ACTUATE UK
THE ENGINEERING SERVICES ALLIANCE

4 February 2022

Actuate UK Consultation Response to:

BEIS Statutory review of the Reporting on Payment Practices and Performance Regulations 2017: call for evidence responsiblepaymentculture@beis.gov.uk

RESPONSE:

Actuate UK welcomes the opportunity to respond to this consultation.

These are the views of Actuate UK members of its Business policy group. More information on Actuate UK can be found on www.actuateuk.org.uk

To contact Actuate UK and for any more information or questions regarding this response, please email: maria.balermpa@actuateuk.org.uk

This response can be made public.

We are keen to continue to work with Government as it reviews the performance of the Regulations with a view to long term improvement in the way companies pay their suppliers.

We realise there have been consultations on the Prompt Payment Code ('PPC'), UK Procurement, Restoring trust in audit and corporate governance and the role of the Small Business Commissioner. Whilst we recognise some of the issues we raise, under a narrow interpretation, may sit outside the strict scope of this consultation, we would encourage you to consider our points in the context of the wider payment landscape.

ABOUT ACTUATE UK

Actuate UK represents the interests of over 60,000 businesses and 350,000 individuals (with a combined annual turnover of almost £10bn) covering a broad range of engineering, design, installation, facilities management and data driven activity, including, but not limited to; steel, lifts and escalators, electrical, heating, plumbing, energy management, micro-generation, ductwork, ventilation, fire and security, and wireless systems (engineering services).

According to the Construction Leadership Council, the construction industry comprises 405,000 businesses of which 99% are SMEs (the bulk of which are involved in B2B transactions) – turnover is estimated by UK Government to be £100bn for construction, but circa £225bn for both construction and facilities management representing 10% of employment and enabling a further £540bn contribution to wider economic output (source: BEIS).

UK construction and facilities management averages four to five levels within its supply chain and 70 sub-contract packages across any one project (source: BEIS). It suffers from high fragmentation and disaggregation meaning that often the delivery level of the supply chain is highly divorced from the procurement level.

The public sector accounts for 30-40% of demand within the construction industry and is a key client and driver of change/evolution. This is because the public sector is a client who will own the built-asset and therefore has a vested interest in the asset whole-life-cycle and value proposition.

The work of Actuate UK members not only forms a key part of the UK construction supply chain - forming between 40-60% of construction project value and sector turnover (capex/construction equates to 10% of asset whole-life cost) – but they also form an integral part of the facilities management service and maintenance sector (opex/operational cost equates to 80% of whole-life cost).

Actuate UK's views are therefore based on a vested interest in driving whole-life value for money through built-asset life-cycle and not simply managing construction cost.

Members of Actuate UK are also leaders on issues within Cabinet Office (SME Payment Group) and Construction Leadership Council (Taskforce and Business Models workstream) as well as within Scottish Government/industry CICV forum.

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Main Response to Questions in the consultation

Objective 1. The Regulations aim to bring greater transparency on payment practices and performance.

1. **To what extent do you agree that the Regulations have brought greater transparency on payment practices and performance?**

   Strongly agree~~/agree/neither agree nor disagree/disagree/strongly disagree/don't know~~

   Please explain your answer / provide evidence

   Statistics from BEIS (An *economic analysis of the construction industry* and a *supply chain analysis of the construction industry*) show how fragmented and disaggregated construction supply chains are and how divorced the tier 1 procurement process is from the delivery level. The introduction of the Regulations has had a profoundly positive impact within the construction industry through the introduction of an open-source transparent data set for payment performance. The Regulations underpin the recognition that large organisations are as strong or as fragile as their supply chains.

   The Regulations, alongside the PPC, can be considered a 'game-changer' which have had a transformative effect on industry behaviours and adoption of digitisation.

   Over the last two years we have also seen revised insolvency law, withdrawal of Government pandemic support initiatives and adverse economic impact of the UK withdrawal from the EU, all putting exacerbated pressure on UK construction. Following which, payment behaviour has hardened and insolvencies have risen, which is at odds with payment data reporting (see latest Build UK reports on industry payment improvement) showing an overall improvement.

