Department
for Business
Innovation & Skills

# CHALLENGING GROSSLY UNFAIR PAYMENT TERMS AND PRACTICES

## Summary of responses

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# Challenging grossly unfair terms and practices: summary of responses

## Introduction

Late payment is a serious issue for businesses, especially small businesses. BACS data from January 2015[1] shows that small and medium enterprises (SMEs) are owed a total of £32.4 billion in late payment. On average small businesses are waiting for £31,900 in overdue payments. This has a damaging knock-on effect on small businesses' ability to manage their cash flow and plan for growth. In addition, late payment by one company can often push the problem down the supply chain, potentially affecting many more firms. Late payment further puts many SMEs perilously close to bankruptcy with £50,000 being the maximum that SMEs in the BACS survey said they could bear before going to the wall. More worryingly, 25 per cent of SMEs state that £20,000 or less is enough to jeopardise their business prospects.

The 2000 EU Late Payment Directive[2] 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". It therefore introduced a right to claim interest in the event of late payments and to reasonable additional compensation for administrative costs, as well as a maximum payment term of 60 days (subject to exceptions).

The Directive further 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".*

The 2002 Late Payment of Commercial Debts Regulations[3] 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.

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[1] http://www.bacs.co.uk/Bacs/DocumentLibrary/PR_Late_payments_are_forcing_businesses_to_make_tough_decisions.pdf
[2] 2000/35/EC - eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:200:0035:0038:EN:PDF
[3] http://www.secola.org/db/2_20/gb_ums2.pdf

In 2011, the re-cast Late Payment Directive[4] was amended to introduce:

*"provisions whereby organisations officially recognised as representing undertakings[5] 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".*

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.

However, "grossly unfair" remains an area open to interpretation. The Late Payment Act 1998 (Section 4 subsection (7A)) provides 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.

Our February 2015 discussion paper *Late Payment: Challenging grossly unfair terms and practices*[6] set out our proposal for how the wider representative bodies' powers could be further transposed into UK law. The paper also set out proposals to further refine the definition of "grossly unfair" payment practices by building on the precedent in other jurisdictions. We proposed that additional criteria could include consideration of when there is a disparity in bargaining power between the parties involved.

We suggested that 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.

This document provides a summary of the responses received to the discussion paper. It does not set out the Government response. We intend to publish and consult on draft regulations and a corresponding consultation stage impact assessment later this year.

[4] 2011/7/EU - eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0007&from=EN
[5] 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"*.
[6] https://www.gov.uk/government/consultations/late-payment-challenging-grossly-unfair-terms-and-practices

# Responses received

We received 39 written responses to the discussion paper. Of these, three responses were each endorsed by two further organisations.

27 responses were from business representative bodies, trade organisations and professional bodies in particular from the retail and construction sectors. We also had 11 responses from small and large businesses. A full list of respondents is available in Annex 1.

We have stated the overall responses we received, but will give appropriate weighting to the type of organisation which provided a response in our subsequent policy considerations. Future policy decisions will be based on analysis of individual responses.

# Summary of responses

## The current situation

This section covers questions 1-8 from the discussion paper.

### Late payment and grossly unfair terms and practices

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. There is little evidence, however, that this power is currently being used, if at all. This might be indicative of demand for the wider power. For this reason, we wanted to better understand demand for this measure and the circumstances under which businesses had taken, or would take, advantage of representative bodies acting on their behalf in the case of late payment disputes.

**Question 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?**

We received 29 responses from SMEs or organisations representing SMEs. Of these responses, 27 clearly stated that late payment and unfair terms were an issue for them or their members. We also received responses from 6 SMEs, with percentages ranging from 10% to 50%.

One representative organisation had undertaken a survey of its members on their experiences of payment in January 2015. The responses indicated that only 10% said that they were paid within 30 days more than 80% of the time, and that about 70% said they had been paid within 60 days. Another respondent said that in the first quarter of 2014, only 72% of public sector contracts were paid within 30 days.

