



Department
for Business
Innovation & Skills

**LATE PAYMENT: CHALLENGING
'GROSSLY UNFAIR' TERMS**

Consultation Paper

OCTOBER 2015



**The Scottish
Government**
Riaghaltas na h-Alba

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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 £26.8 billion, and small businesses are waiting for an average of £31,901 in overdue payments. This has a damaging knock-on effect on small businesses' ability to manage their finances and plan for growth, while also pushing late payment further down the supply chain, affecting many more businesses.

The proposal set out in this consultation paper is part of a broad range of action the Government is taking to tackle late payment and unfair payment terms and practices: statutory measures on public procurement and to establish a Small Business Commissioner; action to increase transparency on payment practices; and promoting wider culture change with a strengthened Prompt Payment Code.

Small businesses are more vulnerable than larger businesses to unfavourable or unfair practices and often do not have the time or resource to challenge them. Through the Enterprise Bill the Government will create a Small Business Commissioner to help small businesses avoid having to go to court to resolve payment disputes with their larger commercial customers. However, in circumstances where small businesses do decide to litigate, the Government believes it is important that they have the range of options available to them to take action against 'grossly unfair' terms and practices.

This document sets out how the Government proposes to change the UK's statutory framework to provide business representative bodies with additional powers to challenge "grossly unfair" payment 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. This follows on from the discussion paper published by the Department in February 2015.

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. Following publication of this paper the Scottish Government will work with stakeholders to identify how this can be taken forward in Scotland. The paper is issued jointly with the Scottish Government.

Issued: 26 October 2015

Respond by: 27 November 2015

Enquiries to: Lisa Pearce, 0207 215 8675, latepayment@bis.gsi.gov.uk

This consultation is relevant to: business representative bodies and businesses of all sizes.

1. Foreword by the Rt. Hon Anna Soubry MP, Minister of State for Small Business, Industry and Enterprise



Small businesses are vital to our economic growth. But late payment continues to be a serious issue for small businesses and can cause serious cash flow problems and delay payments further down the supply chain. In the worst cases it can put successful small businesses in the UK at risk.

The Government is taking forward a package of measures to tackle the issues of late and prompt payment – both legislation and non-legislative. I am pleased that measures to create a Small Business Commissioner included in the Enterprise Bill, currently before Parliament, will provide support to small businesses, to help them deal disputes about payment without having to go to court. But there will still be times when going to court is the necessary course of action for small businesses to challenge unfair payment terms. In these circumstances I want small businesses to have

the range of options available to them, and, where they need it, the opportunity to have the support of their business representative bodies.

The 2011 EU Late Payment Directive gave business representative bodies the power to challenge “grossly unfair” contractual terms and practices. In February 2015, the Government published a discussion paper to seek views on proposals to expand the powers representative bodies in the UK already have to challenge some contract terms and practices, and it also asked whether we ought to better define “grossly unfair” in UK law. I am grateful to all who responded. As a next step, this document now sets out our proposals.

I want you to tell us what you think of our proposal. I would like to hear from businesses of all sizes, and our small business representative organisation.

2. Executive Summary

1. Late payment remains a significant issue for business, especially small businesses. As of June 2015, the overall level of late payment debt owed to small and medium sized businesses in UK is reported as standing at £26.8 billion. Late payment has a damaging knock-on effect on small businesses' ability to manage their cash flow and plan for growth, and in the worst case threatens their survival.
2. The Late Payment of Commercial Debts (Interest) Act 1998 and subsequent regulations created a statutory framework in the UK for tackling late payment.
3. The 2000 EU Late Payment Directive 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.
4. In 2011, the recast EU Directive extended the 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. The 2013 Regulations to the Late Payment Act implemented the requirements of the 2011 Directive which were not already transposed into EU law by virtue of the Late Payment Act or the 2002 Regulations. As a result, it was originally decided that we had transposed the representative body requirement so nothing further was required. Subsequently, the department reviewed its transposition of this requirement and felt that it was necessary to clarify our legislation to make it clear that a representative body can challenge any grossly unfair term.
5. In February 2015, we published a discussion paper to seek views on how to clarify our transposition of this broader power. This consultation paper fulfils our commitment to consult on our proposed changes to the UK's statutory framework, with draft regulations available for scrutiny.
6. There was broad support for the proposal to enhance the powers given to representative bodies to challenge the use of grossly unfair terms and practices so that they better reflect the intention of the 2011 directive. We are therefore proposing to widen the power representative bodies currently have to challenge certain contract terms and practices deemed "grossly unfair" on behalf of small businesses. Chapter 6 sets out our proposed approach.
7. Although there was support for further definition of the term "grossly unfair" the Government believes further work is required to investigate how successful such a change would be.

3. How to respond

8. The consultation will begin on 26 October 2015, closing on 27 November 2015.
9. 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.
10. The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/late-payment-and-grossly-unfair-terms-and-practices-changes-to-the-regulations> (until the consultation closes). The form can be submitted by email to: latepayment@bis.gsi.gov.uk
11. Other versions of the document in Braille, other languages or audio-cassette are available on request.

