

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: ACCESS TO FINANCE

Assignment of receivables

Section 1: Power to invalidate certain restrictive terms of business contracts

104. This section provides a power for the appropriate authority to make regulations restricting the effect of terms in business contracts that restrict the ability of one of the parties to assign a right to be paid under the contract (known as a “receivable”) to a third party. The appropriate authority is the Secretary of State, except in relation to contracts to which the law of Scotland applies, for which the Scottish Ministers are the appropriate authority. Businesses commonly obtain up-front finance against the value of unpaid invoices, assigning the right to the payment due under those invoices to a third party finance provider. Contractual terms which restrict the ability to assign rights to be paid have an impact on businesses’ ability to obtain finance in this way.
105. Subsection (1) enables regulations made under the power to make such terms ineffective either generally or in relation to particular persons or for specified purposes. Subsection (2) defines the type of contractual term concerned. This covers terms which prohibit assignment or impose conditions or other restrictions on a contracting party’s ability to assign a right to be paid, whether under that contract or any other contract between the parties.
106. Subsection (3) sets out which types of contracts come within the scope of the power to make regulations. It applies to contracts for goods, services or intangible assets, where at least one of the parties is acting in the course of a business. Financial services contracts are, however, excluded from scope: the definition of a financial services contract for these purposes is set out in subsection (4) and section 2, although the regulations are to prescribe the types of financial services contract which are excluded.
107. Subsections (7) and (8) provide ancillary powers for the Scottish Ministers in consequence of regulations made under Section 1. These include the power to make transitional, transitory and saving provision and to amend, repeal, revoke or otherwise modify provisions made by or under an enactment (including an Act of the Scottish Parliament).
108. Subsection (10) makes the making of regulations by the Secretary of State under the power subject to affirmative procedure, so that a draft of the regulations must be approved by both Houses of Parliament, before the regulations can be made. Regulations made by the Scottish Ministers are subject to the affirmative procedure in the Scottish Parliament.

Section 2: Section 1(4)(a): meaning of ‘financial services’

109. This section defines “financial services” for the purposes of section 1, subsection (4). The definition covers any service of a financial nature and includes an indicative list of the types of service covered. These include insurance related services, banking and other financial services.

Business payment practices

Section 3: Companies: duty to publish report on payment practices

110. This section provides a new power to enable the Secretary of State to require certain companies to publish information about their payment practices, policies and performance relating to business to business contracts.
111. Subsections (2) and (3) define the scope of the power in terms of the types of company and types of contract to which regulations made under it may apply. The scope extends to all Companies Act companies apart from micro-entities, small and medium-sized companies. As subsection (3) uses the Companies Act definitions of micro-entity, small company and medium-sized company, which do not include public companies within their scope, the reporting requirement can be applied to any public company, regardless of whether it meets Companies Act 2006 accounting thresholds. The duty to publish information on payment practices and policies can be applied to large Limited Liability Partnerships via secondary legislation, making use of powers available in the Limited Liability Partnerships Act 2000.
112. Subsection (2) also sets out the types of contract to which regulations made under the power may apply. The regulations will apply to contracts for goods, services or intangible assets where at least one of the parties is acting in the course of a business and where the contract is of a description prescribed in the regulations. The Government considers that it will be appropriate for some specific types of contract to be excluded from the scope of the reporting requirement, notably financial services contracts, and will consult further on the detail of this.
113. Subsection (4) sets out an indicative list of the specific matters on which regulations made under the power may require companies to report in respect of relevant contracts. The list given in the subsection is not definitive, enabling the detailed requirements that will be set out in the secondary legislation to be informed by further consultation.
114. Subsection (5) provides that the regulations may designate a specified person within a company who will be responsible for approval or signature of the information to be disclosed, for example a company director.
115. Subsection (6) provides that the regulations may require that companies make the reporting information available to certain people, such as a new supplier entering into a significant contract with the company.
116. Subsection (7) sets out a power to create an enforcement regime for compliance with the reporting requirement. In line with Companies Act reporting provisions, subsection (7) creates a power for the imposition of a criminal sanction. For these purposes the sanction is limited to a fine on summary conviction.
117. Subsection (8) requires the Secretary of State to undertake further consultation before the regulations are made. Subsection (9) requires the power to be exercised by regulations to be made by affirmative resolution, so that a draft of the regulations must be approved by both Houses of Parliament before the regulations can be made.