One further respondent had conducted some research in February 2015 which indicated that:

- 46% of their members felt that the inability to negotiate terms was a problem and that 12% saw it as a big issue; and
- 43% felt that businesses changing terms and conditions of payment without warning was problematic with 16% reporting that it was a big problem.

In terms of frequency in the last 12 months, 5 respondents said they experienced grossly unfair terms up to and including 50% of the time. One said it was over 75% of the time. 3 respondents said that over 75% of SMEs were exposed to grossly unfair terms. One agreed with the Federation of Small Business' member feedback of 51% of SMEs having experienced these terms[7], (data included in the original discussion paper).

Respondents generally agreed that late payments can have serious consequences for smaller businesses. One respondent explained that "These practices can be severely damaging for specialist businesses, especially SMEs, stunting business growth and consuming valuable time and energy in chasing payment that is owed." And another felt that their sector was jeopardized by the UK's late payment culture.

Respondents also provided examples of terms and practices they consider grossly unfair – a list is available under question 3.

**Question 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?**

We received 16 responses from large businesses or organisations representing large businesses. 11 stated that they or their members had been affected by late payment or unfair terms. 4 large companies did not provide a response and one stated that 5% of contracts were affected. We received 4 responses providing quantitative data, stating that large businesses were exposed to grossly unfair terms from 5-10% to 50-75% of the time.

In general, while respondents agreed that large businesses are also exposed to grossly unfair terms, they felt that it was less of a problem for them when compared to SMEs. One respondent argued "[…] larger businesses have greater resources at their disposal and ready access to specialist advice for the purpose of pursuing unpaid fees and for eradicating poor and unfair contractual terms before they become an issue."

**Question 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?**

We received 24 responses. 18 said they had noticed an increase in the use of grossly unfair terms and practices. From the 16 representative bodies who responded in total, 12 stated that they had noticed an increase and six businesses responded positively to the question. From all the responses, only two stated that they had not noticed an increase. A further four were not sure.

[7] www.fsb.org.uk/policy/assets/publications/fsb-member-survey-2013-uk.pdf

Respondents provided a wide variety of terms they consider grossly unfair, many of which were sector specific. The common ones were:

- Lower interest rates for late payments
- Excessively long payment terms
- Flat fees/"pay to stay"
- Discounts – either for prompt payment or applied retrospectively ("balance sheet bonuses")
- Making a (sub)contractor responsible for, or unable to challenge, a decision that was made as part of a wider project or further up the supply chain
- Clauses which allow the payer/client to withhold or delay payment:
    - By imposing the right to withhold money for losses that might occur in the future
    - By setting off the money due on one contract for alleged breaches of another
    - By exploiting complexities of the Construction Act payment provisions to prevent payments from becoming due
    - By including provisions that make the payer the sole arbiter of whether the required quality has been achieved, allowing arbitrary deductions from the value of work performed or resulting in delays in payments
    - By imposing administrative conditions, after work has started, as a precedent to payment
    - By imposing impracticable conditions precedent to the right to be paid for changes or extras

Some other grossly unfair terms provided by respondents included:

- Exclusive remedy provisions – SME documents may exclude the SME from utilising any of the remedies available in general law and limit the SME only to those remedies expressed within the contract
- Pay-when-paid third party insolvency – the SME is asked to bear the financial brunt of a third party upstream becoming insolvent, when the SME has no visibility upstream to monitor the risk of that party becoming insolvent and its client is best placed to manage that risk

**Using representative bodies to challenge grossly unfair terms: the business perspective**

We specifically asked for views from businesses on how they have, and would, challenge grossly unfair terms and practices. 11 businesses plus one individual working for a small business responded to questions in this section.

**Question 4: Would you classify yourself as a micro, small, medium or large business?**

Respondents defined themselves as 1 micro business, 2 small businesses, 2 medium sized businesses and 7 large businesses.

**Question 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?**

Businesses are currently able to approach representative bodies to challenge terms or practices which seek to oust or vary the right to interest resulting from a late payment on their behalf. We wished to understand whether businesses had taken advantage of this dispute resolution option.