4. Confidentiality & Data Protection

12. 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.
13. 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

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

Lisa Pearce
 Assistant Director, Business to Business
 Department of Business, Innovation and Skills
 1 Victoria Street
 London SW1H 0ET

Tel: 0207 215 8675

Email: latepayment@bis.gsi.gov.uk

The consultation principles are in Annex A.

6. The proposals

Introduction

14. Late payment remains a significant issue for business, especially small businesses. In June 2015 the overall level of late payment debt owed to small and medium sized businesses in the UK was reported as £26.8 billion. This is down from £32.4 billion in June last year, but it is still significantly higher than the amount owed in 2008. On average small businesses are waiting for £31,900 in overdue payments. Late payment has a damaging knock-on effect on small businesses' ability to manage their cash flow and plan for growth, and in the worst case threatens their survival.
15. The FSB survey of its members in 2014 revealed that 51% had experienced late payment within the previous 12 months.
16. Figures obtained from by the Institute of Directors (IoD) in December 2014 found that two-thirds of its small and medium-sized members were having problems getting timely payment of an invoice, with damaging knock-on effects: late payment by one business could push the problem further down the supply chain, potentially affecting many more firms in that chain.
17. Small businesses are more vulnerable than large businesses to unfavourable or unfair practices and often do not have the time, resources or confidence to challenge them. The Government will establish a Small Business Commissioner to help small businesses avoid having to go to court to resolve payment disputes with their larger commercial customers. But in circumstances where small businesses do decide to litigate, to take action against unlawful 'grossly unfair' terms and practices, the Government believes it is important that they have the proper range of options available to them.

The Late Payment of Commercial Debts Act and EU Late Payment Directives

18. The Late Payment of Commercial Debts (Interest) Act 1998 created a statutory framework in the UK for tackling late payment. We added to this framework in August 2002 and again in March 2013 when we transposed the requirements of the 2000 and 2011 Late Payment Directives 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;
- 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.

19. 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.

20. For this reason, the 2000 EU Late Payment Directive¹ required EU Member States to introduce:

“provisions whereby organisations recognised as, or having a legitimate interest in representing small and medium-sized businesses 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”.

21. The 2002 Late Payment of Commercial Debts Regulations² 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.

22. In 2011, the re-cast Late Payment Directive³ was amended to introduce:

“provisions whereby organisations **officially** recognised as representing **undertakings 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”.

¹ 2000/35/EC - eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:200:0035:0038:EN:PDF

² www.secola.org/db/2_20/gb_ums2.pdf

³ 2011/7/EU - eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0007&from=EN

23. 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.
24. Following a consultation,⁴ the 2013 Late Payment of Commercial Debts Regulations⁵ 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.
25. In February 2015, the Government published a discussion paper to seek views on how to clarify its transposition of this broader power. It also sought views on proposals to further define the definition of “grossly unfair” payment practices. We received 39 written responses to the discussion paper, and subsequently published a summary of responses in May 2015.

Proposals

26. Generally speaking, there was support for the proposal to give representative bodies further powers to challenge grossly unfair terms and practices. Respondents thought that developing case law through the court system was a good way of helping to clarify the meaning of “grossly unfair”. We are therefore proposing to widen the power representative bodies currently have to challenge certain contract terms and practices deemed “grossly unfair” on behalf of small businesses.
27. Although there was support for further definition of the term “grossly unfair” the Government believes further work is required to investigate how successful such a change, for example, providing additional indicative criteria, would be.
28. The Government is however persuaded of the need for further action in this area. Through the Enterprise Bill we will create a Small Business Commissioner to consider complaints by small business suppliers about payment issues with larger businesses that they supply. The Commissioner will consider whether an act or omission relating to payment was fair and reasonable in the circumstance. We will consult on scheme regulations to specify matters that are to be taken into account by the Commissioner in making determinations.
29. This document sets out our proposal to make changes to the UK’s statutory framework to provide business representative bodies with additional powers to challenge “grossly unfair” payment contractual terms and practices as set out in the 2011 EU Late Payment Directive.
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”. 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.

⁴ www.gov.uk/government/consultations/consultation-on-implementing-directive-2011-7-eu-on-combating-late-payment-in-commercial-transactions

⁵ www.legislation.gov.uk/ukxi/2013/395/contents/made

Approved representative bodies

31. 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”⁶.
32. In our discussion paper, we proposed organisations would self-nominate themselves as representative bodies who would be willing to challenge grossly unfair terms and practices to be published on an official list maintained by the Secretary of State. Organisations not on the list wishing to take forward action in this context would not be precluded from doing so but would have to apply to the court to be recognised as such.
33. In terms of the level of demand among representative bodies to be able to challenge grossly unfair terms and practices, a third of representative bodies said they would nominate themselves as representative bodies in this context. Some respondents said that their decision would depend on their members and demand. Overall there was support for the proposal to publish a list of recognised representative bodies, however, on balance, we do not, intend to take forward this proposal. We believe this will add unnecessary bureaucracy to the process, and that representative bodies are in the best position to tell their members if they are able to take forward such action.
34. This would allow each representative body the flexibility to decide whether to take forward a case and to continue to allow the court the freedom, without any restrictions, to determine whether the organisation is within scope of the regulations.
35. 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.

