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Association of Accounting Technicians response to Consultation paper: Late Payment: challenging 'grossly unfair' terms

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1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the Department for Business Innovation & Skills consultation paper "Late payment: challenging 'grossly unfair' terms" released on 26 October 2015 (condoc).
- 1.2. AAT is submitting this response on behalf of our membership and the wider public benefit of achieving effective business administration.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.
- 1.5. Furthermore, the comments made within our response document reflect the potential impact of the proposed changes on SMEs, micro-entities and nano-entities. Many of which either employ AAT members or are represented by our operationally skilled members in practice. In addition many AAT members operate a business in their own right.

2. Executive summary

- 2.1. AAT notes that the draft regulations "The Late Payment of Commercial Debts (Amendment) (No 2) Regulations 2015" are the subject of the condoc and as such this is the latest in a series of regulations following the implementation of "The Late Payment of Commercial Debts (Interest) Act 1998" and a series of subsequent consultations and related information gathering exercises.
- 2.2. The condoc seeks to build on AATs earlier response "AAT response to the BIS discussion paper on "Late payment – challenging grossly unfair terms and practices"¹.
- 2.3. AAT welcomes the fact that the department has chosen to create the "Small Business Commissioner" post in order to augment existing measures available to small businesses, and their representatives for tackling unfair terms imposed by both larger businesses and the public sector. (Section 1: Foreword, Section 6 and paragraphs 17 and 28, condoc)
- 2.4. The decision to progress this matter quickly is welcomed by AAT and our members whose own businesses and those of their clients and employers are affected by unfair terms.
- 2.5. AAT was encouraged to note the strengthening of the power to challenge 'unfair practices' in the same manner as with unfair terms. (Para 26, condoc)
- 2.6. AAT further notes that while the ability to challenge unfair terms has been in place for some time small businesses are affected as much by unfair practices as they are by unfair terms. (Para 26, condoc)

¹ AAT response to late payment - challenging grossly unfair terms and practices

3. Additional comments

- 3.1. In addition to responding to the condoc questions AAT would like to make the following observations in the succeeding paragraphs (3.2-3.3, below).
- 3.2. AAT notes the government's reluctance to further define the term "grossly unfair" (Paragraph 27, condoc) and is disappointed that further clarification was not forthcoming at this stage. Although AAT acknowledges that this matter needs to receive attention in the Courts first as such action will determine of the types of unfair terms and practices which are being challenged before some more detailed form of definition can be determined.
- 3.3. AAT recommends that the department sets a specific date by which it will analyse the case law to date and make a final determination on this matter.

4. AAT response to the consultation paper on *late payment: challenging 'grossly unfair' terms*

Question 1: Do you agree that representative bodies should have the flexibility to take action on behalf of individuals and groups? If not, why?

Question 2: Do you agree that representative bodies should have the flexibility to take action on behalf of members & non-members if they chose to do so? If not, why?

- 4.1. In February 2015 (Response to question 10, para 5.19, condoc) AAT observed that if it were to apply, as an organisation, to be included in the list of representative bodies it would wish to pursue cases following a complaint made by an individual member, certainly as a first step. In the intervening period AAT has not changed its opinion in the period since the submission of our earlier response. Indeed, the condoc sets out at paragraph 36 this measure is specifically designed to assist SME's and micro businesses.
- 4.2. AAT agrees with the comment that a single business suffering as a consequence of late payment or unfair payment and contract practices could be deemed to be being grossly and unfairly treated (para 36, condoc).
- 4.3. AAT considers that as the new measures and the directive² behind it, are specifically designed to protect small business and where necessary afford such businesses an ability to seek restitution, despite the difference in size, it would appear to be counterproductive to restrict the assistance which can be given by representative bodies to businesses (or a single business).
- 4.4. AAT has no firm views regarding a body providing assistance to a non-member.
- 4.5. While it is unlikely that AAT would agree to engage with a non-member to pursue non-payment or grossly unfair practices on their behalf, AAT can envisage other bodies who may want to represent both members and non-members.
- 4.6. AAT considers that it would be for the body concerned to determine firstly if its own constitution gives it the necessary vires to deploy its resources on behalf of non-members and secondly, if it does that the benefit to its membership is sufficient to justify it in engaging in such activity.

² 2011 EU Late Payment Directive.

- 4.7. AAT also believes that including non-members in any action could not only strengthen the overall action being taken it could also ensure that the benefits of such action will have more far reaching effects for business in general.
- 4.8. Overall AAT considers that representative bodies should have the freedom to determine whether or not a case should be pursued on behalf of just one member and whether or not non-members ought to be included.

Question 3: Do you have any additional comments you would like to make in relation to these draft Regulations?

- 4.9. The draft regulations appear to have been designed to afford a much wider range of action against unfair payment, contract terms and practices. Aside from the comments made above, in response to questions 1 and 2 the AAT has no further comments to make.
- 4.10. In relation to the effectiveness of the office Small Business Commissioner, AAT welcomes the move. However, it should be noted that the office will have to demonstrate its effectiveness through the pursuit of large business and public sector bodies where unfair practices are proven and for the naming and shaming of those bodies whose practices fall short of those expected.
- 4.11. Finally, AAT is of the view that if after a post implementation trial period there appeared to be little or no improvement, in the payment culture then AAT would recommend that consideration be given to a full arbitration service, hopefully funded by a large business levy, to pursue cases on behalf of small businesses.

5. Conclusion

- 5.1. AAT is pleased to have been given the opportunity to respond to this consultation paper on late payment: challenging 'grossly unfair' terms.
- 5.2. Generally AAT's members will favour any strengthening of the powers business have to challenge the unfair practices of larger business and the public sector in terms of contract terms, particularly for payment.
- 5.3. AAT supports the proposals to appoint a Small Business Commissioner who will consider complaints made concerning both unfair terms and practices will help towards fostering much better relations between businesses and their suppliers we are doubtful that it would be as effective as a mandatory arbitration service similar to the one for employment complaints.

6. About AAT

- 6.1. AAT is a professional accountancy body with over 49,500 full and fellow members³ and 82,400 student and affiliate members worldwide. Of the full and fellow members, there are over 4,200 members in practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 6.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

³ Figures correct as at 30 Sept 2015

7. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

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