



Department for
Business, Energy
& Industrial Strategy

LATE PAYMENT AND 'GROSSLY UNFAIR' TERMS AND PRACTICES: CONSULTATION

Summary of responses and government
response



February 2018

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Foreword

Andrew Griffiths MP, Minister for Small Business, Consumers and Corporate Responsibility

As we take forward a package of measures to tackle the issues of late payment, the government believes that it is important for small businesses to have a range of options available to them. This includes the support of their representative bodies.

We know smaller businesses are reluctant to launch legal challenges against larger firms. This can be for fear of damaging their business relationships, or concerns over a lack of resource or in-house expert knowledge.

That's why my department published a consultation seeking views on proposals to change the UK's statutory framework to provide business representative bodies with broader power to challenge 'grossly unfair' payment contractual terms and practices.

I am grateful to all those who took time out to respond. This document contains a summary of those responses, as well as setting out the government response taking into account what you told us.



Introduction

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.¹ 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.

In October 2015 we published a consultation paper² which set out how the government proposes to change the UK's statutory framework to provide business representative bodies with broader power to challenge 'grossly unfair' payment contractual terms and practices as set out in the 2011 EU Late Payment Directive³.

This followed the publication of a discussion paper in February 2015⁴.

Proposals

Our consultation paper set out proposals to change to the UK's statutory framework to widen the power representative bodies currently have to challenge certain contract terms and practices deemed 'grossly unfair' as set out in the 2011 EU Late Payment Directive.

The paper proposed that a representative body should be defined, as in UK law, as "an organisation established to represent the collective interests of small and medium-sized enterprises in general or in a particular sector or area". We also suggested that representative bodies would have the flexibility to decide whether to take forward a case and the courts would, as is currently the case, have the freedom to determine whether the organisation is within scope of the regulations. Representative bodies would be under no obligation to take forward requests for representation. Instead, they would be able to choose which cases to take forward, if any.

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'. 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 consultation paper. It also sets out the government response. We have published revised regulations and a corresponding impact assessment alongside this document.

¹ BACS data

² www.gov.uk/government/consultations/late-payment-and-grossly-unfair-terms-and-practices-changes-to-the-regulations

³ On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

⁴ www.gov.uk/government/consultations/late-payment-challenging-grossly-unfair-terms-and-practices

Summary of responses

Responses received

We received a total of 32 written responses to the consultation paper. Of these, six responses made either general comments on the wording of the draft regulation or outlined personal experience of late payment only. Whilst these experiences are useful to understand in developing late payment policy, these did not directly answer the questions asked in the consultation paper and so are not reflected in this document. All comments relating to the wording of the regulations were considered by the department's lawyers.

This document is based on the 26 responses to the consultation questions. Of these 26 responses, 23 came from business representative bodies, trade organisations and professional bodies. We also had 2 responses from businesses and 1 from an individual.

Responses

The consultation asked 3 questions about the draft regulations. This chapter summarises the feedback received.

In the consultation paper we proposed that representative bodies should have the flexibility to decide whether to take action on behalf of individual businesses or groups of individual businesses.

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

In response to question 1, there was strong support for allowing representative bodies the flexibility to take action on behalf of individual and groups of businesses. 26 respondents answered this question. 20 respondents felt that this flexibility should be allowed, but 4 disagreed. 2 respondents stated that they 'did not know'.

Of the 20 respondents who agreed, 12 stated that whilst they agreed in principle they would not immediately choose to make use of the wider power, and take on a case on behalf of their members. This was largely due to the potential financial implications of taking forward a case. One trade body however, was already thinking of how they would get round this:

"The cost of adapting to a new model will be high and a cost that had to be passed on to members. The likelihood is that action will only be taken on behalf of 'groups of firms' affected since this is likely to be more cost effective."

In the consultation paper we proposed that representative bodies should have the flexibility to decide whether to take action on behalf of members and non-members.

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?