   According to payment survey data, SMEs continue to report poor payment practices and insolvency levels within the industry are rising - whilst payment performance within the industry is reportedly improving. It remains, therefore, possible within the Regulations for businesses to obscure their payment performance - for example, by clearing high volumes of smaller invoices faster and paying on credit facilities, allowing them to continue to withhold high value invoices for longer periods from supply chains.

   We have concluded that as the metrics measure only volume of transactions paid within terms, and not the value of transactions paid within terms, the data is only partially accurate and can produce falsely positive or compliant results.

   Recommendation: As with all successful initiatives, the reporting requirements must evolve to retain their value and currency. To do so the reports must begin to measure, not only the volume of transactions paid within the agreed terms/periods, but also the value of invoices paid within those terms/periods.

   We have recently interviewed some of the leading technology solution providers in the payment automation space who have modelled solutions around reporting by volume of payments made within periods/terms. All providers universally stated it was simple to run reports based on value of payments made within terms/periods and that the capability to runs those reports already exists.

   Initially, the milestone step of allowing the press/media (Construction News) and other bodies such as Build UK the ability to scrutinise and publish comparative league tables of industry incumbent's payment performance, has applied considerable pressure on businesses to improve their systems and processes. However, most impactful and transformative has been linking the data with the requirement to win future work, e.g., parties that cannot demonstrate through their payment reports that they meet a minimum payment standard (PPN 08/20/PPC) are unable to pre-qualify for future work.

Objective 2. The Regulations aim to help overcome the asymmetry of information regarding payment practices and performance between large businesses and their suppliers.

2. To what extent do you agree that the Regulations have helped overcome the asymmetry of information regarding payment practices and performance between large businesses and their suppliers?

~~**Strongly agree/agree/neither agree nor disagree/**~~ disagree ~~**/strongly disagree/don't know**~~

Please explain your answer / provide evidence

There remains wholesale asymmetry of information regarding payment practices and performance between large businesses and their suppliers in the private sector, whilst the Regulations do not require the payment performance to be measured based on the value of invoices paid within terms as well as the volume.

We know that under late payment legislation, the public sector must pay invoices in 30 days (at tier 1, 2 and 3) and the private sector in 60 days – but that the private sector may agree more than 60 days provided it is not '*grossly unfair'* (undefined). In addition, many customer contracts will include clauses to reduce the interest rate due under the legislation (which is 8% over Bank of England Base Rate) to something like 1% or 2% above base which then reduces the financial incentive for prompt payment and the penalty for late payment.

So long as there remains a 'backdoor' allowing parties the ability to agree extended payment periods (trade credit), parties are likely to exploit this opportunity. This will mean that payments to large businesses may not be reported on (by JVs and/or SPVs who do not qualify to report), yet large businesses may be required to report on their payment practices.

Relative business size and bargaining power can often force smaller organisations to 'agree' (effectively under threat of not winning the business) to extended payment terms in the contract. Timely payment of contractually agreed extended payment terms is arguably ('trade credit') just as, if not more, financially damaging to a supplier than late payment against reasonable terms (including the inability to use invoice discounting). This is a very common occurrence and it can also hide late payment practices when measured against certain criteria as the customer can claim that the delayed and extended payments were not actually late.

The Regulations have had the greatest impact where the reports have been used in conjunction with other initiatives (e.g., PPN 08/21/PPC) to leverage procurement/buying power in order to improve commercial performance. They also provide a general temperature test as to whether a firm is likely to meet expected standards of payment.

However, this leverage has limited impact within the central government spending portfolio and is not necessarily adopted within the wider local and other public sector authorities and has little or no impact within the private sector.

Recommendation: We would also support the removal of the ability of parties to agree payment periods beyond 60 days under the banner that it is not *grossly unfair* and also to remove the ability to reduce the statutory interest rate.

Objective 3. The Regulations aim to help businesses better understand what to expect from their customers, and therefore be in a better position to:

a) make an informed judgment on whether to enter into a commercial relationship

b) negotiate fair terms

c) have information making it easier to challenge late payment

3. To what extent do you agree that the Regulations have helped businesses better understand what to expect from their customers?

