the last 12 months?
 - g. What is a rough breakdown of the cost for example legal cost staff costs etc?
 - h. Does this differ between a case representing a SME or representing a large firm?
- 8) Have you been made aware of any cases where the contract terms and practices could be deemed grossly unfair but have not been able to do anything about it?
- a. If yes, how many cases were there in the last 12 months?
 - b. Were they a large business or a SME?
- 9) Do you think the cost or resources needed will be significantly different if required to act on behalf of a business for grossly unfair payment terms?

Representative claims

- 10) Should representative bodies be able to take action on behalf of
- a. individual businesses;
 - b. groups of individual businesses; or
 - c. both?
- 11) Do you agree that representative bodies should only be able to take action on behalf of members rather than non-members as well?

How to define “representative bodies”

- 12) Do you agree with our proposal to have an indicative list of representative bodies?
- 13) As a representative body, would you self-nominate yourself to represent businesses in this way?
- 14) Do you agree with our proposal that the list should be regularly reviewed?

Representing members without going to Court

- 15) [For representative bodies] Would you be more likely to use the threat of taking a company to court than actually take them to court?
- a. If yes, how often might you do this? What would your decision be based on?

- b. If yes, are you able to give an indication of the financial benefits of doing so for you and the members you are representing?

Court hearings

- 16) Do you have any comments on our proposals regarding court hearings?

Winning and Losing a Case

- 17) [For representative bodies] How often might you take a case to court? What would the decision be based on?
- 18) [For representative bodies] What do you think would be the resource requirement of representing a business in terms of grossly unfair terms? How would this change in terms of representing a large firm or a SME?
- 19) [For representative bodies] How do you think the resource requirement may differ with the different options of where a case can be heard?
- 20) [For representative bodies] Do you, as a representative body, have the necessary resources to handle these cases?
- 21) [For representative bodies] Would you consider increasing your membership fees to reflect the provision of this service? If so, by how much would the membership fees increase?

Definition of grossly unfair payment contractual terms and practices

- 22) Do you think we should follow the Irish approach, and add additional indicative criteria to the UK definition of grossly unfair?
- 23) If we adopt such criteria, should consideration be given to “the strength of the bargaining positions of the supplier and the purchaser”? Are there any other criteria that are particularly important?

8. What happens next?

65. We welcome responses to this discussion paper until 9 March 2015. We intend to draft regulations based on the responses received and consult on these in the summer.
66. We will continue to speak to businesses and representative bodies throughout the policy development period.

Annex 1: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Angela on 020 7215 1661
or e-mail to: angela.rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see section 5).

Annex 2: 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 9 March 2015.

Please return completed forms to:

Natalie Sterman
3rd Floor, Piccadilly Gate
Store Street
Manchester
M1 2WD

Or

latepayment@bis.gsi.gov.uk

Name:

Organisation (if applicable):

Address:

Telephone:

email:

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

Giving powers to representative bodies to challenge “grossly unfair” terms and practices

The current situation

- 1) [If you are an SME, or a representative organisation for SMEs] How often do you think SMEs have suffered from being exposed to grossly unfair payment terms in the last 12 months, as a percentage of their contracts?

Comments:

- 2) [If you are a large business or a representative organisation for large businesses] How often do you think large businesses have suffered from being exposed to grossly unfair payment terms in the last 12 months, as percentage of their contracts?

Comments:

- 3) Have you noticed an increase in the use of terms and practices that could be considered grossly unfair in the last 12 months?

Yes No Not sure

If yes, what tend to be the circumstances?

Comments:

- 4) [For businesses] Would you classify yourself as a micro, small, medium or large business?

Micro Small Medium Large

Comments:

- 5) [For businesses] Have you ever approached a representative body for help to resolve disputes about terms and practices that oust or vary your right to statutory interest following a late payment?

Yes No *Continue to sub questions*

a. If yes, under what circumstances and, what was the outcome?

Comments:

b. If no, why?

Comments:

- 6) [For businesses] Would you every approach a representative body for help to resolve disputes about grossly unfair payment terms and practices above and beyond those related to statutory interest?

Yes No *Continue to sub questions*

a. If yes, under what circumstances?

Comments:

b. If no, why?

Comments:

- 7) [For representative bodies] Have you ever been approached to challenge grossly unfair late payment terms and practices, i.e. terms that oust or vary the right to statutory interest, on behalf of a business?

Yes No

If yes, please go to sub questions below. If no, continue to question 8.

a. How many times have you been called upon to help in this way in the last 12 months?

Comments:

b. Was the business a SME or a large business?

Comments:

c. What were the circumstances?

Comments:

d. What was the outcome?

Comments:

e. If applicable, which court did this end up in?

Comments:

f. What was the average cost of the cases taken to court on behalf of an SME or large business in the last 12 months?

Comments:

g. What is a rough breakdown of the cost for example legal cost staff costs etc?

Comments:

h. Does this differ between a case representing a SME or representing a large firm?

Comments:

8) [For representative bodies] Have you been made aware of any cases where the contract terms and practices could be deemed grossly unfair but have not been able to do anything about it?

Yes No

If yes, please go to sub questions below. If no, continue to question 9.

a. How many cases were there in the last 12 months?

Comments:

b. Were they a large business or a SME?

Comments:

- 9) Do you think the cost or resources needed will be significantly different if required to act on behalf of a business for grossly unfair payment terms?

Yes No Not sure

Comments:

Representative claims

- 10) Should representative bodies be able to take action on behalf of

- a) individual businesses
 b) groups of individual businesses
 c) both

Comments:

- 11) Do you agree that representative bodies should only be able to take action on behalf of members rather than non-members as well?

Yes No

Comments:

How to define “representative bodies”

- 12) Do you agree with our proposal to have an indicative list of representative bodies?

Yes No

Comments:

- 13) As a representative body, would you self-nominate yourself to represent businesses in this way?

Yes No Not sure

Comments:

14) Do you agree with our proposal that the list should be regularly reviewed?

Yes No

Comments:

Representing members without going to Court

15) [For representative bodies] Would you be more likely to use the threat of taking a company to court than actually take them to court?

Yes No Not sure

If yes, please go to sub questions below, if no, continue to question 16.

a. How often might you do this? What would your decision be based on?

Comments:

b. Are you able to give an indication of the financial benefits of doing so for you and the members you are representing?

Comments:

Court hearings

16) Do you have any comments on our proposals regarding court hearings?

Comments:

Winning and Losing a Case

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Comments:

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Comments:

- 19) [For representative bodies] How do you think the resource requirement may differ with the different options of where a case can be heard?

Comments:

- 20) [For representative bodies] Do you have the necessary resources to handle these cases?

Yes No Not sure

Comments:

- 21) [For representative bodies] Would you consider increasing your membership fees to reflect the provision of this service? If so, by how much would the membership fees increase?

Yes No Not sure

Comments:

Definition of grossly unfair payment contractual terms and practices

- 22) Do you think we should follow the Irish approach, and add additional indicative criteria to the UK definition of grossly unfair?

Yes No Not sure

Comments:

- 23) If we adopt such criteria, should consideration be given to “the strength of the bargaining positions of the supplier and the purchaser”? Are there any other criteria that are particularly important?

Comments:

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views.

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

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