

# **Small Business Commissioner and Late Payments etc Bill [HL]**

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## EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Member in charge of the Bill, Lord Mendelsohn, have been ordered to be published as HL Bill 44 – EN.



# Small Business Commissioner and Late Payments etc Bill [HL]

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## CONTENTS

### PART 1

#### AMENDMENTS TO THE LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998

- 1 Introductory
- 2 Statutory limit for payment of invoices
- 3 Resolution of payment disputes
- 4 Entitlement to interest payment and penalties for non-compliance
- 5 Substantial remedy

### PART 2

#### AMENDMENTS TO THE ENTERPRISE ACT 2016

- 6 Introductory
- 7 Role of the Small Business Commissioner: remit
- 8 Penalty notices, rights of appeal and determination of appeals
- 9 Role of the Small Business Commissioner: publishing ranked performance data
- 10 Prohibition of specified practices

### PART 3

#### AMENDMENTS TO OTHER ENACTMENTS

- 11 The Companies Act 2006: auditors' reporting duties
- 12 Amendments to secondary legislation

### PART 4

#### SECRETARY OF STATE TO AMEND REGULATION 113 OF THE PUBLIC CONTRACTS REGULATIONS 2015

- 13 Regulation 113 of the Public Contracts Regulations 2015

**PART 5**

FINAL PROVISIONS

14 Short title, extent and commencement

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**B I L L**

TO

Make provision to amend the statutory limits for payment of invoices; make provision for a statutory time limit for resolving payment disputes; amend interest for late payments and penalties for persistent late payments and non-compliance; prohibit specified payment practices, on-boarding and pay-to-stay; require payments becoming due under public sector construction projects to be held in project bank accounts; amend the remit, role and powers of the Small Business Commissioner in regard to late payments; provide for a duty on auditors to publish late payment data; and for connected purposes.

**B**E IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**PART 1**

AMENDMENTS TO THE LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998

**1** **Introductory**

The Late Payment of Commercial Debts (Interest) Act 1998 is amended in accordance with sections 2 to 5.

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**2** **Statutory limit for payment of invoices**

- (1) Section 4 (period for which statutory interest runs) is amended as follows.
- (2) In subsection (2E) for “60-day” in both places substitute “30-day”.
- (3) After subsection (2H), insert—  
“(2HA) “Payment” is the point at which the payee is in receipt of cleared funds”
- (4) Omit subsection (2I).
- (5) In subsection (5B), omit “and (2I)(c)”.
- (6) In subsection (6), omit “and (2I)(a)”.

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### 3 Resolution of payment disputes

After section 5A, insert the following new sections –

#### **“5B Statutory time limits for resolving payment disputes**

- (1) A purchaser must notify the supplier of a dispute regarding a supplier’s invoice before the end of the verification period. 5
- (2) The verification period is the period of 21 days beginning with the later of –
  - (a) the day on which the obligation of the supplier to which the debt relates is performed; or
  - (b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt. 10
- (3) The Secretary of State must provide by regulations made by statutory instrument for –
  - (a) how notifications of disputes are to be notified to the supplier; and 15
  - (b) the evidence to be retained by the purchaser concerning the notification of the dispute.
- (4) A statutory instrument containing regulations under subsection (3) is subject to annulment in pursuance of a resolution of either House of Parliament. 20
- (5) A purchaser is not permitted to raise a dispute after the end of the verification period.
- (6) Any sums undisputed between the two parties are to be paid in full by the purchaser, subject to the statutory time limit as set out in section 4 of this Act. 25
- (7) In this section, “dispute” means a dispute about the amount of the invoice, or any other matters that the Secretary of State considers appropriate as set out in regulations made by statutory instrument under this section. 30
- (8) A statutory instrument containing regulations under this section, except those under subsection (3), may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

#### **5C Resolving payment disputes and referral to the Small Business Commissioner** 35

- (1) Upon notification of the dispute, both parties (supplier and purchaser) have 30 days to resolve the dispute (“the resolution period”).
- (2) For the purposes of subsection (1), the resolution period can be extended if both parties agree to an extension in writing. 40
- (3) For the purposes of subsection (2), if one party does not agree to an extension within seven days of the initiating party’s written expression, then the resolution period is not extended.