~~**Strongly agree/agree/neither agree nor disagree/disagree/**~~ strongly disagree ~~**/don't know**~~

Please explain your answer / provide evidence

To a limited extent the data on average payment terms and % of invoices paid within terms will help form an initial view/informed commercial judgment of whether to enter into a commercial relationship. However, the data is by no means decisive and it does not preclude the reliance on

credit rating reports for these purposes.

The data does not aid the negotiation of fair terms as this is wholly based on the bargaining strength of the parties and the payer's disproportionately stronger position and ability to leverage its position in order to use a period of trade credit in order to off-set the risk of exposure to a less financially secure, higher risk smaller supplier/payee. As previously stated, whilst parties are legally free to specify longer than 60 day payment periods and remain unchallenged on whether these are '*grossly unfair'* the data will have limited relevance.

It is useful that the information is in one single report making it easier to assess any means of challenging late payment, beyond legal action. However, the data does not prima facie assist the challenge itself. To optimise the potential of the Regulations and improve payment behaviour the reports must capture value of payments made within terms/periods as well as volume of payments made within terms/periods.

Measuring value

Introduction of data on value of invoices paid within terms will no doubt provide more transparency on the financial impact of late payments, assuming that the guidance on how to incorporate value data is robust and clearly articulated.

Under the PPC, the Code doesn't specify whether the 95% is by 'Volume' of invoices or 'Value' of invoices but volume seems to be regarded as the default. However, critically most businesses (and especially SMEs) would be concerned about the value of late paid invoices and not the number of invoices as it is the value that represents the amount of cash being withheld.

Payment performance based on value of invoices is therefore much more important than volume of invoices. There is also a third payment related performance measure which is average time to pay.

There are an infinite number of invoice and payment combinations and scenarios. For simplicity, the scenarios below are based on the requirement to pay 95% of invoices within 60 days although the same principles would apply to the added requirement to pay 95% of invoices within 30 days for small businesses.

The following scenarios are designed to show that:

a) A business could manipulate its payment policy to achieve compliance by 'Volume' or by 'Value' (but rarely both) even if they are not genuinely trying to achieve 100% compliance with the lower 95% target in the PPC and PPN 08/20, allowing for exceptions (disputes, genuine delays, errors, process failures etc.).

b) A combination of low value/high volume immediate (chip'n'pin/tap'n'pay) transactions and invoices can result in compliance by 'Volume' (although not by 'Value') even though no invoices are actually being paid within 60 days.

Scenario 1 - Mix of high and low value invoices:

a) The prompt payment of larger invoices (as might be common because of supplier size and influence) can give very different results for 'Value' and 'Volume'.

b) The potential for misinterpreting payment performance is shown below as the 'Average Days to Pay' in the base case is 44 days although all medium sized and small invoices have been paid after 90 days.

c) Manipulating company payment policy can achieve compliance with either 'Value' or 'Volume' (but typically not both).

d) Although it might achieve compliance, neither manipulation ensures that all invoices regardless of size are scheduled to be paid within 60 days.

e) As an example of manipulating payment policy, the company can (i) achieve compliance by 'Volume' by paying £100k of smaller invoices but not paying £500k of medium sized invoices; or (ii) achieve compliance by 'Value' by paying 5 medium sized invoices and not paying 100 small invoices.

Scenario 1 - Mixed value invoices - Non Compliant (Volume and Value)

Invoice Amount (£)	Number of Invoices	Value Multiplier	Days to Pay	Payment Multiplier	Paid within 60 days		Avg Days to Pay
					By Value	By Volume	
1,000,000	2	2,000,000	30	60,000,000	Y	Y	
100,000	5	500,000	90	45,000,000	N	N	
1,000	100	100,000	90	9,000,000	N	N	
Total	107	2,600,000		114,000,000	77%	2%	44

Scenario 1A - Mixed value invoices - Change policy to pay smaller invoices faster
Now compliant by Volume (but not Value)

Invoice Amount (£)	Number of Invoices	Value Multiplier	Days to Pay	Payment Multiplier	Paid within 60 days		Avg Days to Pay
					By Value	By Volume	
1,000,000	2	2,000,000	30	60,000,000	Y	Y	
100,000	5	500,000	90	45,000,000	N	N	
1,000	100	100,000	60	6,000,000	Y	Y	
Total	107	2,600,000		111,000,000	81%	95%	43