Again, 26 respondents answered this question. There was strong support amongst these respondents for allowing representative bodies flexibility to take action on behalf of member

and non-members. 20 felt that this flexibility should be allowed, but 4 disagreed. A further 2 respondents stated that they 'did not know'. Of the 20 respondents who agreed with allowing this flexibility, 12 stated that they would not immediately seek to take on, or take up the action in practice. Again, the main reason cited was the financial implications of taking a case to court, with one representative body stating that "we would need to take the time to work up a costed case as this would need to be a fully chargeable service. Until full costs were known it would be impossible to say if it was a viable option". Others felt they would need to consult with their membership before taking it on.

Finally, we asked whether respondents had any additional comments to make in relation to the draft regulations.

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

18 respondents provided additional comments on the regulations. The comments were wide ranging - some raised substantive issues, and others highlighted minor suggested drafting changes.

5 of the 18 respondents felt that the draft regulations needed to make reference to 'unfair terms and practices', and not just 'unfair terms', as drafted. Respondents thought that including 'practices' would act as a stronger deterrent. 5 respondents also discussed ways to extend the remit of the new Small Business Commissioner, which was being established through the Enterprise Act 2016 during the consultation.

3 respondents felt strongly that the regulations should extend the power to representatives of all businesses and not just small and medium sized enterprises (SMEs).

12 respondents felt there remained a need for clarity of the definition of 'grossly unfair' primarily to ensure representative bodies were fully informed before making a decision to take action on late payment. Comments included:

"We are concerned that representative bodies who have the flexibility to take action on late payments will not have the necessary knowledge or expertise to decide whether to take action on late payments on behalf of members. This includes an appropriate interpretation of grossly unfair".

"The lack of clarity on what grossly unfair constitutes also has the potential to dissuade representative bodies from incurring the cost of taking court action, as it will be difficult to predict a successful outcome."

Government response

Challenging grossly unfair payment terms and practices

Given the broad support for the proposal, we will make a change to the UK's statutory framework to widen the power representative bodies currently have to challenge certain contract terms and practices deemed "grossly unfair" as set out in the 2011 EU Late Payment Directive. This change is subject to Parliamentary approval. Under this change, representative bodies will have the flexibility to decide whether to take action on behalf of individual businesses or groups of individual businesses. Representative bodies will be able to decide whether to take action on behalf of members or non-members.

Following the views expressed on the draft regulations published with the consultation paper, we have included 'practices' as well as 'terms'. Furthermore we have removed the reference to SME's from Regulation 3(1) of the Late Payment of Commercial Debts Regulations 2002 so that a 'representative body' is defined as 'an organisation established to represent the collective interests of any enterprise, either in general or in a particular sector or area'.

There was support for further definition of the term 'grossly unfair', and we will consider the impact of any case law that develops through the courts system. A study has been undertaken to gather further information on the implementation of the Directive in all EU countries, and this agreed that greater clarity on this term was desirable. We will consider further ways to improve clarity.

The government is however persuaded of the need for further action to challenge late payment. Through the Enterprise Act 2016 we created a Small Business Commissioner who will 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 circumstances. We have now laid scheme regulations to specify matters that are to be taken into account by the Commissioner in making determinations.

It is important to remember that this change to the legislative framework 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; action to increase transparency on payment practices; and promoting wider culture change with the Prompt Payment Code.

Annex 1: List of respondents

- Association of Accounting Technicians
- Association for Consultancy and Engineering
- Association of Recruitment Consultancies
- British Chambers of Commerce
- British Hospitality Association
- British Telecom
- Building & Engineering Services Association
- CADA Design
- Chartered Institute of Credit Management
- Chemical Business Association
- Confederation of Construction Specialists
- Commercial Law Committee of the City of London Law Society
- Federation of Small Businesses
- Food and Drink Federation
- Forum of Private Business
- Genesis Initiative
- Growth Innovators Group Limited
- Institute of Chartered Accountants in England and Wales
- Institute of Directors
- National Federation of Roofing Contractors
- Road Haulage Association Limited
- Specialist Engineering Contractors Group
- Stratlab Limited
- The Society of Motor Manufacturers and Traders
- Traidcraft Exchange



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