THE CITY OF LONDON LAW SOCIETY

COMPANY LAW COMMITTEE

Response to Department for Business and Trade consultation in respect of the Reporting on Payment Practices and Performance Regulations 2017 and Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017

Introduction

The views set out in this response have been prepared by a working party of the Company Law Committee of the City of London Law Society (the "**CLLS**"). The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This working party is made up of senior and specialist corporate lawyers from the CLLS who have a particular focus on issues relating to company law and corporate governance.

We welcome the opportunity to comment on the whether the Regulations should be extended beyond their current expiry date of 6 April 2024 and on other potential amendments and improvements to the Regulations.

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Amending the expiry date to extend the Regulations beyond 6 April 2024

Question 1: Do you agree that the Regulations should be amended to extend their effect beyond 6 April 2024?

We agree that the Regulations should be extended beyond 6 April 2024. Improvements have been made in payment practices and performance but there is both scope for further improvement in some cases and a risk that, where improvements have been made, these will not be maintained if the reporting requirement is dropped. The aims of the Regulations are still relevant:

- bringing greater transparency to payment practices;
- incentivising businesses to improve payment practices;
- overcoming the asymmetry of information between large businesses and their suppliers;
- helping businesses better understand what to expect from their customers; and
- helping representative bodies and others to apply commercial and reputational pressure on businesses to pay promptly.

Extending the expiry date would send a consistent message about late payment more generally, would remind businesses about the importance that is attached to this topic and would allow the government to continue to take further measures to increase awareness among small businesses of the requirements and the reports service. Failure to extend the expiry date risks undermining both the progress made to date and other initiatives in this area, such as the work of the Small Business Commissioner and the Prompt Payment Code.

Companies which fall within scope should have already set up the necessary processes to enable them to make the required reports so now have just the ongoing operational compliance cost. Companies which are approaching the relevant thresholds have a clear picture of what will be required of them once they fall within scope enabling them to plan accordingly.

We note Government's provisional view to extend the Regulations for a further seven years with a review after five years. At the current time we envisage that the same arguments would apply for a further extension – the Regulations are likely still to be relevant in 2029 as part of the ongoing process to normalise prompt payment.

Additional value reporting metric

Question 2: Do you agree that the Regulations should be amended so that a qualifying business is required to report the total value of payments due in the reporting period that have not been paid within agreed terms?

We agree that, as well as reporting on the proportion of transactions not paid within terms, in-scope entities should be required to report on the total value of due payments which have not been paid within agreed terms. Only the value of those payments where the contractual period for payment expired in the relevant reporting period and which were not paid before that date should be reported on (i.e. the report should detail performance in the relevant 6 month reporting period). Entities should not be required to report the value metric on a cumulative basis (i.e. the value of payments outside terms remaining outstanding at the end of the reporting period).

Both the volume and the value metrics are required to give a true picture of a business's payment practices and avoid the risk of a business skewing the figures. The current requirement to report solely on the proportion of invoices settled within terms could encourage businesses to settle a large number of low value invoices; this incentive would be removed if the business was also required to report on the total value of payments not paid within terms.

Referencing payment reporting in a company's directors' report

Question 3: Do you agree that it should be a requirement for a reporting business to include their payment practices and performance reports in their directors' report?

As stated in our response (jointly with The Law Society) to the consultation on restoring trust in audit and corporate governance (available here) we agree that a requirement to report on payment practices would be helpful, not only to seek to improve supplier payment practices but also to give shareholders and other stakeholders better visibility on how a company's directors are meeting their section 172(1) duties. Including payment practices reporting in the directors' report would also, for public interest entities, bring it within scope of the proposed review and enforcement powers of the Audit, Reporting and Governance Authority (ARGA).

We would be in favour of companies having flexibility in how they approach the required reporting summary, with the content for the summary being addressed in guidance developed by ARGA when established. This would allow for the disclosure requirements to evolve over time. ARGA could be given the authority to make regulatory rules in the future as to the prescribed content of the reporting summary if, having allowed companies time to prepare such summaries and investors and other stakeholders to assess the utility of them, it considered that this was necessary.

As well as increasing transparency and scrutiny by a wider audience, inclusion in the directors' report would also increase general board engagement with this issue and push it up the board agenda. As only one director is required to approve the report under the current Regulations, many board members of a reporting business may not be fully focused on the business's payment practices.

Within many groups, the subsidiary entities are likely to have significantly more suppliers than the parent/group holding company. A summary of the payment practices and performance of all in-scope businesses within a group should therefore be covered in the group directors' report included in a parent company's consolidated report and accounts to give a comprehensive picture of payment practices within the group, with an exemption for subsidiaries covered by the group report to avoid duplication of reporting.