Scenario 1B - Mixed value supply chain invoices - Change policy to pay medium sized invoices faster
Now compliant by Value (but not Volume)

Invoice Amount (£)	Number of Invoices	Value Multiplier	Days to Pay	Payment Multiplier	Paid within 60 days		Avg Days to Pay
					By Value	By Volume	
1,000,000	2	2,000,000	30	60,000,000	Y	Y	
100,000	5	500,000	60	30,000,000	Y	Y	
1,000	100	100,000	90	9,000,000	N	N	
Total	107	2,600,000		99,000,000	96%	7%	38

Scenario 2 – Mix of low value/high volume immediate payments and mixed value invoices:

a) A combination of low value/high volume immediate (chip'n'pin/tap'n'pay) payments and a mix of high and low value invoices within a supply chain ledger can distort the compliance measures.

b) If compliance is only being measured by 'Volume', instantaneous low value transactions in a purchase ledger are ranked equally with much more substantial and extended supply chain invoices.

c) Compliance by 'Volume' can be achieved even if all small and medium sized invoices are paid after 90 days (and even if all supply chain invoices regardless of size are paid after 90 days) which is why compliance by 'Value' is also important.

Scenario 2 - Mix of low value/high volume immediate (chip'n'pin/tap'n'pay) transactions and invoices

Compliant by Volume (but not Value)

Invoice Amount (£)	Number of Invoices	Value Multiplier	Days to Pay	Payment Multiplier	Paid within 60 days		Avg Days to Pay
					By Value	By Volume	
1,000,000	2	2,000,000	30	60,000,000	Y	Y	
100,000	5	500,000	90	45,000,000	N	N	
1,000	100	100,000	90	9,000,000	N	N	
10	10,000	100,000	1	100,000	Y	Y	
Total	10,107	2,700,000		114,100,000	78%	99%	42

Scenario 2A - Mix of low value/high volume immediate (chip'n'pin/tap'n'pay) transactions and invoices

Compliant by Volume (but not Value)

Invoice Amount (£)	Number of Invoices	Value Multiplier	Days to Pay	Payment Multiplier	Paid within 60 days		Avg Days to Pay
					By Value	By Volume	
1,000,000	2	2,000,000	90	180,000,000	N	N	
100,000	5	500,000	90	45,000,000	N	N	
1,000	100	100,000	90	9,000,000	N	N	
10	10,000	100,000	1	100,000	Y	Y	
Total	10,107	2,700,000		234,100,000	4%	99%	87

Based on the scenarios and basic business fundamentals, compliance by 'Value' is much more important than compliance by 'Volume', especially for SMEs. However, genuine attempts by a company to achieve compliance would almost certainly satisfy both 'Value' and 'Volume' so both should have a 95% requirement under the PPC and PPN 08/20.

Until such time as prompt payment reporting takes into account payment performance by value as well as by volume of transactions, the reports will remain of limited use in the commercial market-place or as a barometer for corporate governance, trust and resilience.

Objective 4. The Regulations aim to provide incentives on businesses to improve payment practices.

4. To what extent do you agree that the Regulations have provided incentives on businesses to improve payment practices?

~~Strongly agree/~~ <u>agree</u> ~~/neither agree nor disagree/disagree/~~strongly ~~disagree/don't know~~

Please explain your answer / provide evidence

Our strict/literal answer to the question is that the Regulations themselves have not provided incentives on business to improve payment practices. However, the Regulations are a catalyst enabler of other initiatives in the payment landscape – e.g., PPN 08/01, PPC, payment league tables, open source platforms (Good Business Pays), supply chain finance, statutory interest on late payment, grossly unfair payment terms etc.

Some of our group were involved in the policy thinking behind the original Regulations and reporting requirements, the design of which was to create a data source for payment behaviour. This would enable transparency and act as a catalyst for change. Other initiatives could then link to the payment data source in order to measure acceptable payment behaviour. This would then create both a 'pull' and a 'push' towards improving liquidity and lowering wider economic reliance on trade credit as a means of free financing as an alternative to bank lending, given that trade credit puts a disproportionate pressure on SMEs lower down in supply chains who are less able to manage contractual and credit risk.

