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The Provisional Late Payments (Commercial Transactions) Common Framework

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This paper explores issues arising from the Provisional Late Payments Common Framework, to assist the Committee for the Economy in its scrutiny role.

This information is provided to Members of the Legislative Assembly (MLAs) in support of their duties, and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice, or as a substitute for it.

Introduction

This briefing paper is prepared at the request of the Committee for the Economy (the Committee), to assist its scrutiny of the Provisional Late Payments (Commercial Transactions) Common Framework (LPCF).¹ It is a non-legislative Common Framework (CF), setting out the proposed arrangements in the area of Late Payments, to underpin working relationships between the United Kingdom (UK) Government, the Scottish and Welsh Governments, and the Northern Ireland (NI) Executive, following on from the UK's exit from the European Union (EU). The LPCF has been "...provisionally approved by Ministers across the UK Government and devolved administrations...". Now, it - as is the case for all proposed CFs (non-legislative and legislative) – is:

*...shared with committees across UK Parliament and devolved legislatures to enable parliamentary scrutiny before final review.*²

To contextualise detailed examination of the LPCF, Section 1 of this paper first provides general background, explaining the general purpose of CFs and their related process. Section 2 discusses key issues arising for all CFs, including the LPCF. Thereafter, the paper presents an overview of the LPCF (Section 3), identifying key issues arising, which potentially merit Committee consideration. Finally, key concluding remarks are offered (Section 4), drawing on findings made earlier in the paper. Throughout, potential scrutiny points are highlighted to facilitate Committee engagement with the Department for the Economy (DfE) about the LPCF.

This paper is not offered as legal advice or opinion. Rather, it aims to assist the Committee in further expanding its knowledge and understanding of the LPCF. That information seeks to facilitate the Committee when exercising its scrutiny role both now and in future.

¹ Department for Business, Energy and Industrial Strategy (2021) *Late Payments (Commercial Transactions): Provisional Common Framework*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041173/Late_Payment_Provisional_Common_Framework.pdf

² UK Government, Collection: *UK Common Frameworks* (updated 3 February 2022) <https://www.gov.uk/government/collections/uk-common-frameworks>

1 Background to CFs

This section presents context-setting information, giving an explanation of the role of CFs and outlining the process under which CFs are to be implemented and reviewed.

1.1 What are CFs

When the UK was a Member State of the EU (pre-31 January 2020) and during the transition period (i.e. 31 January 2020 – 31 December 2020), EU law provided the basis for minimal standards across the UK in specified policy areas, regardless of those areas having been reserved, excepted or transferred (devolved) under prevailing devolution settlements in the UK. Simply stated, that effectively provided a common approach under which EU law could be transposed and implemented in those specified policy areas, across all four nations comprising the UK.

However, the EU common basis in the specified policy areas changed following the UK's exit from the EU *via* the UK and the EU's signing of Withdrawal Agreement³, and Westminster's subsequent enactment of The European Union (Withdrawal Agreement) Act 2020.⁴ At the time of writing this paper, that change remains unsettled; unresolved matters relating to the Protocol on Ireland/NI (the Protocol) continue and the outcome of the ongoing Protocol-related negotiations between the UK Government and the EU is awaited. CFs provide the legislative and non-legislative mechanism, under which, the UK Government and the Devolved Administrations can:

*... ensure a common approachwhere needed on policy areas where powers are returning/have returned from the EU and which intersect with devolved competence...*⁵

1.2 Principles for CFs

Three underpinning Principles for all CFs were proposed by the UK Government and endorsed by the Scottish and Welsh Governments at the Joint Ministerial Committee (European Negotiations) (JMC(EN)) in October 2017.⁶ They later were endorsed by the NI Executive in June 2020. The JMC(EN) Principles are presented in Table 1 below:

³ UK Government Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

⁴ The European Union (Withdrawal Agreement) Act 2020 <https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>

