Draft Business Contract Terms (Assignment of Receivables) Regulations 2018

Submission from Mr Richard Greenhill

The draft Business Contract Terms (Assignment of Receivables) Regulations 2018 (ISBN 978-0-11-117108-0) were laid before Parliament on 4 July 2018 and published online on 6 July ("the 2018 draft").


Paragraphs 10.6, 10.7 and 10.13(b) to (f) of the Explanatory Memorandum accompanying the 2018 draft indicate that the 2018 draft has been revised to reduce its scope (cf paragraphs 8.4 and 8.8 of the Explanatory Memorandum accompanying the 2017 draft).

In particular, as well as excluding various "special purpose vehicles", the 2018 draft would now exclude large enterprises that are too big to qualify as "medium-sized" for the purposes of the Companies Act 2006. In simplified terms, this means excluding most supplier companies with an annual turnover of more than £36 million.

Four points:

1. The 100-page Impact Assessment published alongside the 2018 draft appears to be substantively identical to the one published alongside the 2017 draft, with the remarkable distinction that the date on the upper right of the first page has been changed from "09/03/2016" to "24/02/2015". So not only does the IA not seem to have been updated, the newer IA unexpectedly has an older date.

(The page layout also has minor changes and, as expected, the ministerial signature block on page 1 has been updated from "Margot James, Date: 13 September 2017" to "Andrew Griffiths, Date: 4th July 2018". But the words and amounts seem to be otherwise identical. The Regulatory Policy Committee reference remains "RPC15-BIS-3174").

Given that the 2018 draft has been revised to exclude large companies (as well as several other categories of supplier), it would seem appropriate for the Impact Assessment to have been either revised or (if the change was considered de minimis) at least accompanied by a front page note and a further note in the 2018 Explanatory Memorandum of why no revision to the previous figures was considered necessary.

Moreover, from the subtotals in the Impact Assessment, it is by no means clear that the effect of excluding large supplier companies is minimal. Though large companies are not referred to in terms of those with a turnover of more than £36m (as in the Companies Act definition), several of the tables break down certain monetised benefits for suppliers with turnover bands of £25m–£50m and £50m+.

Of the six types of benefits calculated [para 138 of the IA], such turnover bands are separately identified for benefits (1) to (3), in respect of Year 5 of the proposed regime:

(1) Reduction in Discount Charge: pre-phasing benefit £13.7m, of which £0.8m/6% for suppliers with turnover £25m+ (including £0.5m/4% with turnover £50m+) [para 82]
(2) Reduction in Service Charge: pre-phasing benefit £46.1m, of which £0.1m/<1% for suppliers with turnover £25m+ (including £0.1m/<1% with turnover £50m+) [para 90]

(3) Benefit to existing SME invoice finance clients from extra funding: pre-phasing benefit £84.6m, of which £12.5m/15% for suppliers with turnover £25m+ (including £7.5m/9% with turnover £50m+) [para 115]

That makes an aggregate annual pre-phasing benefit in Year 5 for items (1) to (3) of £144.4m, of which £13.4m/9% is attributed to suppliers with turnover £25m+ (including £8.1m/6% with turnover £50m+). Though phasing adjustments affect the final amounts calculated for each year, they do not affect the above percentages.

Whatever the effect on benefits (4) to (6), a 6% to 9% effect on the disaggregated amounts would seem to justify at least a qualification of the 2015 (2016?) Impact Assessment in the 2018 Explanatory Memorandum.

Alternatively, or additionally, if BEIS considers a 6% to 9% discrepancy well within the margin of uncertainty of its original estimates, then the Impact Assessment summaries should not have been presented with such spurious purported accuracy in the first place (i.e. with headline totals presented to within a tenth of a million: "£44.9m" annual benefit and "£966.0m" total net present value).

Intuitively, it seems to me implausible that anyone could really estimate the effect of such a policy with confidence to within a precision of much less than £10m. But either way, an explanation is surely warranted.