- (4) For a resolution to be agreed, both parties must confirm the agreed terms of resolution in writing.
  - (5) For the purposes of subsections (2) and (4), there is an agreement in writing if—
    - (a) the agreement is made in writing, 5
    - (b) the agreement is made by exchange of communications in writing, or
    - (c) the agreement is evidenced in writing, by both parties.
  - (6) Should a resolution between the two parties not be agreed within the resolution period, either party may complain to the Small Business Commissioner under the scheme established in accordance with section 4 of the Enterprise Act 2016. 10
- 5D Disputes referable to adjudication under section 108 of the Housing Grants, Construction and Regeneration Act 1996** 15
- (1) Subject to subsection (2), sections 5A to 5C and this section do not apply where a party to a construction contract refers a dispute arising under the contract for statutory adjudication in accordance with section 108 (right to refer disputes to adjudication) of the Housing Grants, Construction and Regeneration Act 1996. 20
  - (2) Where a party to a construction contract—
    - (a) has a dispute over the amount in an application, an invoice, a payment notice or a pay less notice, and
    - (b) has the right to refer the dispute to statutory adjudication under section 108 of the Housing Grants, Construction and Regeneration Act 1996, 25it may instead refer the dispute to the Small Business Commissioner if the dispute constitutes a small claim.
  - (3) Subsection (2) applies irrespective of any contractual provisions governing the right to refer disputes to statutory adjudication. 30
  - (4) The Secretary of State must make provision by regulations about—
    - (a) the definition of a small claim in subsection (2),
    - (b) the procedure for referring a dispute under this section to the Small Business Commissioner, and
    - (c) the process by which the Commissioner must decide such a dispute. 35
  - (5) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
  - (6) In this section—
    - “pay less notice” means a notice under section 111(3) (requirement to pay notified sum) of that Act, and
    - “payment notice” means a notice which complies with section 110A (payment notices: contractual requirements) of the Housing Grants, Construction and Regeneration Act 1996.” 45

- 4 Entitlement to interest payment and penalties for non-compliance**
- (1) Section 5A (compensation arising out of late payments) is amended as follows.
- (2) After subsection (3) insert –
- “(3A) Where a contract exists between a small business and a larger business or a public authority, and the purchaser is a larger business or public authority, compensation and statutory interest must be paid at the same time as the invoice, regardless of whether a supplier has requested the compensation for late payment.” 5
- (3) Omit subsection (5) and insert –
- “(5) In this section – 10
- (a) “contract term” means a term of the contract relating to a sum due to the supplier under this section;
- (b) “larger business” has the meaning given by section 3(11) (general advice and information) of the Enterprise Act 2016;
- (c) “public authority” has the meaning given by section 13 (definitions used in part 1) of the Enterprise Act 2016; 15
- (d) “small business” has the meaning given by section 2(1) (small businesses in relation to which the Commissioner has functions) of the Enterprise Act 2016.”
- (4) Section 6 (rate of statutory interest) is amended as follows. 20
- (5) After subsection (1) insert –
- “(1A) The Secretary of State must provide in the order made under subsection (1) for the statutory interest rate to increase by 50% in cases where the qualifying debt, statutory interest on the debt and any compensation payable under section 5A have not been paid in full within 60 days of the agreed payment day or (if there is none) the last day of the relevant 30-day period. 25
- (1B) In subsection (1A) “agreed payment day” and “relevant 30-day period” have the meanings given in section 4.”
- 5 Substantial remedy** 30
- (1) Section 9 (meaning of substantial remedy) is amended as follows.
- (2) After subsection (3) insert –
- “(3A) A substantial remedy cannot be less than an amount that is the lower of – 35
- (a) the interest rate applied by the purchaser to its own customers, or
- (b) the purchaser’s blended cost of finance as reported in its statutory accounts plus 4%.”
- (3B) For the purposes of subsection (3A)(b), “blended cost of finance” must be defined in the regulations made by the Secretary of State.” 40

