



## Late Payment: Challenging Grossly Unfair Terms and Practices Discussion Paper Response Form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 9 March 2015.

Please return completed forms to:

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Manchester  
M1 2WD

Or

[latepayment@bis.gsi.gov.uk](mailto:latepayment@bis.gsi.gov.uk)

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<b>X</b>	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

## Giving powers to representative bodies to challenge “grossly unfair” terms and practices

### The current situation

- 1) [If you are an SME, or a representative organisation for SMEs] How often do you think SMEs have suffered from being exposed to grossly unfair payment terms in the last 12 months, as a percentage of their contracts?

Comments:

***The Market Research Society (MRS) is the world’s largest research association. In 2012 MRS with PWC undertook an assessment of the size and impact of the UK research and evidence market, producing the MRS report The Business of Evidence. One of the main findings from this report is that the UK ‘business of evidence’ market is substantially larger than previously estimated, employing up to 59,000 people and generating £3 billion in annual gross value added (GVA).***

***MRS represents both large businesses and SMEs and we have a range of research suppliers included in our membership. However the research supplier market is dominated by SMEs. The MRS 2013 League Tables which are the MRS Intelligence industry statistics detailing the largest suppliers of market research, analysis and intelligence ranked by individual company UK-based turnover (£m) reported in 2013, indicates that once outside the Top 15 companies, all other suppliers are SMEs and there is a considerable number of small and micro business suppliers.<sup>1</sup> This report is available at [MRS Intelligence Industry League Table](#)***

Although we have not surveyed our members directly in response to this current consultation we have previously gathered evidence on unfair practices more generally particularly in regard to public procurement issues. Details are set out later in our response.

[If you are a large business or a representative organisation for large businesses] How often do you think large businesses have suffered from being exposed to grossly unfair payment terms in the last 12 months, as percentage of their contracts?

Comments:

See above.

- 2) Have you noticed an increase in the use of terms and practices that could be considered grossly unfair in the last 12 months?

Yes       No       Not sure

If yes, what tend to be the circumstances?

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<sup>1</sup> Based on EU definition of SME using sole turnover criteria of 50 million euros.

Comments:

We have not surveyed members directly in response to this consultation but details are set out later in this response on evidence gathered on unfair practices more generally particularly in regard to public procurement issues.

3) [For businesses] Would you classify yourself as a micro, small, medium or large business?

Micro                       Small                       Medium                       Large

Comments:

N/A

4) [For businesses] Have you ever approached a representative body for help to resolve disputes about terms and practices that oust or vary your right to statutory interest following a late payment?

Yes                       No                      *Continue to sub questions*

a. If yes, under what circumstances and, what was the outcome?

Comments:

N/A

b. If no, why?

Comments:

N/A

5) [For businesses] Would you every approach a representative body for help to resolve disputes about grossly unfair payment terms and practices above and beyond those related to statutory interest?

Yes                       No                      *Continue to sub questions*

a. If yes, under what circumstances?

Comments:

N/A

b. If no, why?

Comments:

N/A

6) [For representative bodies] Have you ever been approached to challenge grossly unfair late payment terms and practices, i.e. terms that oust or vary the right to statutory interest, on behalf of a business?

Yes       No

*If yes, please go to sub questions below. If no, continue to question 8.*

a. How many times have you been called upon to help in this way in the last 12 months?

Comments:

b. Was the business a SME or a large business?

Comments:

c. What were the circumstances?

Comments:

d. What was the outcome?

Comments:

e. If applicable, which court did this end up in?

Comments:

f. What was the average cost of the cases taken to court on behalf of an SME or large business in the last 12 months?

Comments:

g. What is a rough breakdown of the cost for example legal cost staff costs etc?

Comments:

h. Does this differ between a case representing a SME or representing a large firm?

Comments:

7) [For representative bodies] Have you been made aware of any cases where the contract terms and practices could be deemed grossly unfair but have not been able to do anything about it?

Yes       No

*If yes, please go to sub questions below. If no, continue to question 9.*

a. How many cases were there in the last 12 months?

Comments:

b. Were they a large business or a SME?

Comments:

MRS has been involved in advocacy for our members and gathered evidence on standard public procurement terms and conditions which caused considerable problems for research suppliers. These practices are instructive as are potentially likely to also be an issue with business to business relationships i.e. between research suppliers and commercial clients and can contribute adversely to a business culture that is unhelpful to commercial viability of small suppliers.

Areas of most concern identified in the public procurement process were:

- Obligation to pay 0.5% of all charges for services that have been invoiced to any contracting body each month under a call-off agreement, which cannot be passed on to the contracting body under a call-off agreement and is excluded from the limitation of liability.
- Significant number and scale of warranties required for research contracts in public procurement process
- Research suppliers shouldering costs for changes in contracts for decisions they were not able to influence
- Broad and unlimited research supplier liability (within the call-off agreement) for any losses suffered by an agreement

As individual suppliers were unable to negotiate independently to achieve redress MRS prepared a framework document for the Government Procurement Service setting out concerns and recommendations with a view to implementation of workable solutions. This led to improvements in some of the terms that our members were required to adhere to.