8 of the 11 companies had never approached a representative body to help them resolve a dispute of this kind. The other 3 companies did not respond.

When asked why not, 7 of those 8 responded and feedback varied considerably. The three large businesses stated they would try to resolve any issues directly because most representative bodies are not perceived to have any actual power. One large business did comment that they would be willing to engage with a representative body if the other party had requested this. The four smaller businesses said fear of being removed from supplier lists and the time and cost involved in challenging this prohibited them from approaching a representative body. One said they were not aware of any representative bodies to approach in such a case.

**Question 6: Would you ever 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?**

Under further transposition of the 2011 Directives, representative bodies would have power to challenge grossly unfair terms and practices on behalf of all businesses, rather than just SMEs. It would also cover all contractual terms or practices deemed “grossly unfair” in relation to late payment, rather than just those terms drawn up for general use. We wished to understand whether companies would approach a representative body under these wider conditions.

Of the 11 businesses, 3 SMEs and 1 large business stated that they would consider this. Equally, 4 said they would not. The rest did not respond. SMEs said they would consider approaching a representative body as grossly unfair practices seem to be becoming the norm. The large business said they would consider it but only if the representative body had teeth. 3 SMEs stated that they would not consider approaching a representative body

for fear of upsetting their clients or being removed from supplier lists. Again, it was considered too costly and time consuming.

## Using representative bodies to challenge grossly unfair terms: the representative body perspective

We also wished to understand the representative bodies' point of view on the existing power to challenge grossly unfair terms and practices, and how any wider transposition of the power would impact on them. 27 representative bodies responded to the discussion paper.

**Question 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?**

As previously explained, representative bodies currently have the power to challenge terms or practices that seek to oust or vary the right to statutory interest resulting from a late payment on behalf of a small business. We asked whether they had ever been approached to challenge such terms. 18 of the 27 representative bodies responded. 8 of them had been approached to challenge terms considered grossly unfair and 10 had not been approached.

We further asked how often they had been approached in the last 12 months (question 7a). 11 representative bodies replied to this question. 5 said they had been contacted only a few times, 4 said they received such requests frequently. In terms of actual numbers, responses varied between 0 and 9, to 180 cases.

We asked whether such requests typically came from SMEs or large businesses (question 7b). Only 4 responded but all of them said they were typically approached by SMEs as opposed to large businesses.

Subsequent questions asked about the circumstances, the costs, which court cases ended up in and outcomes of the case (questions 7c-h). Only 8 representative bodies responded to some of these questions, mainly responding to the circumstances of the cases. In 6 cases, members approached a dedicated (legal) helpline or team within a representative body which provided advice on contractual matters. One respondent tried to take forward a test case but subsequently had to drop it due to the high cost of the challenge. When approached by a member about a case of unfair practice, one of the respondents stated that they use media campaigns rather than the legal system to force firms to change their terms or practices. Only one representative body stated that they had taken one case to court after their member had gone insolvent.

**Question 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?**

We further asked if representative bodies had 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. This would give us better evidence as to whether to expand the existing

power as per the 2011 Directive. 16 of 27 representative bodies responded stating that they had been made aware of cases where they had not been able to take action. 3 said they had not.

We asked for further information on how often they had been approached in relation to such cases in the last 12 months (question 7a). 15 responded to this question. 8 were only able to say they had been made aware of this “many” or “numerous” times. A further 5 respondents were able to provide more concrete numbers, ranging from 3 or 4 to 800 cases.

When asked whether cases tended to involve SMEs or large companies (question 7b), 11 of the 27 representative bodies stated that these cases related to SMEs. Only 2 said they affected large businesses. The other representative bodies did not respond. One of the main reasons why SMEs are unwilling to step forward is the fear of jeopardising a relationship with a supplier, or the relative size or importance of the other party. According to one respondent “it is this imbalance of market power that has led to the proliferation of ‘pay to stay’ and other such unpopular tactics from suppliers. Our experience has been that the victims of these practices are overwhelmingly SMEs but that large businesses are not immune.” A further respondent said that while by the EU definition a business will be classified as “large”, when compared to big multinational companies they are actually comparatively small.