## PART 2

### AMENDMENTS TO THE ENTERPRISE ACT 2016

#### 6 Introductory

The Enterprise Act 2016 is amended in accordance with sections 7 to 10.

#### 7 Role of the Small Business Commissioner: remit

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- (1) In section 1 (Small Business Commissioner) –
  - (a) in subsection (2)(b) “small businesses” insert “, the Secretary of State or an auditor”;
  - (b) in subsection (2)(b) after “larger businesses” insert “and public contracting authorities”; 10
  - (c) after subsection (2)(b) insert –
    - “(c) to impose penalty notices for persistent late payment, non-compliance and mis-reporting of payment performance data (see section 5A);
    - (d) to collate and publish ranked payment performance data including interest and compensation paid (see section 9A).” 15
- (2) The Secretary of State must by regulations made by statutory instrument provide for construction operations to be included within the remit of the Small Business Commissioner. 20
- (3) For the purposes of subsection (2), “construction operations” has the meaning given by section 105 of the Housing Grants, Construction and Regeneration Act 1996.
- (4) For the purposes of subsection (2), a statutory instrument containing regulations may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament. 25
- (5) In section 3 (general advice and information), after subsection (11) insert –

“(12) In this Part “public contracting authority” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity.” 30
- (6) In section 4 (the SBC complaints scheme) –
  - (a) in subsection (3), after paragraph (c) insert –

“or a complaint which – 35

    - (d) is made by the Secretary of State (“the complainant”) or
    - (e) is made by an auditor in carrying out duties under section 498(2)(d) of the Companies Act 2006 (“the complainant”).”;
  - (b) in subsection (4)(a), for “or a failure to pay” substitute “, a failure to pay (in whole or in part), late payment, or a failure to pay interest or compensation”; 40

- 
- (c) after subsection (4)(a)(ii) insert –
- “(4A) For the purposes of subsection (4)(a), a complaint which relates to a “late payment” is one which relates to payments made outside the relevant statutory periods set out in –
- (a) regulation 113 of the Public Contracts Regulations 2015 (S.I. 2015/102) (payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors), or 5
- (b) section 4 of the Late Payment of Commercial Debts (Interest) Act 1998.”; 10
- (d) after subsection (4) insert –
- “(4A) For the purposes of subsection (4)(a), a complaint which relates to a “late payment” is one which relates to payments made outside the relevant statutory periods set out in –
- (a) regulation 113 of the Public Contracts Regulations 2015 (S.I. 2015/102) (payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors), or 15
- (b) section 4 of the Late Payment of Commercial Debts (Interest) Act 1998.” 20
- (7) Section 5 (enquiry into, consideration and determination of complaints) is amended as follows.
- (8) In subsection (2) omit “voluntarily”.
- (9) After subsection (2) insert –
- “(2A) Any refusal from either party to provide information or documents relevant to the Commissioner’s enquiry will be stated in the Commissioner’s report under section 6 of this Act and will be considered in the determination of the complaint”. 25
- (10) In subsection (3), for “, and may give” substitute “and”.
- (11) In subsection (6), after “future” insert “including by means of independent arbitration in accordance with the Arbitration Act 1996”. 30
- (12) After subsection (6), insert –
- “(6A) The determination may contain a financial penalty under conditions set out in section 5A (financial penalties)”.
- (13) In subsection (8) after “recommendations” insert “and any penalty notice”. 35
- (14) In subsection (9) after “recommendations” insert “or any penalty notice”.
- (15) In subsection (11) omit “not”.
- 8 Penalty notices, rights of appeal and determination of appeals**
- (1) After section 5 insert the following new sections –
- “5A Penalty notices** 40
- (1) If the Commissioner is satisfied that a relevant public contracting authority has persistently failed or is persistently failing in relation to