There remains a lack of clarity over which organisations need to report and how. This confusion has arisen in part due to the fact that construction applies for and is paid prior to invoice – for tax reasons. Therefore, differing obligations of complying with the 2017 Regulations versus complying with the long standing Housing Grants, Construction and Regeneration Act 1996 have emerged. Although there is statutory guidance on this point, it would seem this is a source of confusion which can be exploited by parties wishing to implement incorrect metrics. The guidance states that parties should measure from the first date on which they have notice of the amount due, which under the Housing Grants, Construction and Regeneration Act 1996, is the date of the first notice containing

the notified sum (the application for payment). We have seen several parties measuring from a date beyond that and therefore not counting periods which are inconvenient to them in order to improve their payment metrics. Further, the website does not identify which business need to report but are not – it only supplies a self-diagnostic tool.

Recommendation: Businesses operating through HMRC/Companies House could self-declare whether they meet the tests for reporting requirements. Answers would then automatically feed into the BEIS reporting website highlighting those who should be reporting but are not.

Research published by *Construction* News has indicated that one sixth of larger construction organisations are not publishing data on their payment times. Reasons for this include misunderstanding of the regulation's reporting requirements. There is also uncertainty as to the definition of balance sheet totals and also on the standard for organisations in scope.

Objective 5. The Regulations aim to make it easier for business representative bodies, suppliers, and other businesses to identify late paying businesses and put commercial and reputational pressure on these businesses to pay promptly.

5. **To what extent do you agree that the Regulations have made it easier for business representative bodies, suppliers, and other businesses to identify late paying businesses and put commercial and reputational pressure on these businesses to pay promptly?**

   ~~Strongly agree/~~ ~~agree/~~ neither agree nor disagree **/~~disagree/strongly disagree/don't know~~**

   Please explain your answer / provide evidence

   League tables (Construction News, Build UK), PPC exclusion/suspension and PPNs have leveraged the data source within the reports filed under the Regulations to identify perennial later paying businesses and put commercial pressure on these businesses to improve their payment behaviour.

   Those bodies are precluded by anti-competition law from taking action against organisations who demonstrate poor payment performance. This has not helped individual businesses put commercial pressure on the poorly performing businesses to achieve a better result within the context of their relationships which are still dictated by commercial size, resources and bargaining strength.

   It is also worthy of note, that reputational pressure is only applicable where the business manages either a consumer facing brand/image, and/or is reliant on the public sector for work. Beyond those areas of reputational pressure, negative reputational issues stemming from payment data have only a limited impact upon share price or risk ratings.

   We have recently interviewed some of the leading technology solution providers in the payment automation space who have modelled solutions around reporting by volume of payments made within periods/terms. All providers universally stated it was simple to run reports based on value of payments made within terms/periods and that the capability to runs those reports already exists.

6. **Do you think there have been any unintended effects of the Regulations?**

   ~~Yes/~~ No **~~/don't know~~**

   Please explain your answer / provide evidence

   Reports are painting a more positive picture of an improving payment performance than is reflected in market research and insolvency statistics. We think this is because the reports measure the volume of transactions paid within terms and not the value of transactions paid within terms. If both volume and value were measured, the true picture of payment performance would be gathered and a realistic picture of performance presented. It may have resulted in prioritisation of payment of lower value invoices, so that it could provide the company with a positive rating.

   We have seen how a rate of 95% of invoices paid on time could mean that the company has paid on time invoices of low value (i.e., monthly catering bills) rather the less frequent but of higher value invoices of sub-contractors. Instead of the current reporting, we could have a breakdown of how promptly invoices of different values were paid – tiered approach of % for invoices with specified value brackets as described above.

7. Do you think the Regulations should remain in effect?

Yes ~~/no/don't know~~

Please explain your answer

Summary: as stated above the Regulations have been transformative and for reasons outlined in our response industry cannot afford to lose these Regulations. Indeed, we would encourage Government to:

a) Make the Regulations permanent; and

b) Consider incorporating the improvements recommended herein.

Why: Many industry commentators seek to differentiate between contractually agreed delayed payment periods (trade credit) and late payment (payment made after the agreed trade credit period). However, both delayed and late payment are symptomatic of the high levels of disaggregation and fragmentation of the UK construction industry.

