EXPLANATORY MEMORANDUM TO

THE LEGAL AID (FINANCIAL RESOURCES AND PAYMENT FOR SERVICES) (LEGAL PERSONS) REGULATIONS 2013

2013 No. 512

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations set out the circumstances in which legal persons (that is, corporate bodies such as companies, as distinct from individuals) are to be financially eligible for civil or criminal legal aid.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013, currently before Parliament, will allow for civil legal aid to be provided in relation to applications under the Convention on the international recovery of child support and other forms of family maintenance concluded at The Hague on 23 November 2007 (the "2007 Hague Convention"). Subject to Parliamentary approval of that Order, a further set of regulations will be brought forward to amend these Regulations to make provision for the financial eligibility rules for cases under the 2007 Hague Convention. It is intended that those amending Regulations will come into force on 1 April 2013.

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act'). These instruments will be laid in time for Part 1 of the Act to come into force on 1 April 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Act gives effect to the Government's policy position on legal aid. At present legal aid is available only to individuals. Section 31 of, and Schedule 3 to, the Act make it available to legal persons in certain limited circumstances. That change is necessary to give effect to a judgment of the European Court of Justice in December 2010, which found that "the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned"[1]. The Act therefore allows for legal aid to be granted to a legal person where failure to do so would be a breach of the legal person's Convention rights or enforceable EU rights ('an exceptional case determination').

7.2 In order to qualify for legal aid, legal persons will have to meet the criteria for an exceptional case determination. Those that meet the criteria will also be subject to a separate determination as to financial eligibility. The existing provisions for determining financial eligibility were devised with individuals in mind and would not be fully suitable for legal persons. It is therefore necessary to put in place a bespoke financial eligibility provision for legal persons.

7.3 In essence these regulations provide that for civil cases, legal aid will be refused if the legal person can withdraw from their resources and/or borrow a sum in excess of £8,000 or if they have disposable income in excess of £733 a month (these sums represent the existing eligibility thresholds for individuals). A legal person who is not excluded under those tests must in addition show that they are unable reasonably to obtain sufficient means to fund the necessary legal services without legal aid. For criminal cases, the starting point is that a legal person is to be treated as financially ineligible for legal aid, unless they can show on application to the Director that they are unable reasonably to obtain sufficient means to fund the services required. For both civil and criminal cases a legal person who is granted legal aid and can afford to make a contribution towards the cost of their case will be required to do so.

7.4 Subject to that, these regulations draw from the regulations on financial eligibility for individuals those provisions which are required for legal persons and adapt them as necessary – for example, there is provision for treating as still possessed by legal persons resources of which they have deprived themselves. There are also provisions for reassessment of the legal person's financial eligibility, for example where there has been an administrative error or change of circumstances. The Director may require legal persons to provide information and there is a duty on legal persons to report relevant changes of circumstances.

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[1] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (C 279/09, 22 December 2010)

8. Consultation outcome

8.1 The consultation 'Proposals for the reform of legal aid in England and Wales' was published on 15 November 2010 and closed on 14 February 2011. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees. Most changes widened access to legal aid for certain types of case compared to the original proposals, for example an expansion of the criteria to qualify for legal aid in a private family law case involving domestic violence. However, other changes further limited access to legal aid, such as removing funding for certain immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year.

8.3 With regard to criminal legal aid the Government concluded that: "*those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it. We do not therefore consider that it is appropriate to restrict further legal aid in criminal cases.*"

8.4 A detailed Government response to the consultation exercise is available on the MoJ Website at www.justice.gov.uk/consultations/legal-aid-reform.

8.5 We have not consulted on the Legal Aid (Financial Resources and Payment for Services) (Legal Persons) Regulations 2013.

9. Guidance

9.1 Legal aid providers will not be required to carry out financial eligibility assessments for legal persons, which will be carried out by the Director (or legal aid caseworkers on the Director's behalf). The Legal Services Commission will prepare any necessary internal guidance and training for staff.

10. Impact

10.1 No impact on business, charities or voluntary bodies is foreseen.

10.2 No significant impact on the public sector is foreseen. There may be a small additional resource demand on the Legal Aid Agency in processing legal aid applications from legal persons.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not regulate small business.

12. Monitoring & review

12.1 The Ministry of Justice will conduct a post-implementation review of the Act between three to five years after implementation.

13. Contact

Simon MacCulloch at the Ministry of Justice (tel: 020 3334 6074 or email: Simon.MacCulloch@justice.gsi.gov.uk) can answer any queries regarding the instrument.