- payment as described in section 4(4)(a), the Commissioner may, by written notice (a “penalty notice”), require the person to pay to the Commissioner an amount in sterling not exceeding £1,000,000 specified in the notice.
- (2) If the Commissioner is satisfied that a relevant business has persistently failed or is persistently failing in relation to payment as described in section 4(4)(a), the Commissioner may, by written notice (a “penalty notice”), require the person to pay to the Commissioner the higher of –
- (a) an amount in sterling not exceeding £10,000,000, or
  - (b) 4% of the undertaking’s total annual worldwide turnover in the preceding financial year,
- as specified in the notice.
- (3) For the purposes of subsection (1) or (2), a penalty notice can include interest on debt as set out in section 6 of the Late Payment of Commercial Debts (Interest) Act 1998.
- (4) In this section, “persistently” means having had two or more relevant complaints for failing as described in section 4(4)(a) investigated by the Commissioner in the preceding 18 calendar months.
- (5) If the Commissioner is satisfied that a relevant public contracting authority or business has misrepresented or is non-compliant regarding publishing payment performance data as set out in regulations made under section 3 of the Small Business, Enterprise and Employment Act 2015, the Commissioner may, by a penalty notice, require the person to pay to the Commissioner an amount in sterling specified in the notice.
- 5B Rights of appeal**
- (1) A person who is given a penalty notice under section 5A of this Act may appeal to the First-tier Tribunal (“the Tribunal”).
- (2) A person who is given a penalty notice may appeal to the Tribunal against the amount of the penalty specified in the notice, whether or not the person appeals against the notice.
- (3) Where a determination is made under section 5A in respect of late payment under section 5A(1) or (2) or misreporting or non-compliance regarding publishing payment performance data under section 5A(5), the person who is the subject of the determination may appeal to the Tribunal against the determination.
- 5C Determination of appeals**
- (1) Subsections (2) to (4) apply where a person appeals to the Tribunal under section 5B.
- (2) The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.
- (3) If the Tribunal considers –
- (a) that the notice or decision against which the appeal is brought is not in accordance with the law, or
  - (b) to the extent that the notice or decision involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently,

the Tribunal must allow the appeal or substitute another notice or decision which the Commissioner could have given or made.

- (4) Otherwise, the Tribunal must dismiss the appeal.

#### **5D Prosecution**

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|---|----|
| (1) In England and Wales, proceedings for an offence under this Act may be instituted only –  | 5  |
| (a) by the Commissioner, or   |    |
| (b) by or with the consent of the Director of Public Prosecutions.  |    |
| (2) In Northern Ireland, proceedings for an offence under this Act may be instituted only –   | 10 |
| (a) by the Commissioner, or   |    |
| (b) by or with the consent of the Director of Public Prosecutions for Northern Ireland.   |    |
| (3) Subject to subsection (4), summary proceedings for an offence under section 5A (penalty notices) may be brought within the period of 6 months beginning with the day on which the prosecutor first knew of evidence that, in the prosecutor’s opinion, was sufficient to bring the proceedings. | 15 |
| (4) Such proceedings may not be brought after the end of the period of 3 years beginning with the day on which the offence was committed.   | 20 |
| (5) A certificate signed by or on behalf of the prosecutor and stating the day on which the 6-month period described in subsection (3) began is conclusive evidence of that fact.   |    |
| (6) A certificate purporting to be signed as described in subsection (5) is to be treated as so signed unless the contrary is proved.   | 25 |
| (7) In relation to proceedings in Scotland, section 136(3) of the Criminal Procedure (Scotland) Act 1995 (deemed date of commencement of proceedings) applies for the purposes of this section as it applies for the purposes of that section.”   |    |
| (2) In section 7(2)(a) (scheme regulations) at the end insert “unless the complainant is the Secretary of State”.   | 30 |