According to UK construction: An economic analysis of the sector,

- construction businesses are considered to be of higher risk due to low levels of fixed capital and smaller firm size. Late payment is a particular problem for construction businesses, and construction contracting SMEs rely on trade credit to smooth cash flow during the period between doing the work and receiving payment.
- it is estimated that for every £1 spent in construction at least 90% stays in the UK.
- during the last recession, bank lending to the construction contracting sector decreased both in absolute terms and relative to other sectors from about £32.2 billion in early 2009 to £19.9 billion in December 2012. This is equivalent to a reduction of 38% and compares with a fall of less than 5% on average across all UK sectors.
- SMEs in the construction contracting industry are less successful than other sector SMEs on average in applying for overdrafts (59% compared to 71% overall) and loans (44% compared to 59% overall) 47% of all companies who received trade credit considered it to be very important for company growth. the UK Construction industry is also more fragmented than its major European competitors and the evidence shows it has higher levels of sub-contracting

Conclusions from the Supply Chain Analysis into the construction industry, highlighted that:

- the UK construction sector is characterised by high levels of fragmentation. While there are some large businesses, at least 99.9% of organisations are SMEs and, of those, some 83% employ no more than one person[118]. The industry tends to rely on a high degree of sub-contracting and has a high proportion of self-employment, with over 40% of construction contracting jobs being self-employed.
- a 'typical' large building project – that is, in the £20 - £25 million range - the main contractor may be directly managing around 70 sub-contracts of which a large proportion are small – £50,000 or less and the average supply chain is 4 to 5 levels deep.

Trade Credit in the UK Construction Industry, highlighted that construction contracting organisations make between two and three times more use of trade credit than companies in the rest of the economy. Credit received from suppliers has a value equal to 32% of construction contractors' total assets (24% of construction SMEs' assets) compared to 11% for the rest of economy. Trade credit given by construction contractors makes up 20% of total assets for construction contractors (21% for construction SMEs) compared with 8% for the rest of economy.

In 2016, The Farmer Review: Modernise or Die, highlighted that:

- the industry has a reputation for being a cash flow rather than margin led sector. The derivation of this is difficult to pinpoint but seems to have been driven by fragmentation.
- businesses higher up the supply chain will use other businesses' money lower down to temporarily support and enhance their own cash flow.
- industry should look at more use of project bank accounts and new methods of project level insurance policy to re-aggregate the natural fragmentation that may exist around transactional and legal liability

interfaces that often stand in the way of innovative procurement and product assembly models. This should also extend to digitisation of the payment process all the way down the supply chain and a move away from a culture of using other peoples' money to make money. These measures need to be supported by appropriate contractual mechanisms.

We also know that only 4% of construction regards factoring or invoice financing as a viable source of funding and only 1% are likely to achieve any realistic equity financing (verses 3% outside construction within SMEs). Therefore, given the relatively high-risk nature of construction businesses, the fragmentation and disaggregation of supply chains, delayed payment (trade credit), as much as late payment, is an acknowledged barrier to the industry's growth and investment.

Construction Excellence: The Payment Minefield stated that UK construction, as an area of commerce, is unique in the extremely high level of disaggregation and fragmentation within its supply chains. Small businesses which dominate construction on average spend 130 hours each year, at an average cost of £1,500 per business, chasing payment, while incurring £180 million in debt interest charges – money that could otherwise be used for investment and growth at a time where the industry desperately needs both capacity and innovation.

Cash flow issues can also be experienced by large organisations. In a low profit margin industry such as construction, some large companies will pay late to maximise cash flow. This can realise significant benefit if large sums of money are withheld for the longest possible turn to increase funds.

On the basis that the use of trade credit as an alternative form of liquidity financing has been the reliable source of financing in the highly fragile construction industry, the Regulations have been the single most transformative payment initiative from Government for decades.

As described above, the payment performance reports have acted as a catalyst for change and integration within the wider payment landscape. Even with reports from the unintended 'gaming the system' practices, it reinforces positive messages that promptness of payment is good business practice. Moreover, it is a measure operated with no extra cost to the public purse.

