

Provisional common framework: Late payment (commercial transactions) Research Briefing

August 2022



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The UK and devolved governments published the **provisional common framework on late payment (commercial transactions)** in December 2021.

Common frameworks are agreements between the UK and devolved governments on how to work together and manage divergence in areas previously governed at EU level.

Provisional common frameworks are being published for scrutiny. In 2022, the Senedd's **Public Accounts and Public Administration Committee** scrutinised the provisional common framework on late payment (commercial transactions), and made **recommendations** to the Welsh Government.

Once all parliaments have completed scrutiny, the UK and devolved governments intend to respond to recommendations and agree a final version.

This briefing provides an overview of the provisional common framework on late payment (commercial transactions).

Contents

Summary	1
1. Background	1
2. The common framework	2
3. Governance	2
Roles and responsibilities	2
Making decisions.....	3
Managing international obligations.....	3
Managing the impact of the UK Internal Market Act	4
Resolving disputes.....	4
Planned changes to law and policy	5
4. Monitoring, review and amendment	6
5. Transparency and accountability.....	6

Summary

EU law on late payment aims to protect small and medium-sized businesses from late payment by public authorities and by other businesses. Now that the Brexit transition period has ended, the UK and devolved governments ('the governments') can take different approaches to late payment law.

The provisional common framework on late payment (commercial transactions) ('the framework' hereafter) sets out how the governments will work together to manage divergence in late payment law. The governments agree to seek to maintain a level playing field for businesses, and commit to notify and consult each other about proposals for new law and policy.

The framework sets out a dispute resolution process. If the governments do not agree on whether to take the same approach or diverge, they will seek to resolve the disagreement at the lowest possible level. They may then escalate the disagreement to senior officials and to Ministers.

The framework does not require the governments to update parliaments and stakeholders on how it is working, or to involve parliaments and stakeholders in review and amendment. The governments have agreed in principle to report regularly to parliaments on common frameworks. The Welsh Government has also agreed unilaterally to report to the Senedd on common frameworks, and to consult the Senedd and stakeholders during review and amendment.

1. Background

The provisional common framework on late payment covers the EU Late Payment Directive (2011/7/EU). This was transposed into domestic law. The regulations transposing the Directive into domestic law have been retained following the end of the transition period.

The Directive aims to **protect small- and medium-sized businesses** from late payment by public authorities and by other businesses. It provides that:

- public authorities have to pay for the goods and services that they procure within 30 days;
- enterprises have to pay their invoices within 60 days, unless they expressly agree otherwise and provided it is not grossly unfair;

- there is automatic entitlement to interest for late payment and €40 minimum as compensation for recovery costs (in the UK, a fixed charge of £40, £70 or £100 depending on the size of the debt, plus additional reasonable costs incurred); and
- there is statutory interest for late payment of at least 8% above the European Central Bank's reference rate (in the UK, the Bank of England reference rate plus at least 8 percentage points).

In the EU, national authorities are allowed to adopt laws that are more favourable to the creditor than the Directive allows.

Late payment law is devolved. Now that the transition period has ended, the governments do not need to comply with EU law, and can take different approaches to late payment law. The framework aims to ensure that divergence between different parts of the UK is managed.

2. The common framework

The framework affirms the **principles for common frameworks** agreed between the governments by the Joint Ministerial Committee (European Negotiations) in October 2017.

The framework states it's needed **"to enable the functioning of the internal market, while acknowledging policy divergence"**. The governments agree to "maintain a level playing field" for businesses operating across the UK.

The framework notes that, although the governments had some scope to diverge while in the EU, they chose to maintain the same rules to avoid businesses facing competitive disadvantage.

3. Governance

The framework is a non-legislative agreement between the governments. It will be underpinned by an exchange of letters between Ministers.

Roles and responsibilities

The framework sets out a tiered governance structure for the governments to work together and make decisions:

- at official level, a **Late Payment Working Group** will meet regularly for officials

to “engage on policy development, provide updates on progress, and raise concerns and awareness of cross-cutting issues”;

- at senior official level, a **Late Payment Programme Board** will meet as needed to maintain oversight of the Working Group, and consider any decisions and disputes that are escalated to it; and
- **Ministers** will consider decisions and disputes that are escalated to them.

The Late Payment Working Group will be chaired by a UK Government official, while the chair of the Late Payment Programme Board will be rotated between the governments. The UK Government will provide secretariat support.

Making decisions

The governments agree to consider the impact of their decisions on other governments and the UK internal market. They agree to notify the other governments and consult them on any proposed legislative changes at the earliest opportunity.

Officials from the governments will discuss policy proposals through the Late Payment Working Group, and make recommendations to Ministers. This could either be for the same approach to legislation across the UK or for divergent approaches.

If the governments do not agree whether divergence is appropriate, the disagreement can be referred to the dispute resolution process.

The Senedd’s **Public Accounts and Public Administration Committee has called** for the Welsh Government to seek agreement that the framework should not dilute the role of parliaments and stakeholders in making law and policy. The **Welsh Government has said** the framework does not constrain the powers of the Senedd.