#### **9 Role of the Small Business Commissioner: publishing ranked performance data**

After section 9 insert the following new section –

- |  |           |
|--|-----------|
| <b>“9A Publishing of ranked payment performance data</b>   | <b>35</b> |
| (1) The Commissioner must at the end of each financial year publish ranked payment performance data for –                                  |           |
| (a) large businesses (as defined in section 3(11)),  |           |
| (b) public contracting authorities,  |           |
| including late payment interest and compensation for which each are liable and which each have paid.                                       | 40        |
| (2) Data for the purposes of subsection (1) must be compiled through the published payment performance data as set out in regulations made |           |

under section 3 (companies: duty to publish report on payment practices and performance) of the Small Business, Enterprise and Employment Act 2015.”

## 10 Prohibition of specified practices

After section 40 insert the following new section – 5

### *“Prohibition of specified payment practices*

#### **40A Prohibition of specified practices regulations**

- (1) The Secretary of State must provide by regulations made by statutory instrument for the prohibition of –
  - (a) purchasers demanding discounts for early payment of invoices, 10
  - (b) purchasers imposing charges on suppliers for –
    - (i) submitting invoices, or
    - (ii) becoming a supplier (“on-boarding” practices), or
    - (iii) maintaining approved supplier status (“pay-to-stay” practices), and 15
  - (c) purchasers using payment clauses that preclude suppliers from ceasing supply or placing works on hold for non-payment.
- (2) Regulations under this section may make transitory or transitional provision or savings.
- (3) A statutory instrument containing regulations under this section must not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.” 20

## PART 3

### AMENDMENTS TO OTHER ENACTMENTS

## 11 The Companies Act 2006: auditors’ reporting duties 25

- (1) The Companies Act 2006 is amended as follows.
- (2) In section 495 (auditor’s report on company’s annual accounts) –
  - (a) after subsection (2)(d) insert –
    - “(e) a report on the published payment performance of the company required by regulations made under section 3 of the Small Business, Enterprise and Employment Act 2015.”; 30
  - (b) in subsection (3), after paragraph (a)(iii) insert –
    - “(iv) in the case of payment performance, of the state of the payment performance of the company for the end of that financial year”. 35
- (3) In section 498 (duties of auditor) –
  - (a) after paragraph (c) insert –
    - “(d) the payment performance record as set out in regulations made under section 3 of the Small Business, Enterprise and Employment Act 2015 is not in 40

- agreement with the accounting records or the data is not accurate,” and
- (b) after “the auditor shall state the fact in his report” insert “and, where paragraph (d) applies, send a copy of the report to the Small Business Commissioner.” 5
- (4) In section 507 (offences in connection with auditor’s report) –
- (a) after subsection (2)(a) insert –
- “(aa) section 498(2)(d) (statement that company’s payment performance does not agree with accounting records and returns or the data is not accurate);” 10
- (b) after subsection (4) insert –
- “(5) A person found guilty of an offence under subsection (2)(aa) is liable –
- (a) on summary conviction in England and Wales, to a fine;
- (b) on summary conviction in Scotland or Northern Ireland, 15
- to a fine not exceeding level 5 on the standard scale.
- (6) For the purposes of subsection (2)(aa), a person may be found guilty of the offence if late payment has been reported to and determined by the Small Business Commissioner under section 5 of the Enterprise Act 2016 (enquiry into, consideration and determination of complaints) and was not reported in the auditor’s report.” 20