In addition, it has helped digitisation of payment systems, as they support reporting and monitoring. There are sectors that have wholesale adopted technologies which enable them to meet the reporting requirements and it would be a substantive step-backwards on the digital maturity curve to see those organisations regress into opaque payment procedures.

Those technologies have all been interviewed and can adapt/pivot and provide the necessary reporting on value as well as volume of transactions paid within terms. The Government's Help to Grow scheme could also accelerate this adoption.

Monitoring of compliance

We do believe however, that the reporting could be improved to provide some quality check of the data. Feedback from users is they find the 'honesty-box' approach undermines the objectives of the reporting Regulations, i.e., whilst there may be corporate and individual sanctions for not reporting or misreporting, there is little or no means of currently identifying if the data is an accurate reflection of reality.

We also know that 'gaming the system' has been in play with some parties using supplier issued credit cards to allow the buyer to pay on time and achieve a hidden benefit of delayed payment.

Other parties have taken advantage of ambiguities within the statutory guidance regarding dates from which they measure payment, in order to misrepresent a more positive picture of payment performance.

Thirdly, some parties are able to use supply chain finance data to improve their payment performance. The payer can instruct their SCF provider to pay the payee early – subject to an administration fee and claw-back arrangement should the payer become insolvent and fail to pay the finance provider. The payer then pays the SCF provider on the original extended payment period. This creates a false impression that the payer is paying the payee early when the payee is paying for the SCF system and early payment and is also subject to claw-back in the event of payer insolvency.

We also know statutory auditors will not check the accuracy of payment data, only that the data has been reported which remains a source of frustration.

Therefore, while many companies will embrace the Regulations' requirements, others can mask performance for competitive advantage. This is because the Regulations have a self-reporting focus and it is unclear how data is submitted, authenticated, interpreted, and interrogated.

Recommendation: We suggest Government introduce random audits of company reporting. We also ask Government to demonstrate how it will ensure compliance with the Regulations by organisations who currently believe they are exempt.

We suggest the Regulations are amended to include the requirement to report on:

	Percentage of suppliers (in volume terms)	Percentage of suppliers (in value terms)
Payment <= 30 days		
31 <=payment <=60		
Payment >=61		

We also suggest a priority is set for audit of payment performance based on the following risk factors - targeting companies with a high concentration of their supplier base e.g., 80% of the companies' payables are concentrated on 20% of their supplier base. Random/spot check audits should prioritise spot audits on companies' suppliers with a high dependency ratio i.e., if criteria (a) below is met and start with those meeting multiple criteria:

a) Businesses that generate over 50% of any single supplier's turnover

b) Payment terms exceed 30 days

c) Finance rating of suppliers below investment grade

d) Applied for the government support scheme during lockdowns

Whilst these criteria may seem high, they provide key identifiers on which to prioritise resources and target compliance checks. This recommendation dovetails with the concept of supply-chain resilience contained within Government playbooks following the collapse of Carillion.

Failing to report, or intentionally publishing false or misleading information, is a criminal offence under the Regulations. Both the qualifying business itself and its directors (or designated members) may be liable to a fine. However, directors (or designated members) have a defence if they can show that they took all reasonable steps (undefined) to ensure that the requirements under the Regulations were satisfied. The defence that the publishing of false or misleading information was 'unintentional' or 'reasonable steps' were taken is wide and ensures the threshold for prosecution would be extremely high and difficult to prove. This undermines the punitive deterrent for compliance.

Actuate UK's Business Group has concluded that whilst the Regulations measure only the volume of payment made within 30, 30-60 and 60+ days, there is a fundamental flaw in the Regulations reporting requirements.

Whilst tracking the number of payments organisations make within 30, 30-60 and 60+ days provides an indication of average payment speed, it does not indicate if the bulk of value of those payments is being made in line with its average payment time.

Measuring the value of payments made within 30, 30-60 and 60+ days, on the same basis as volume, will provide a more accurate picture of a company's performance on payment.

In 2020, Cabinet Office launched the Construction Playbook setting out 14 policies across 12 chapters.

Measuring value of payments made within terms alongside volume of payment made within terms, is consistent with the principles of the Construction Playbook – specifically the principles in chapters

3 Early Supply Chain Involvement, 6 Contractualisation, 7 Fairness and payment, 8 Due Diligence and 10 Resolution Planning and Financial Monitoring – specifically:

We want to create a contracting environment that delivers a sustainable, resilient and effective relationshipbetween contracting authorities and the supply chain, focused on outcomes, and that creates long-term value for all.