Managing international obligations

In 2017, **the governments agreed** that common frameworks should be established where needed to:

- ensure compliance with international obligations; and
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.

Unlike most common frameworks, the late payment framework does not include any consideration of how it will interact with international obligations.

With regards to **post-Brexit UK-EU obligations**, the framework acknowledges that it does not fall within the **Trade and Co-operation Agreement**, or interact with the **Withdrawal Agreement's Protocol on Ireland/Northern Ireland**.

Managing the impact of the UK Internal Market Act

The **governments also agreed in 2017** that common frameworks should be established where needed to ensure the functioning of the UK internal market, to prevent unintended barriers to trade from developing between different parts of the UK.

In December 2020, the UK Parliament passed the **UK Internal Market Act 2020** ('the Act'). This sets new market access principles in law. These principles are intended to ensure that, in general, goods, services and professional qualifications sold or recognised in one part of the UK can be sold or recognised in another part.

Sections **10** and **18** of the Act allow the UK Government to make regulations to create exclusions from the market access principles. They may do this to "give effect to an agreement that forms part of a common framework agreement." The governments have agreed a **process for considering and agreeing exclusions from the market access principles in common framework areas**.

UK Government analysis suggests that the Act will have an impact on the operation of this framework. It is not clear to what extent the Act will impact the framework, or whether the Welsh Government will seek any exclusion.

Resolving disputes

The framework sets out a process for the resolution of disputes. It states this should only be used if disagreements cannot be resolved "at working level".

If officials in the Late Payment Working Group do not agree on whether the governments should take a common approach or diverge, the disagreement may be escalated to the Late Payment Programme Board, and then to portfolio Ministers. The governments agree that actions under dispute should be paused while the dispute resolution process under way. No time limits are set for dispute resolution.

If the dispute cannot be resolved through this process, it may be escalated to the interministerial dispute resolution process set out in the recent **Intergovernmental Relations Review**. The **Counsel General said** this was a “groundbreaking step”.

The framework does not provide for disputes to be notified to parliaments or stakeholders. However, the **Welsh Government has committed** to notify the Senedd of disputes.

Planned changes to law and policy

UK Procurement Bill

The UK Government introduced a **Procurement Bill** to reform EU-derived procurement law in June 2022.

Part 4 of the Bill makes provision for terms in public contracts. As part of this, it would introduce a requirement for contracting authorities to make payments within 30 days, and a power for Ministers to reduce this period by regulations.

The governments have also agreed a provisional common framework on public procurement. The **Welsh Government has said** that the common framework on public procurement falls outside the scope of the late payment framework, and that there is no link between the two frameworks.

The **Senedd’s Public Accounts and Public Administration Committee has recommended** that the Welsh Government set out how it will ensure late payment officials are involved in discussions on any relevant proposed reform to procurement law

Welsh Government Social Partnership and Public Procurement Bill

The Welsh Government introduced a **Social Partnership and Public Procurement Bill in June 2022**.

This will set a statutory duty on certain public bodies to consider socially responsible public procurement, to set objectives in relation to well-being goals, and to publish a procurement strategy.

The **Welsh Government has acknowledged** that there may be links between this Bill and the UK Procurement Bill.

UK Government review of retained EU law

The **UK Government has set out plans** to introduce a Retained EU Law Bill to make it easier to change or repeal retained EU law (REUL) and to remove the **special status** it has in UK law.

The **UK Government has said** that it will not seek to make changes to REUL within common frameworks “without following the ministerially-agreed processes in each framework”.

4. Monitoring, review and amendment

The Late Payment Working Group will oversee the functioning of the framework. The Late Payment Working Group and the Late Payment Programme Board will review their operation annually against their terms of reference.

The governments will review the framework regularly. The framework is inconsistent about the frequency of review: it states that it will be reviewed “annually”, but later says reviews will happen “one year after final sign off, and every three years thereafter”. The **Welsh Government has said** that the latter version is correct.

Reviews will consider compliance with the framework and “whether it is still suitable to ensure all Parties can achieve their aims on late payment policy”.

There may also be a review if a “significant issue” arises that has a “fundamental impact” on the framework’s operation and is time-sensitive.

Following a review, the governments may agree to open a discussion of amendments by unanimous agreement. Amendments to the framework must be agreed unanimously. If there is no agreement, the dispute resolution process may be used.

5. Transparency and accountability

The framework does not set out whether there was any consultation with stakeholders. The **Welsh Government has said** that a variety of stakeholders were provided with a summary of the framework across the UK.

The framework states that there is “no regular planned Parliamentary or stakeholder engagement for this policy area” and that “communication takes place on an ad hoc basis”.

There are no commitments to give parliaments a role in monitoring the operation of the framework or scrutinising amendments. The framework says that the governments may use third parties to advise on review and amendment to the framework. This could include government bodies or external stakeholders. In March, **the Counsel General committed** to notify the Senedd and stakeholders when a common framework is reviewed, and consider their recommendations before the review process concludes.

There is no commitment for reports on the operation of the framework to be produced or published. The **Welsh Government has committed** unilaterally to report annually on the functioning of each frameworks. In November, the **Counsel General said** that the governments had all agreed to future reporting on common frameworks.