## Giving representative bodies further powers to challenge grossly unfair terms and practices

This section covers questions 9-21 from the discussion paper.

### General feedback on proposal

Generally speaking, there was support for the proposal to give representative bodies further powers to challenge grossly unfair terms and practices (24 in favour compared to 9 against). Respondents thought that developing case law through the court system was a good way of helping to clarify the meaning of “grossly unfair”. In the longer term, this would give businesses, especially SMEs, more confidence to challenge grossly unfair terms.

However, some respondents disagreed, stating that “Representative bodies should not play a role in legal claims on commercial matters, rather champion best practice.” 5 respondents, plus two endorsers, suggested setting up an adjudicator to act in place of either the representative bodies or the courts, while another suggested that access to hearings before a tribunal, sector or professional body should be maintained. One respondent suggested creating “an empowered agency/authority which may take up and consider practices that are evidently occurring in commercial contractual arrangements and to make rulings on whether they are grossly unfair. An example of a similar arrangement is the Competition and Markets Authority’s powers to investigate unfair contract terms in consumer contracts.” A further 3 suggested that more should be done to promote best practice and strengthen existing mechanisms.

**Providing a list of approved representative bodies**

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”[8].

In the discussion paper, we proposed organisations would self-nominate themselves as representative bodies, who would be willing to challenge grossly unfair terms and practices. These would 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. This would have to be done on each occasion they wished to take action in this way. We further suggested criteria which organisations may wish to consider when deciding whether to nominate themselves.

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

We wished to understand whether there was demand amongst representative bodies to be able to challenge grossly unfair terms and practices.

9 of the 27 representative bodies said they would self-nominate themselves as representative bodies in this context, a further 6 said they weren’t sure and 8 said they would not. Only 5 did not respond to the question.

One respondent summarised the reasons why they would not wish to be recognised in this way as “Taking court action on contract law is a specialised field and the representative rights proposed fall outside [our] capacity, capability and budget”. Another stated: “It is important for [us] to remain neutral in any and all disputes involving [our] members, particularly where a dispute may be one member against another, and seek to supply each party with professional and objective advice as appropriate.”

Respondents who were not sure said their decision to be recognised as a representative body in this context would depend on their members and demand.

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

We wanted to gain views on how our proposal was received from both representative bodies and the business community. 20 of all respondents agreed with the proposal of a published list of recognised representative bodies (compared to 8 who did not).

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[8] www.secola.org/db/2_20/gb_ums2.pdf

**Question 14: Do you agree with our proposal that the list should be regularly reviewed?**

In the discussion paper we proposed that, over time, this list would need to be updated. This might occur when a new organisation applied to be added to the list, or when a representative body decided they no longer had the resource to be able to represent businesses in this way. Therefore, this list ought to be reviewed at regular intervals. 18 of all respondents agreed the list should be regularly reviewed. None disagreed.

**Whose behalf can a challenge be made?**

**Question 10: Should representative bodies be able to take action on behalf of a. individual businesses; b. groups of individual businesses; or c. both?**

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

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.

We also 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.

In response to question 10, 19 of all 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 and none for individuals only). Four businesses responded to the proposal and stated a preference for groups and individuals. Among representative bodies, 14 stated a preference for individuals and groups and two stated a preference for just group action.

For question 11, 15 respondents were in favour of challenges being raised on behalf of members only, but 8 disagreed. Among representative groups, 13 of 18 favoured a members-only approach and this figure stood at two of four for businesses. Some felt that, in cases of group action, representative bodies should have the choice of whether to represent members as well as non-members. In addition, four felt that they might wish to join forces with other representative bodies or involve non-members to build a stronger case when challenging grossly unfair terms and practices. They, therefore, would not want to be restricted to only bring cases on behalf of members.

**Bringing cases to court**

We expect that taking another firm to court for using grossly unfair terms and practices should be the last step of the process. When a business approaches a representative body for help, we would assume that all other avenues for resolution had been unsuccessful.