## 12 Amendments to secondary legislation

- (1) The Public Contracts Regulations 2015 (S.I. 2015/102) are amended as follows.
- (2) In regulation 113(7)(b) after “to pay interest” insert “and compensation”. 25
- (3) After regulation 113(7)(c) insert –
- “(d) the total number of invoices that were not paid in accordance with those obligations”.
- (4) The Reporting on Payment Practices and Performance Regulations 2017 (S.I. 2017/395) are amended as follows. 30
- (5) In regulation 1 omit paragraph (3).
- (6) In regulation 8(3)(a) at the end insert “in accordance with section 5(5A) of the Enterprise Act 2016”.
- (7) In regulation 9(2)(a) at the end insert “in accordance with section 5(5A) of the Enterprise Act 2016”. 35
- (8) In regulation 10 after “under these Regulations” insert “, other than one which relates to information relating to a small business as defined in regulation 2 of the Small Business Commissioner (Scope and Scheme) Regulations 2017.”.
- (9) In the Schedule after paragraph 1 insert –
- “(1A) For the purposes of regulation 3, for each reporting period a qualifying company must publish the information set out in paragraphs 2 to 11 in respect of businesses in general, and separately in respect of small businesses as defined in regulation 2 of the Small Business Commissioner (Scope and Scheme) Regulations 2017.” 40

- (10) In the Schedule, in paragraph 10, after the second “period” insert “and a statement of any statutory interest and compensation payable under the Late Payment of Commercial Debts (Interest) Act 1998”.

#### PART 4

### SECRETARY OF STATE TO AMEND REGULATION 113 OF THE PUBLIC CONTRACTS REGULATIONS 2015 5

#### 13 Regulation 113 of the Public Contracts Regulations 2015

- (1) The Secretary of State must by regulations made by statutory instrument amend regulation 113 of the Public Contracts Regulations 2015 (S.I. 2015/102) to require contracting authorities, when procuring construction operations (as defined in section 105 of the Housing Grants, Construction and Regeneration Act 1996), to put in place project bank accounts where operations are in excess of £500,000. 10
- (2) For the purpose of this section, a project bank account is an account set up with a bank (as defined in section 2 of the Banking Act 2009) that has the following features – 15
- (a) the bank account is set up by the contracting authority and the contractor under a construction contract for the provision of construction operations;
  - (b) the contracting authority and contractor are joint trustees of the monies that are held from time to time in the account and are also joint account holders; 20
  - (c) the contracting authority is required to deposit in the account all sums becoming due to the beneficiaries under the contract and any disputed sums remain in the account until the dispute is resolved and any retention monies remain in the account until they are released to the beneficiaries; 25
  - (d) due payments from the account are made to all beneficiaries simultaneously; and
  - (e) the beneficiaries include – 30
    - (i) the contractor,
    - (ii) all subcontractors where the value of each subcontract or sub-subcontract is at least 5% of the value of the construction contract entered into between the contracting authority and the contractor, and 35
    - (iii) any other subcontractor (or sub-subcontractor) which has specifically requested that its payments are discharged through the project bank account.
- (3) A statutory instrument containing regulations under this section must not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament. 40

## **PART 5**

### FINAL PROVISIONS

#### **14 Short title, extent and commencement**

- (1) This Act extends to England and Wales, Scotland and Northern Ireland.
- (2) This Act comes into force at the end of the period of six months beginning with the day on which it is passed. 5
- (3) This Act may be cited as the Small Business Commissioner and Late Payments etc Act 2020.



# Small Business Commissioner and Late Payments etc Bill [HL]

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To make provision to amend the statutory limits for payment of invoices; make provision for a statutory time limit for resolving payment disputes; amend interest for late payments and penalties for persistent late payments and non-compliance; prohibit specified payment practices, on-boarding and pay-to-stay; require payments becoming due under public sector construction projects to be held in project bank accounts; amend the remit, role and powers of the Small Business Commissioner in regard to late payments; provide for a duty on auditors to publish late payment data; and for connected purposes.

*Lord Mendelsohn*

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