Financial information about businesses

Section 4: Small and medium sized businesses: information to credit reference agencies

118. **Section 4** gives the Treasury the power to make regulations imposing a duty on designated banks to provide information about their small and medium sized business customers to designated credit reference agencies (“CRAs”), and to impose a duty on designated CRAs to provide information about small and medium-sized businesses to finance providers. Subsections (2) and (3) require that the recipient request the information and the business to which the information relates agree to the information being provided, before the duties apply. Subsection (4) enables the regulations to impose other conditions that must be met before the duty applies to a CRA, such as the finance provider that has requested the data providing information about its small and medium sized business customers to the CRA.
119. Subsection (5) requires the regulations to describe the information that must be provided by designated banks and CRAs (and by finance providers requesting information, if a condition is imposed requiring the provision of data by finance providers). Subsection (7) requires the regulations to provide for the designation of banks and CRAs by the Treasury, which may include matters such as conditions that banks or CRAs must meet before they may be designated, considerations or advice that the Treasury may take into account, how the list of designated banks and CRAs is to be published, and the revocation of designations.
120. The Act allows regulations to make different provision for different purposes, cases or areas. This means that the regulations may make different provisions for banks, CRAs and finance providers, or for particular types of bank, CRA or finance provider. The regulations may also provide that the criteria for designating banks or CRAs under subsection (7) differ as between different parts of the UK.

Section 5: Small and medium sized businesses: information to finance platforms

121. **Section 5** gives HMT the power to make regulations imposing a duty on designated banks to provide information about small and medium sized business customers that they reject for finance to designated finance platforms. Subsection (2) requires that this duty may only apply where the business has agreed to its information being shared with designated platforms, and enables the regulations to require designated banks to seek such agreement or further information from businesses, and to provide the information to the designated platforms within a specified period. Subsection (3) allows the regulations to make further provision about the duty on designated banks, including specifying the types of applications that will be in scope of the duty, what constitutes a rejection, and which platforms must be provided with the information.
122. Subsection (4)(a) allows the regulations to impose a duty on designated platforms to provide the information they receive to finance providers who request access to it. Subsection (5) requires that such information must be anonymised. Subsection (4)(b) allows the regulations to require platforms to provide information about a particular business where a finance provider has requested it and the business has agreed to its provision. Subsection (6) allows the regulations to provide that the duty on platforms to share information with finance providers does not apply to finance providers that have not agreed to platforms’ terms and conditions or do not comply with specified requirements about use and disclosure of the information.
123. Subsection (7) allows the regulations to make further provision about the duty on finance platforms to provide information to finance providers; including the timeframe in which platforms must provide information to finance providers; how requests for information must be made to finance platforms, how businesses may agree to their information being provided to finance providers; how long platforms must retain information on businesses; and the removal of information from the finance platform.

124. Subsection (8) allows the regulations to prohibit or permit the charging of fees by platforms to small and medium sized businesses for their service.
125. Subsection (9) requires the regulations to provide for the designation of banks and finance platforms by the Treasury, which may include matters such as conditions that banks or platforms must meet to be designated, considerations or advice that the Treasury may take into account, how the list of designated banks and platforms is to be published, and the revocation of designations.