As in-scope entities are already required to collect and report on the relevant information we do not consider that it is a significant extra burden to reproduce the information in the directors' report. The inclusion could add to the length of the directors' report, particularly the group report of a parent company which has a large number of in-scope subsidiaries. However, our view is that the additional transparency is sufficient justification. We noted above our preference for ARGA to determine the content of the summary to be included in the directors' report and we envisage that ARGA would take into account the impact of the summary on the overall length of the report. One option would be to reproduce the statistics and include a link to the full report if readers want to read the narrative descriptions and the tick box statements.

Question 3a: Do you agree that making it a requirement for a reporting business to include their payment practices and performance reports in their directors' report is a sufficient additional requirement for a reporting business?

In our view the additional requirement for a reporting business to include their payment practices and performance in its directors' report is sufficient at this stage. This would require all the directors of a reporting business to engage with the issue which should increase the level of internal scrutiny of the data and reports. If this fuller board scrutiny does not increase confidence in the data, additional verification or assurance work could be considered at that point but we do not regard that as necessary or proportionate at this stage.

Supply chain finance

Question 4: Do you agree that the Regulations should be amended to clarify payment dates used for reporting when supply chain finance is used?

We agree that the reporting requirements should be clarified where supply chain finance is used. A qualifying business should not include within its "paid within agreed terms metric" any invoices for which supply chain finance is used at the supplier's cost.

Disputed invoices

Question 5: Do you agree that the Regulations should be amended to consider disputed invoices as a separate entity, to improve the accuracy and transparency of the reporting data?

Given that this proposal would result in significantly more complex reporting it should only be adopted if disputed invoices are a significant issue. We are not aware of the volume and value of disputed invoices and are therefore unable to give a view as to the proposed amendments. A detailed definition of "disputed" would be required. An alternative method of dealing with disputed invoices could be for the guidance accompanying the Regulations to encourage companies to provide this additional level of detail on a voluntary basis where appropriate, either in the report itself or in footnotes.

Retention payments in the construction sector

Question 6: Do you agree that the Regulations should be amended so that payment practice and performance reports should include information on the standard retention payment terms in qualifying construction contracts?

We agree that including this information in relation to qualifying construction contracts would help give a more complete picture of a business's payment practices and performance.

Question 7: Do you agree that the Regulations should be amended so that payment practice and performance reports should include statistical information on retention payments?

We agree that this would help give a more complete picture of a business's payment practices and performance.

Impact assessment

Question 8: How many hours does your business spend and which staff are required (please give an indication of hours by level of seniority) in order to comply with the Reporting on Payment Practices and Performance Regulations 2017?

Question 9: What does this cost your business in terms of pay for each level of seniority?

Question 10: What (if any) additional costs did your business incur (beyond staff pay) in complying with the Reporting on Payment Practices and Performance Regulations 2017?

As this response has been prepared by a working party of the Company Law Committee of the City of London Law Society, we are unable to respond to these questions which are aimed at individual businesses.

Additional comments

We would like to take this opportunity to repeat our view, as stated in our response (jointly with the Law Society) to the consultation on improving the quality and value of financial information on the UK companies register (available here) that the definition of turnover, and in particular how it applies to credit institutions and insurance companies in the context of payment practices, should be clarified and should be in line with the relevant accounting treatment to ensure a consistent approach. It would also be helpful, as far as possible, to clarify how the Regulations apply to financial services businesses and exactly what they have to report. The Regulations provide that "qualifying contracts" exclude financial services contracts and the BEIS guidance note states that if a company qualifies but has no qualifying contracts it still has to report. It therefore appears that the intention is that financial services type income counts towards the turnover threshold even when companies have no qualifying contracts on which to report, but this is not beyond doubt on the current drafting.

We also note that the government has indicated that it is proposing to carry out a more general review of non-financial reporting which would include considering the thresholds used to determine which companies must comply with reporting obligations under the CA 2006, such as the turnover threshold. At present, the definition of turnover in section 474(1) CA 2006 (used by the Regulations), is defined as amounts derived from the provision of goods and services, after deduction of trade discounts, value added tax and any other taxes based on the amounts so derived, which does not correspond to a line item that companies are required to state in their accounts. As this is going to be the subject of a separate consultation, we will not comment on it further at this stage other than to note that it would be very helpful for companies to have simple tests that are easy to apply, and for the various different reporting requirements to use the same tests as far as practicable and where appropriate.

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