In both Directives, representative claims may be brought before the courts or “competent administrative bodies”. While there may be a case in favour of bringing claims before a tribunal or 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. Furthermore, pursuing matters through the courts are the number of remedies available to end cases of bad practice, e.g. an injunction.

However, we anticipate that representative bodies would 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 this could be followed up with 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?**

18 of the 27 representative bodies commented on this question. 9 respondents agreed that they would be more likely to threaten legal action rather than taking a firm to court in the hope of an agreeable outcome, than actually doing so. 6 were not sure, while 3 said they would not use this.

Taking legal action would be used only as a last resort. The hope would be that the threat of an expensive and time-consuming court case might be enough to prompt an amicable solution. Respondents, therefore, agreed that the threat of going to court would be used more often than going to court (question 15a).

Some respondents warned that this could be an empty threat if a representative body were not able to take the case to court, e.g. due to lack of resources. One respondent commented, “We don't believe a sustainable business relationship should be based upon threats, by either side.” Equally, one respondent said that this could be perceived as a form of blackmail, i.e. change your terms or we will take you to court, and considered this proposal inappropriate. Conversely, one respondent commented, “If large contractors believe that SMEs are more likely to seek redress for late payments with this mechanism in place, they may be more likely to pay on time in the first place.”

We asked about the financial benefits of threatening court action for the representative body and their members (question 15b). As well as being more cost effective, 3 of 8 respondents to this question agreed that encouraging a firm to change their unfair terms in favour of the supplier would improve cash flow but equally also have more long-term non-

financial benefits: “If large companies are required to change their terms this is likely to improve the cash flow of SMEs and that, in turn, promotes growth through investment in jobs, training and technology. The resultant financial benefits would be incalculable.”

However, one respondent warned “We do not see any real indication of the financial benefits of going to court as the relationship with the customer will be irrevocably damaged and the supplier could lose further contracts as a result.”

**Question 16: Do you have any comments on our proposals regarding court hearings?**

Three respondents commented that the civil court fees are due to increase in April, which could prove prohibitive.

We noted 7 respondents also suggested alternatives to court action, including introducing an adjudicator or independent body to challenge grossly unfair terms and practices.

**Question 17: [For representative bodies] How often might you take a case to court? What would the decision be based on?**

17 of the 27 representative bodies responded to this question. 5 restated that they would not wish to get involved in court proceedings themselves. The others said they would only rarely take a firm to court, if at all, and only after other routes had failed. Their decision to go ahead would be based on costs primarily, as well as the legal precedent, the merits and impact of winning the case and the likelihood of winning. It would also depend on the member’s willingness to take the case to court.

### Resources

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. We wished to better understand the resource implications for representative bodies should they consider taking legal action.

**Question 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?**

13 of the 27 respondents said it would impact on them significantly; a further 4 were not sure. None felt this would not be the case. One respondent outlined their resource requirements as: “Our only source of revenue is from our members. We would need to charge our members accordingly, bring in new resource, expertise, change our corporate governance, liability insurance and all other structures.”

**Question 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?**

We had 17 responses to this question. 6 said they would need additional legal resource and the costs involved in taking legal action could be considerable, as they do not have the in-company or financial resources to represent businesses in court proceedings. In addition, it would vary depending on the type of case and the size of the company being

represented. "The bigger the case or company, the bigger the likely costs and hence the risk to the businesses and the representative body supporting each case. However, in circumstances of a lost case, the proportional negative effect on an SME is likely to be greater than to that of a larger company."

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

14 of the 27 representative bodies responded. They generally agreed that costs should be kept to a minimum. Alternative, and potentially lower cost, options to taking a case to court were again suggested, e.g. an adjudicator or tribunal, though it was acknowledged that the court is the best place if the aim is to develop case law. One respondent summarised as "The main benefit of tribunals and other smaller hearings is to reduce complexity and costs, but in this case it seems clear that the benefits of allowing court hearings and thus the development of case law and precedent will outweigh the additional costs of such hearings." One respondent felt that the use of an adjudicator, rather than the courts, would make it more likely for a challenge to be brought.