Section 6: Sections 4 and 5: supplementary

126. This section supplements the power for the Treasury to make regulations in sections 4 and 5. Subsections (1) to (3) enable the regulations to confer functions on the Financial Conduct Authority, to do with the monitoring and enforcement of compliance with the regulations, which may include applying a modified version of the monitoring and enforcement regime in the Financial Services and Markets Act 2000.
127. Subsection (4) provides the Treasury with a power to extend the remit of the Financial Ombudsman Service (FOS) so that a complaint may be referred to the FOS about a designated CRA or designated finance platform. This will allow the remit of the FOS to be amended such that a person who would be able to seek a FOS decision when dealing with a CRA or finance platform authorised by the Financial Conduct Authority is also able to seek a FOS decision when dealing with a designated CRA or finance platform that is not so authorised. And it will also enable all those businesses that generally have recourse to the FOS (those with turnover of less than £2 million) to seek FOS decisions in respect of the activities of designated CRAs and finance platforms, rather than just individuals and small firms as at present.
128. Subsection (5) enables the regulations to require designated CRAs to provide information received under the regulations to the Bank of England, subject to provision to protect the confidentiality of the information.
129. Subsection (6) enables the regulations to provide that where a designated bank or CRA has failed to comply with a duty to provide information, a person may sue to recover any loss suffered as a result of that failure.
130. Subsection (7) enables the regulations to apply provisions in the Data Protection Act 1998 and the Consumer Credit Act 1974 about access and correction of information about individuals and small firms to designated CRAs that are not authorised by the Financial Conduct Authority under the Financial Services and Markets Act 2000 in the same way that those provisions apply to CRAs that are authorised, so that the same protections apply to information about individuals and small firms provided to a CRA under the regulations, whatever the status of the CRA.
131. Subsection (8) enables the regulations to provide a small or medium-sized business with the right to apply to a court for an order to rectify, block, erase or destroy data held about the business by a designated CRA. This enables the regulations to mirror an equivalent provision in section 14 of the Data Protection Act 1998 which applies only to personal data about individuals.
132. Subsection (9) provides for the regulations to impose a duty on designated finance platforms to provide statistical information to the Treasury.
133. Subsection (10) requires regulations under sections 4 and 5 to be approved by both Houses of Parliament before being made by the Treasury.

Section 7: Sections 4 to 6: interpretation

134. Section 7(1) defines the small and medium sized businesses about which regulations may be made under sections 4 and 5, one element of which is a turnover of less than £25 million, and subsections (3) to (5) enable the Treasury to make regulations changing

the figure of £25 million. Subsection (2) defines finance platforms, and the finance providers to which designated CRAs and finance platforms may be required to provide information under sections 4 and 5.

Section 8: Disclosure of VAT registration information

135. **Section 8** provides for HMRC to release non-financial VAT data for the purpose of assessing creditworthiness, the risk of fraud or compliance with regulations relating to financial matters (a “financial assessment”). Further disclosure of any information shared is barred without the specific consent of HMRC.
136. The section also makes provision for HMRC to attach conditions as part of the sharing of information with any ‘person’ and lists specific (although non-exhaustive) examples of the type of conditions that may be provided for in such arrangements. Finally, it enables additional purposes for which data may be disclosed to be provided for by regulations made by the Treasury. Any such regulations will be subject to the affirmative resolution procedure.

Section 9: Offences for the purposes of Section 8

137. **Section 9** creates offences for the misuse of any data shared under section 8. These are equivalent to those which already exist under section 19 of CRCA. The section also applies the sanctions which apply under that section.

Exports

Section 10: Disclosure of exporter information

138. **Section 10** provides HMRC with a power to make regulations authorising the disclosure of specified data in relation to the exports of goods. The information will be obtained from customs declarations made by exporters to HMRC. Section 8 of the Finance Act 1988 already allows HMRC to disclose specified data from customs declarations in relation to importers of goods. The power will be exercisable by way of affirmative resolution.
139. **Section 10 (3)** provides a limit on the information that may be disclosed under the regulations by confining the data that may be specified to a list of categories.

Section 11: Power of the Secretary of State under section 1 of the EIGA 1991

140. **Section 11** amends section 1 of the Export and Investment Guarantees Act 1991 (the “EIGA”) and changes that section’s title to reflect those amendments.
141. The amended section 1(1) will empower the Secretary of State, acting through the Export Credits Guarantee Department, to make arrangements which he considers are conducive to supporting or developing (in both cases whether directly or indirectly) exports or potential exports, of goods, services or intangible assets by persons carrying on business in the United Kingdom.
142. The amended section 1(1) will broaden the powers of the Secretary of State with regard to support for exports in certain respects. Principally, it will make it easier for the Secretary of State to support more complex export contracting structures, to support businesses engaged, or wishing to become engaged, in exporting or in exporting supply chains in the United Kingdom and to provide support for exports of intangibles, such as licences of software or other intellectual property.
143. The new section 1(5) empowers the Secretary of State to provide advice to exporters in addition to the financial support which he is already empowered to provide.