See further for details:

(2014) Improving Market Research Procurement: MRS Recommendations on the Creation of Framework 2 for research services

(2012) Improving Market and Social Research Procurement and Commissioning within the Public Sector: The Market Research Society (MRS) Report: Lessons Learnt from the Creation of the Pan-Government Framework for Market Research Services

Publications available on the MRS website at: <https://www.mrs.org.uk/article/item/576>

8) Do you think the cost or resources needed will be significantly different if required to act on behalf of a business for grossly unfair payment terms?

Yes       No       Not sure

Comments:

### **Representative claims**

9) Should representative bodies be able to take action on behalf of

- a) individual businesses  
 b) groups of individual businesses  
 c) both

Comments:

10) Do you agree that representative bodies should only be able to take action on behalf of members rather than non-members as well?

Yes       No

Comments:

It is important that there is a clear mandate and basis for the actions by representative bodies. In light of this it would be preferable for action to be taken on behalf of members defined to cover organisations with businesses that includes full members and/or associate/affiliate members. Naturally other businesses in the sector may also benefit as a result. It would also be helpful in strengthening the role of representative bodies if government were discerning in its procurement practices by requiring businesses and practitioners supplying products and services to government to be part of their representative bodies particularly where these bodies operate a self-regulatory scheme to improve quality and standards across the sector.

### **How to define “representative bodies”**

11) Do you agree with our proposal to have an indicative list of representative bodies?

Yes       No

Comments:

We agree that it is useful to have an indicative list of representative bodies who have met key objective criteria. However it is important to ensure that there is full consultation with a range of bodies. An exercise designed to improve awareness so that a wide variety of representative bodies across different markets are afforded the opportunity to be placed on the indicative list would be useful. This will ensure that smaller associations are not disadvantaged but have a full opportunity to make their views known on whether they have the capacity to undertake this level of representation.

Clear criteria are important in developing an indicative list but we consider that a wider track record in representing interests of members is important rather than the narrow suggestion proffered in the consultation paper of working on "late payment contractual terms and practices issues". For example, MRS has a broader track record in representing the interests of members in procurement matters especially regarding changes to government procurement systems and also on SME exports and other issues relevant to small businesses. However we have not worked in depth on late payment issues, as this is only part of the spectrum of unfair practices, that can be damaging to businesses in the sector. We would not consider this to be a factor that would disqualify us from robustly and competently representing our members in this area, if we felt that it was important to do so.

12) As a representative body, would you self-nominate yourself to represent businesses in this way?

Yes       No       Not sure

Comments:

13) Do you agree with our proposal that the list should be regularly reviewed?

Yes       No

Comments:

### **Representing members without going to Court**

14) [For representative bodies] Would you be more likely to use the threat of taking a company to court than actually take them to court?

Yes       No       Not sure

*If yes, please go to sub questions below, if no, continue to question 16.*

a. How often might you do this? What would your decision be based on?

Comments:

Level of resources required to take legal action means that this is a decision that has to be carefully weighed. Although threatening legal action would only be used where it was felt there was a case to answer a subsequent cost/benefit analysis would need to be undertaken before actually taking a company to court. Representative bodies also have to balance the needs of all their members, as key stakeholders, therefore any decision would also have to include an assessment and balancing of the value of a specific case compared to the needs of the entire membership.

b. Are you able to give an indication of the financial benefits of doing so for you and the members you are representing?

Comments:

### **Court hearings**

15) Do you have any comments on our proposals regarding court hearings?

Comments:

### **Winning and Losing a Case**

16) [For representative bodies] How often might you take a case to court? What would the decision be based on?

Comments:

Commencement of legal action would depend in each case on evaluation of merits of the particular case and likelihood of success, weighing up the scale of the practice and overall impact on individual members and members as a whole together with financial implications and resources available for taking legal action. The likely impact of the action and the scope for improving future trading conditions as a result of any legal action would be critical as there would be little point in pursuing an expensive court claim if success would only lead to very minor improvement in trading conditions.

17) [For representative bodies] What do you think would be the resource requirement of representing a business in terms of grossly unfair terms? How would this change in terms of representing a large firm or a SME?

Comments:

18) [For representative bodies] How do you think the resource requirement may differ with the different options of where a case can be heard?

Comments:

19) [For representative bodies] Do you have the necessary resources to handle these cases?

Yes       No       Not sure

Comments:

20) [For representative bodies] Would you consider increasing your membership fees to reflect the provision of this service? If so, by how much would the membership fees increase?

Yes       No       Not sure

Comments:

### Definition of grossly unfair payment contractual terms and practices

21) Do you think we should follow the Irish approach, and add additional indicative criteria to the UK definition of grossly unfair?

Yes       No       Not sure

Comments:

22) If we adopt such criteria, should consideration be given to “the strength of the bargaining positions of the supplier and the purchaser”? Are there any other criteria that are particularly important?

Comments:

The strength of bargaining position is important particularly with SME's. The structure of the market research industry with preponderance of smaller suppliers would make this an important factor. It will also be important to recognise the importance of specific sector characteristics and customary practices and the impact this may have on whether practices considered to be unfair. For example as an industry based on intellectual capital the applicable terms in the research sector are likely to differ from other sectors that may be based on physical capital such as the construction sector.

**Do you have any other comments that might aid the consultation process as a whole?**

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views.

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

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