**Question 20: [For representative bodies] Do you have the necessary resources to handle these cases?**

Of the 27 representative bodies, 18 responded. 12 said they did not have the necessary resources to handle these cases, especially legal and financial. 3 said they did and a further 3 weren't sure.

Two respondents said they would be reluctant to put themselves at the financial risk and may therefore not go ahead with this without (financial) support. There was also the question of whether representative bodies have the necessary insurance to cover themselves.

**Question 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?**

Only 7 representative bodies responded. None said they would consider increasing their membership fees, and all respondents clearly stated that they would not do this. There was strong agreement amongst respondents that this would be inappropriate and would not be welcomed by members.

## Further defining "grossly unfair"

This section covers questions 22-23 from the discussion paper.

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. It can also be open to interpretation.

In the discussion paper, we proposed further defining "grossly unfair" following the Irish precedent which 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 extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and
- the extent of the term.

We were particularly interested in views on whether to include the strength of the bargaining positions of the supplier and purchaser in the enhanced definition.

**General feedback on proposal**

The majority of respondents agreed that the current definition of "grossly unfair" is not clear enough and more clarity would be valued (27 agreeing compared to 6 disagreeing). This would also give businesses more confidence as to what constitutes "grossly unfair" and possibly give them more confidence to challenge unfair terms.

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

All respondents were asked to respond. 24 agreed with this approach and that additional indicative criteria would be welcome. Only 2 did not agree. Of those who disagreed, one was a business representative body and the other a large company. Those who agreed were: 17 business representative bodies, one charity, one individual, one large company, two medium companies, one small business and one micro business. Those who were against this proposal were concerned this would result in more stringent rules with regards

to contracts. Two respondents suggested referring to Schedule 2 of the Unfair Contract Terms Act which includes some of the proposed criteria.

**Question 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?**

Again, all respondents could comment on this question but only 26 did so. 14 agreed that the bargaining positions should be considered as a criterion for defining grossly unfair, 12 of these responses came from business representative bodies and the other responses came from a charity and a medium business. Two thought this was not appropriate. Some respondents asked for caution and to investigate further how successful or useful the Irish model really is, and consider other European jurisdictions' approach to grossly unfair. Sector specific differences should also be considered.

## Next steps

Over the coming months, we will continue to engage with stakeholders to refine how this policy could be best implemented. We intend to publish and consult on draft regulations and a corresponding consultation stage impact assessment later this year.

# Annex 1: List of respondents

| ALDI Stores Ltd |
|---|
| Association for Consultancy and Engineering |
| Association of Accounting Technicians |
| Association of Convenience Stores |
| Association of Interior Specialists |
| Association of Licensed Multiple Retailers |
| Association of Recruitment Consultancies |
| B&Q |
| BCSA Ltd |
| British Beer & Pub Association |
| British Chamber of Commerce |
| British International Freight Association |
| British Retail Consortium |
| Building & Engineering Services Association |
| CECA North East (Civil Engineering Contractors Association) |
| Chartered Institute of Credit Management |
| Confederation of British Industry |
| Electrical Contractors' Association |
| Federation of Small Business |
| Food and Drink Federation |
| Forum for Private Business |
| Kingfisher |
| Lawrence Harvey Search & Selection Ltd |
| Lochwynd Ltd |
| Market Research Society |
| Matthew Clark Wholesale Ltd |
| myfm ltd |
| National Federation of Roofing Contractors |
| National Specialist Contractors' Council |
| Recruitment & Employment Confederation |
| Road Haulage Association Ltd |
| Screwfix |
| Specialist Engineering Contractors' (SEC) Group |
| St Helens Chamber Ltd |
| The Institute of Practitioners in Advertising |
| Tungsten Corporation |
| Waste Management Total Solutions Ltd |
| Williamson Tea |

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Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000
Email: enquiries@bis.gsi.gov.uk

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