Section 12: EIGA 1991: further amendments

144. **Section 12** amends section 6 of the Export and Investment Guarantees Act 1991 (the “EIGA”).
145. The amendment to section 6(1) consolidates the present sterling and foreign currency limits on the liabilities which the Secretary of State, acting through the Export Credits Guarantee Department, may incur under sections 1 & 2 of the EIGA, in supporting UK exports and UK investments overseas, into a single limit expressed in special drawing rights and equivalent to the aggregate value of the existing limits.
146. The amendment to section 6(3) consolidates the corresponding limits in section 6(3) for liabilities arising under portfolio management arrangements entered into under section 3.
147. The consolidations will allow the Secretary of State to access the spare capacity under the relatively unutilised sterling limits.
148. The amendment to section 6(4) allows the Secretary of State, by order, to increase either of the new limits up to three times following the commencement of the Small Business, Enterprise and Employment Act 2015.
149. The amendment to section 13 of the EIGA repeals section 13(4) of that Act.
150. Section 13(4) of the EIGA requires the Secretary of State to consult the Export Guarantees Advisory Council (EGAC) when exercising his duty under section 11(2) of the EIGA to determine, from time to time, whether it is in the national interest for him to reinsure persons providing insurance for classes of risk that he might himself have insured under section 1 of the EIGA.
151. The repeal of s13(4) removes that requirement because the remit of EGAC is now to advise the Secretary of State on the application of ECGD’s ethical policies and there is no longer any need for the Secretary of State to consult the EGAC on matters relating to the provision of reinsurance.

Presentment of cheques etc

Section 13: Electronic paying in of cheques etc.

152. **Section 13** inserts a new Part 4A into the Bills of Exchange Act 1882, replacing the existing alternative method of presenting cheques for payment at sections 74B and 74C of the 1882 Act (which are repealed by subsection (4)).
153. In new section 89A of the 1882 Act, subsection (1) provides that a relevant paper payment instrument may be presented by providing an electronic image of the front and back of the instrument.
154. Subsections (3) and (4) enable the Treasury to make regulations to restrict the circumstances in which presentment by image is permissible.
155. Subsections (4) to (6) remove existing requirements that apply to the presentment of a cheque or other instrument that would be inconsistent with presentment in an electronic system, such as the exhibition, presentment and delivery of the paper instrument itself, and a particular place and time of presentment.
156. Subsection (7) ensures that the duties of the bankers involved in presentment and payment are the same as they would be if the paper instrument were presented.
157. New section 89B describes the types of payment instrument that may be presented under section 89A. Key requirements are that the instrument is one which enables a person to obtain payment from a banker, that it is an instrument that must be presented for payment, and that it could not otherwise be presented electronically.

158. New section 89C provides that the new method of presentment is not available where a bank imposes terms on a customer which require the customer to provide an image of the instrument for paying in, and prevent the customer from providing the instrument itself to the bank.
159. New Section 89D enables HMT to make regulations requiring a bank which pays a cheque or similar instrument to provide a copy of the instrument to the paying customer on request, and providing that this copy stands as evidence that the sum payable has been received.
160. In new section 89E, subsection (1) enables the Treasury to make regulations allowing claims for compensation for certain types of loss arising out of electronic presentment of an instrument to be made against the bank which is responsible for collecting the funds on behalf of the customer (that also being, in almost all circumstances, the bank which is responsible for the decision about how and by whom the electronic image is created). The regulations may also cover situations where there is no proper presentment, for example where there is no valid underlying instrument or the instrument did not qualify for electronic presentment. Such regulations could, for example, provide for a claim by the drawer of a cheque or the bank that paid the cheque where the payment was made to the wrong account because of a defect in the image, or where the image had been created fraudulently. Subsection (5) enables the regulations to provide for strict liability, and for the liability to be reduced by the contributory negligence of the claimant. Subsection (6) ensures that if a bank has to pay compensation under the regulations, it is not prevented from making a claim against another party for a contribution towards the compensation.

Payment systems

Section 14: Powers of the Payment Systems Regulator

161. This section amends section 108 of the Financial Services (Banking Reform) Act 2013 so that:
 - i. the existing restriction in that section on the Payment Systems Regulator's exercise of its powers to enable access to a payment system does not apply in relation to systems to which the access provisions of the Payment Services Directive, as implemented in UK law via the Payment Services Regulations 2009, do not apply (including, most significantly, systems designated under the Settlement Finality Directive); and
 - ii. a similar but narrower restriction is applied in relation to those systems to which the access provisions of the Payment Services Directive do apply.
162. This section also amends section 58 of the Financial Services (Banking Reform) Act 2013 so that the power for the Payment Systems Regulator to require disposal of ownership interests in payment systems extends to an ownership interest in an infrastructure provider for a regulated payment system.