In addition, it is perhaps surprising that the Impact Assessment text has not been revised to document the concerns which you previously raised, and to which BEIS responded, in your 6th Report. I note, in contrast, that BEIS has inserted references and links to relevant consultation documents in its revised Explanatory Memorandum (paragraphs 10.1 to 10.4), in accordance with your advice (6th Report, Appendix 4, Q3).

2. The Impact Assessment includes the following eyebrow-raising note [para 176, "Familiarisation costs to debtors", i.e. purchasers]:

"There will be no requirement on debtors to familiarise themselves with the change. Although ban on assignment clauses in contracts will become non-enforceable with respect to contracts established after the commencement date [but see below re 31 December 2018], the legislation will not require such clauses to be omitted. There will therefore be no requirement on large businesses to familiarise themselves with the legislation."

Just because the change will apply regardless of debtors' knowledge of it, does not mean that they should or will take no trouble to familiarise themselves with it. Particularly to the extent that more debts become factorised as purchasers' contractual exclusions become overridden by the proposed Regulations, purchasers will notice an effect in having to deal with different pursuers of outstanding payments. In the event of court proceedings, further differences will arise. And fears have been widely expressed about contractual confidentiality, notwithstanding BEIS's assurances (your 6th Report, Appendix 4, Q2). Moreover, it can hardly be desirable in principle that purchasers will be unaware of the true legal effect of their own terms and conditions.

You previously raised with BEIS the intrinsic disbenefits to debtors in your 6th Report (Appendix 4, Q1). But the issue of familiarisation is, I submit, distinct and startling.
3. The Regulations (in regulation 1(1) of both the 2018 draft and the 2017 draft) "come into force on the day after the day on which they are made". However, the 2018 draft adds the proviso (as draft regulation 1(2)):

"These Regulations apply to any term in a contract entered into on or after 31[st] December 2018."

This new restriction must be welcome for its anti-retrospective clarity and unambiguous advance notice.

But then surely the commencement formula in regulation 1(1) should also have been changed to specify that the Regulations "come into force on 31st December 2018".

As now drafted (and assuming of course that the instrument is signed before 31 December 2018), the commencement formula in regulation 1(1) seems at best irrelevant (having no practical effect until at least 31 December) and at worst misleading (to those who overlook the override in regulation 1(2)).

4. Finally, and more generally, it is salutary to reflect that, lacking any equivalent to the above new proviso (i.e. to regulation 1(2) of the 2018 draft), the 2017 draft would, once made, have taken effect with only a few hours' notice after signature – practically retrospective if the Regulations were not published later the same day.

Though departments are almost always respectful of the 21-day rule conventionally applicable to negative instruments, it is by contrast common for affirmative instruments (having been approved in draft) to be expressed to come into force on the day after they are made, i.e. at midnight after they are signed.

Ministers and departments doubtless find the uncertain timing of parliamentary approval inconvenient, but the draft affirmative procedure gives those affected by imminent legislation no firm advance indication of when a draft statutory instrument will actually be made. Non-statutory publicity (even if it exists and is thorough) is no substitute for clear drafting. The "on the day after the day" formula should, I submit, therefore be avoided in favour of "on the 21st day after the day" (or some later day) whenever a draft affirmative will impinge on those beyond the Department making it, except in cases of emergency or wholly beneficial effect. (Note that the recent variant of "21 days after the day" is ambiguous and highly undesirable, since the day of making is strictly excluded but intuitively included in the reckoning.)

Accordingly, I respectfully hope that you can, both in particular cases and in more general terms, encourage ministers to greatly restrict their future use of short-notice commencement formulae.

You may be aware that the Joint Committee on Statutory Instruments expressed a similar view in its recent Special Report (HL Paper 151 / HC 1158, 12 June 2018, particularly paragraph 2.23); I would suggest that this is an area where the respective policy and technical remits of the two Committees may beneficially overlap.

9 July 2018