

EXPLANATORY MEMORANDUM TO

THE LATE PAYMENT OF COMMERCIAL DEBTS (AMENDMENT) REGULATIONS 2018

2018 No. 117

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These regulations transpose article 7(5) of the EU Directive 2011/7/EU to allow representative bodies to challenge certain grossly unfair contractual terms and practices in the High Court on behalf of businesses. Where a representative body brings proceedings, the High Court can grant an injunction to stop the use of a grossly unfair term or practice.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Late Payment of Commercial Debts (Interest) Act 1998¹ (the “Late Payment Act”) and subsequent regulations created a statutory framework in the UK for tackling late payment of commercial debts.
- 4.2 The 2000 EU Late Payment Directive (2000/35/EC) gave representative bodies the power to challenge certain contract terms deemed “grossly unfair”, on behalf of small businesses. This power was transposed into UK law by the Late Payment of Commercial Debts Regulations 2002 (S.I. 2002/1674, the “2002 Regulations”), in relation to certain terms that seek to “oust or vary the right to statutory interest” following a late payment.
- 4.3 In 2011, Directive 2011/7/EU (the “recast Directive”), which replaced Directive 2000/35/EC, extended the power to allow representative bodies to challenge contractual terms or practices with regards to late payment considered “grossly unfair”, on behalf of any business. The Late Payment Act was amended in 2013 to transpose those requirements of the recast Directive which were not already

¹ 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.

transposed by virtue of the Late Payment Act or the 2002 Regulations. The power of representative bodies was not amended at this stage. Subsequently, the department reviewed the transposition of this requirement and decided to clarify the legislation to make it clear that a representative body can challenge grossly unfair terms or practices relating to late payment.

- 4.4 These Regulations will not apply retrospectively. They will affect contracts made from the date these Regulations enter into force.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales and Northern Ireland.
- 5.2 The territorial application of this instrument is England and Wales and Northern Ireland.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 As of June 2015, the overall level of late payment debt owed to small and medium-sized businesses is reported as standing at £26.8 billion. Evidence shows that 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, and in the worst case threatens their survival. Small businesses often do not have the time or resource to challenge such unfavourable or unfair practices.
- 7.2 The Late Payment Act, the 2002 Regulations and the 2000 and recast Directives aim to create an environment where paying on time is the norm and late payment is seen to be unacceptable across the business community. They tackle late payment in commercial transactions, through measures including giving creditors a right to charge interest for late payment. This instrument makes a change to the UK's statutory framework to provide business representative bodies with broader power to challenge "grossly unfair" contractual terms and practices relating to late payment, on behalf of businesses. This is to ensure that small businesses have a range of options available to take action against such "grossly unfair" terms and practices, including the opportunity to have support of representative bodies. It transposes the obligation in article 7(5) of EU Directive 2011/7/EU.
- 7.3 This instrument makes clear that representative bodies may challenge grossly unfair terms and practices relating to payment dates or periods, the right to late payment interest or compensation for late payment. It extends the right to challenge such terms and practices to representatives of all businesses, not just small and medium enterprises, so representative bodies of any business can decide to challenge. Representative bodies will 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.

Consolidation

- 7.4 This instrument does amend existing regulations, but there is currently no intention to consolidate the legislation in this area.

8. Consultation outcome

- 8.1 In February 2015, the Government published a discussion paper to seek views on how to clarify the transposition of the power for representative bodies. The consultation ran from 3 February to 9 March 2015. 39 responses were received and a summary of responses was published in June 2015. Generally speaking, there was support for the proposal to give representative bodies further powers to challenge grossly unfair terms and practices. In October 2015 the Government set out its intention to amend the power for representative bodies in the consultation *Late Payment: Challenging 'Grossly Unfair' Terms*, and published draft regulations for consultation. The government response details broad agreement for this amendment to the transposition. The consultation ran for a month from 26 October 2015. 32 responses were received, the majority of which were from business representative bodies, trade organisations and professional bodies.

9. Guidance

- 9.1 General guidance for the UK's transposition of the Directive is available at: <https://www.gov.uk/government/publications/late-payment-directive-user-guide-to-the-recast-directive>

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is estimated to be a £0.8 million cost for Representative Bodies to familiarise themselves with the change. The benefits of this policy are indirect and to a large extent will depend upon the behavioural responses from debtors, the wider economy and the potential outcomes of successful legal precedents being established. The more cases brought before the courts, the greater the potential benefits could be. Extending the scope for representative bodies to challenge certain grossly unfair terms and practices in the courts on behalf of businesses will enhance the confidence of suppliers who would otherwise not wish to take on court action alone, thereby improving the chances of a case being taken forward.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 A review provision has been included in the regulations to require the Secretary of State to review section 3 of the regulations. As this statutory instrument is part of broader legislation, and will affect the late payment landscape as part of a range of measures that Government is undertaking, there are no plans to monitor this section of the regulations in isolation.

13. Contact

- 13.1 Kathleen Minett at the Department for Business, Energy and Industrial Strategy. Telephone: 0207 215 2584 or email: kathleen.minett@beis.gov.uk can answer any queries regarding the instrument.