On whose behalf can a challenge be made?

36. For the transposition of the 2000 Directive, the Government proposed that representative claims could only occur in cases of group action. However, given that the Directive was originally written to support SMEs, it could be argued that any time a single business is subjected to 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.
37. In our discussion paper, we asked whether representative bodies should be able to take action on behalf of individual business; groups of individual businesses; or both. We proposed 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.
38. The majority of respondents felt that representative bodies should be able to bring forward a challenge on behalf of groups as well as individuals (only 2 were in favour of groups only

⁶ www.secola.org/db/2_20/gb_ums2.pdf

and none for individuals only). The majority of respondents were also in favour of challenges being raised on behalf of members only. Some stated that there needed to be some flexibility, to allow them to join forces with other representative bodies or involve non-members to build a stronger case when challenging grossly unfair terms and practices.

39. We therefore propose that representative bodies should have the flexibility to decide whether to take action on behalf of individual businesses or groups of individual businesses, and also whether to take action on behalf of members or non-members.

7. Consultation questions

Q1. Do you agree that representative bodies should have the flexibility to take action on behalf of individuals and groups? If not, why?

Q2. Do you agree that representative bodies should have the flexibility to take action on behalf of members & non-members if they chose to do so? If not, why?

Draft Regulations

40. We have drafted Regulations on our proposed approach to implementing this change. You can find our draft Regulations at Annex C.

Q3. Do you have any additional comments you would like to make in relation to these draft Regulations?

8. What happens next?

41. The Government will consider the views expressed in response to this paper, along with further evidence and consideration of other factors to inform our final proposals.
42. We will publish a summary of the views expressed and reasons given for decisions finally taken. This document will be published on www.gov.uk with paper copies available on request.

Annex A: 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 B: Late payment: challenging ‘grossly unfair’ terms and practices 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 27/11/2015

Name:

Organisation (if applicable):

Address:

Please return completed forms to:

Lisa Pearce

Assistant Director, Business to Business
Department of Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Tel: 0207 215 8675

Email: latepayment@bis.gsi.gov.uk

Please tick a box from the list of option below what best describes you or your organisation:

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

| | |
|--|---|
| | Business representative organisation/trade body |
| | Trade union or staff association |
| | Other (please describe) |

Question 1: Do you agree that representative bodies should have the flexibility to take action on behalf of individuals and groups? If not, why?

Comments:

Question 2: Do you agree that representative bodies should have the flexibility to take action on behalf of members & non-members if they chose to do so? If not, why?

Comments:

Question 3: Do you have any additional comments you would like to make in relation to the draft Regulations?

Comments:

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

Annex C: Draft regulations

STATUTORY INSTRUMENTS

2015 No.

CONTRACTS, ENGLAND AND WALES

CONTRACTS, NORTHERN IRELAND

The Late Payment of Commercial Debts (Amendment) (No. 2) Regulations 2015

| | | |
|-------------------------------|---------|-----|
| <i>Made</i> | - - - - | *** |
| <i>Laid before Parliament</i> | | *** |
| <i>Coming into force</i> | - - | *** |

1. The Secretary of State, being a Minister designated⁽⁷⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽⁸⁾ in relation to matters relating to the combating of late payment in commercial transactions, makes the following Regulations in exercise of the powers conferred by section 2(2) of that Act.

Citation, commencement and extent

—(1) These Regulations may be cited as the Late Payment of Commercial Debts (Amendment) (No. 2) Regulations 2015 and come into force on x.

These Regulations extend to England and Wales and Northern Ireland.⁽⁹⁾

Amendment of the Late Payment of Commercial Debts Regulations 2012

—(2) Regulation 3 of the Late Payment of Commercial Debts Regulations 2012⁽¹⁰⁾ (proceedings restraining use of grossly unfair terms) is amended as follows.

In paragraph 2, omit 'which include a term purporting to oust or vary the right to statutory interest in relation to qualifying debts created by those contracts.'

Anna Soubry

Minister of State for Small Business, Industry and Enterprise

⁽⁷⁾ S.I. 2002/248.

⁽⁸⁾ 1972 c.68.

⁽⁹⁾ The functions of the Secretary of State under the Late Payment of Commercial Debts (Interest) Act 1998 are, so far as exercisable in or as regards Scotland, devolved to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

⁽¹⁰⁾ S.I. 2002/1674.

Date

Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement requirements of Directive 2011/7/EU of the European Parliament and of the Council of 16th February 2011 on combating late payment in commercial transactions.

These Regulations amend Regulation 3 of the Late Payment of Commercial Debts Regulations 2002. The amendment clarifies that representative bodies are able to challenge the use of any grossly unfair term.



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