The payment mechanism and pricing approach, and the approach to risk go hand in hand. The aim of the payment mechanism is to reflect an optimum balance between risk and return in the contract.

The government understands the importance of prompt, fair and effective payment in all businesses. Being paid promptly for work carried out in accordance with the contract ensures businesses have a healthy cash flow throughout the supply chain, especially at the lower tiers

PPC Reforms

In the changes announced 19th January 2021, the PPC has been strengthened by:

- Confirming the requirement to pay 95% of invoices within 60 days.
- Introducing an added requirement that 95% of invoices from small businesses (with less than 50 employees) must be paid within 30 days (effective from 1st July 2021 for existing signatories).
- Requiring small and medium sized signatories to report annually on their payment performance, on a comply or explain basis.
- Promoting and strengthening the PPC website.
- Requiring the signatories to recognise the right of suppliers to charge late payment interest if an invoice is paid late without justification.
- Stating that applications to join the PPC, must be signed by the Chief Executive, Finance Director, or in the case of smaller businesses, the company owner.
- Suppliers should be provided with a contact point for payment queries.

It is not clear how the PPC expects a company to identify small businesses (with less than 50 employees) in their supply chain as that classification is not held anywhere and would not be straightforward to establish. Other recommendations have been made for changes by Companies House whereby such data would be captured as part of the mandatory annual Confirmation Statement.

We would support a solution whereby Companies House website contains mandatory questions which would means that a business is self-declaring to Companies House whether it was small, medium or large.

Finally, the category of 30-60 days is quite broad, assuming that most organisations are on average 30 day terms, but we respect that this meets the requirements of the late payment legislation dictating a maximum of 30 days payment terms in the public sector and 60 day payment terms in the private sector. However, that same late payment legislation allows the parties to override 60 day payment requirements provided it is not '*grossly unfair*'. The current reporting requirements only measure 60+ days. It would be helpful in construction to also measure 61-90, 91-120 and 120+ day payments.

Retentions

The Actuate UK Business Group would also like to highlight that in construction a percentage of the contract price is conventionally withheld until a delayed period after completion (1-2 years) as security against defects (contractual non-performance).

The construction team at BEIS has over recent years consulted on this issue and industry has responded with a call for reform. Previously, opinion was divided on the shape of the reform required. Actuate UK's position is that retentions should be reformed through legislation. At its essence this practice delays payment of sums in respect of labour and goods already delivered by years and is widely understood that this practice hinders growth and investment in construction.

Whilst this issue is specific to construction, it highlights that payment is legislated for generally in most aspects, except for this one which, at a macro-level structurally damages and undermines industry performance.

Recommendation: additional requirement to report, for those business registered against the construction SIC code, whether they delay payments a security against contractual non-performance? If so, on average by how long? What percentage of these invoices (by value and by volume), were paid within contractually agreed terms?

In the absence of specific legislation to abolish retentions, this recommendation would at least go some way to shining transparency on the negative payment performance.

Review

The Actuate UK Business Group would like to work with Government to build on the success of and strengthen the Regulations.

We call on Government in partnership with industry to:

- Develop construction specific guidance on the reporting requirements and the organisations that fall within their scope.
- Expand the remit of the Office of the Small Business Commissioner to include construction.
- Strengthen monitoring of compliance at Government level.
- Expand the Help to Grow Digital offer to include technology options specifically tailored to digitising payments (in compliance with the Housing Grants, Construction and Regeneration Act 1996) for the purposes of reporting under the Regulations.
- Remove the ability of parties to agree payment periods longer than 60 days and remove the ability to reduce penalty interest rates.
- Expand the reporting requirements to include the requirement to measure value of invoices paid within terms, as well as volume of invoices paid within terms.
- Integrate the reporting website within BEIS to work with Companies House and HMRC to identify those who should report but are not doing so, and to identify which entities are small, medium and large in line with legislation and reporting requirements.
- Monitor through targeted spot checks/audits of those large organisations with the most vulnerable supply chains.