SMALL BUSINESS COMMISSIONER AND LATE PAYMENTS ETC BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Small Business Commissioner and Late Payments etc Bill [HL] as introduced in the House of Lords on 21 January 2020 (HL Bill 44).

- These Explanatory Notes have been prepared by Lord Mendelsohn in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

Overview of the Bill

1 The Small Business Commissioner and Late Payments etc Bill aims to address the problem of late payments experienced by small and medium-sized enterprises (SMEs). It seeks to introduce a framework to ensure that large businesses and public authorities pay their SME suppliers on time.

2 The Bill seeks to do this by strengthening the powers of the Small Business Commissioner (SBC) to enforce a new uniform 30-day statutory limit for payment of invoices, underpinned by financial penalties for persistent late payment or non-compliance by large businesses and public authorities.

3 The Bill further introduces a statutory time limit for resolving payment disputes and a duty on auditors to publish late payment data, requires the use of Project Bank Accounts for construction projects, and prohibits specified predatory payment practices including 'onboarding' charges, 'pay-to-stay' charges and 'prompt payment discounts'.

Legal background

4 The regulatory framework for ensuring prompt payment includes the following:

- The Late Payment of Commercial Debts (Interest) Act 1998 provides that businesses must pay invoices within 60 days unless otherwise expressly agreed and provided such terms are not "grossly unfair".
- Public bodies (including all contracting authorities and sub-central bodies such as local councils and NHS Trusts) must pay undisputed invoices within 30 days, as provided for by the Public Contracts Regulations 2015.
- Public bodies must also publish their payment performance every financial year, as provided for by S113(7) of the Public Contracts Regulations 2015.
- Businesses can claim statutory interest for late payment through the Late Payment of Commercial Debts (Interest) Act 1998. The act was incrementally strengthened in 2002 enabling businesses to claim compensation (£40-£100 per invoice), and again in 2013 allowing businesses to claim 'reasonable costs' of recovery.
- Large businesses are required to report on payment practices and performance, through the Reporting on Payment Practices and Performance Regulations 2017. This data is published online by BEIS. However, there are no powers for monitoring the accuracy of submitted data, and no consequences for non-compliance with reporting requirements or for poor payment performance or practices.
- The Prompt Payment Code is a voluntary code established in 2008 with over 2,000 signatories. Signatories agree to pay 95% of all supplier invoices within 60 days, to "work towards adopting 30 days as the norm", and to "avoid any practices that adversely affect the supply chain".
- The UK's first Small Business Commissioner, Paul Uppal, was appointed in October 2017 through the Enterprise Act 2016 to "to empower small businesses to resolve payment disputes with larger businesses and avoid future issues by encouraging a culture change in payment practices and how businesses deal with each other."[1]

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766161/sbc-framework-document.pdf

- In June 2019, the Government responded to its consultation and call for evidence "*Creating a responsible payment culture: a call for evidence on tackling late payment*", proposing to strengthen the powers of the Small Business Commissioner "to hold to account the minority of larger businesses who fail to make payments on time", including "through fines and binding payment plans".[2] However, these measures were proposed only for further consultation rather than legislation, and no progress has since been announced.

Summary of key clauses

Part 1: Amendments to the Late Payment of Commercial Debts (Interest) Act 1998

A 30-day statutory limit for payment of invoices

5 Clause 2 introduces a statutory limit of 30 days for the payment of invoices by all businesses, matching the requirement on public authorities.

A 30-day statutory dispute resolution period

6 Clause 3 introduces a 30-day limit on resolution of payment disputes, extendable only by mutual agreement. It requires purchasers to notify suppliers of a dispute within a 21-day verification period beginning on the day the service was fulfilled or the day the invoice was submitted, whichever is later. If a resolution is not agreed within the 30-day resolution period, either party may complain to the SBC.

7 This Clause also includes a provision to amend the Housing Grants, Construction and Regeneration Act 1996 to ensure that disputes in the construction industry may also be referred to the SBC.

Automatic payment of interest and compensation

8 Clause 4 introduces a duty on purchasers to pay statutory interest and compensation automatically at the point of paying a late invoice. This replaces the current entitlement for suppliers to claim interest and compensation, which is not always used.

9 Clause 4(4) increases the interest rate to 50% in cases where non-payment has exceeded 60 days or when required interest was not paid at the time of invoice payment.

Part 2: Amendments to the Enterprise Act 2016

Expanding the remit of the Small Business Commissioner

10 Clause 7 expands the remit of the SBC to include public contracting authorities and construction businesses.

11 Clause 7(2) places a duty on the Secretary of State to ensure by regulations that construction operations should be included within the remit of the SBC.

Financial penalties for persistent late payment

12 Clause 7 also introduces a power for the SBC to impose penalty notices on larger businesses or public contracting authorities for persistent late payment, non- compliance, mis-reporting of

[2] https://www.gov.uk/government/consultations/creating-a-responsible-payment-culture-a-call-for-evidence-on-tackling-late-payment;
https://www.gov.uk/government/news/broad-new-measures-to-ensure-small-businesses-get-paid-on-time

payment performance data, or failure to provide information or documents requested by the SBC as part of their investigations.

13 Clause 8 sets the maximum financial penalty for large businesses at £10,000,000 or 4% of annual worldwide turnover, whichever is higher (matching the fines introduced in the Data Protection Act 2018). The maximum penalty for public contracting authorities is £1,000,000.

Publication of payment performance data by the Small Business Commissioner

14 Clause 9 provides a responsibility for the SBC to collect and publish payment performance data by both large businesses and public contracting authorities at the end of each financial year.

Banning of unfair payment practices

15 Clause 10 provides for the banning of unfair payment practices which negatively impact SMEs namely:

a. ‘Prompt payment discounts’ whereby purchasers demand discounts for early payment of invoices;
b. ‘Onboarding’ whereby purchasers impose charges for becoming a supplier;
c. ‘Pay-to-stay’ practices whereby purchasers impose charges on suppliers to maintain their supplier status;
d. Contractual clauses that preclude suppliers from ceasing work or placing works on hold for non-payment.

Part 3: Amendments to other enactments

Duty on auditors to report on payment performance

16 Clause 11 introduces a duty on auditors to report on the accuracy of late payment data reported by their client. It further makes auditors liable for any misreporting or non-compliance with the duty to report by their clients.

Publication of payment performance by public contracting authorities

17 Clause 12 widens the data that public contracting authorities must publish under the terms of the Public Contracts Regulations 2015, to include their annual compensation liability and the total number of invoices not paid on time.

Part 4: Introducing Project Bank Accounts in the construction sector

18 Clause 13 requires public contracting authorities to establish Project Bank Accounts (PBAs) where they are involved in construction operations in excess of £500,000. PBAs would ensure that all monies would be held in a separate account so that all contractors in the supply chain have their payments protected in the event of a Tier 1 insolvency. This means that a contractor’s insolvency practitioner will not be able to have access to the funds in the PBA.

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