⁵ UK Common Frameworks - GOV.UK (www.gov.uk)

⁶ NI Executive did not agree principles in October 2017 due to the collapse of the Executive on 16 January 2017. The NI Executive subsequently endorsed the principles following its formation in 2020. [UK Common Frameworks - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

Table 1: JMC (EN) Principles for CFs⁷

Principle 1
<p><i>Common Frameworks will be established where they are necessary in order to:</i></p> <ul style="list-style-type: none"> • <i>enable the functioning of the UK internal market, while acknowledging policy divergence;</i> • <i>ensure compliance with international obligations;</i> • <i>ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;</i> • <i>enable the management of common resources;</i> • <i>administer and provide access to justice in cases with a cross-border element; and,</i> • <i>safeguard the security of the UK.</i>
Principle 2
<p><i>Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:</i></p> <ul style="list-style-type: none"> • <i>be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;</i> • <i>maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory, as is afforded by current EU rules;</i> • <i>lead to a significant increase in decision-making powers for the devolved administrations.</i>
Principle 3
<p><i>Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK which shares a land frontier with the EU. They will also adhere to the Belfast Agreement.</i></p> <p><i>CFs are to ensure:</i></p> <ul style="list-style-type: none"> • <i>recognition of the economic and social linkages between NI and the Republic of Ireland (RoI); acknowledgement that NI is to be the only part of the UK sharing a land frontier with the EU; and, adherence to the Belfast/Good Friday Agreement.</i> • <i>In addition to the above Principles, the UK Government and the Devolved Administrations agreed that a CF's design is to be informed by the specific policy area it is to address, as that is to determine whether the CF requires a legislative and non-legislative approach.</i>

Source: UK Cabinet Office (2020)

In addition to the JMC (EN) Principles, the UK Government and the Devolved Administrations agreed that a CF's design is to be informed by the specific policy area it addresses, as that determines whether a legislative or a non-legislative approach is required for the given CF.

1.3 Framework Analysis

Since March 2018, the UK Government has published a series of working documents known as "Frameworks Analysis", which present a breakdown of policy areas previously governed by EU law that intersect the devolved competences in Scotland, Wales and NI. The Frameworks Analysis categorises policy areas under the following three headings:

- Requiring no further action;
- Requiring legislative CFs; and
- Requiring non-legislative CFs.

⁷ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674447/The-European-Union-Withdrawal-Act-and-Common-Frameworks.pdf)

The most recent Frameworks Analysis (dated 9 November 2021),⁸ identified 152 policy areas and categorised them as follows:

- 120 areas required **no further action**. That represented an increase from September 2020, wherein 115 areas requiring no further action.
- 29 areas required **non-legislative CFs**. That represented an increase from the September 2020, wherein 22 non-legislative CFs were identified.

The UK Government attributed the noted increases to:

*...collaborative work between the UK Government and devolved administrations leading to a shared understanding that several do not require a Framework, and greater clarity on the implementing arrangements for a number of policy areas that do require a Framework.*⁹

In addition, 3 areas were categorised as requiring **legislative CFs**. Whereas the UK Government's published position in September 2020 (over a year earlier), had been 18 areas requiring a legislative CF. It attributed the noted decrease to:

*...a result of clarity of arrangements for several Frameworks that were originally identified as possibly required a legislative approach through primary legislation.*¹⁰

1.4 CF Delivery Plan

Under Schedule 3 to the *European Union (Withdrawal) Act 2018*,¹¹ the UK Government has a statutory requirement to report to the UK Parliament every three months on the progress made on the development of the CFs. In the corresponding December 2021 update, the UK Government stated the following:

*...the UK government and devolved governments have agreed to aim to complete delivery of the programme in March 2022 ahead of the pre-election period for the 2022 Northern Ireland Assembly elections.*¹²

The December 2021 update also presented a “five-phase” delivery plan, to illustrate how a CF is to be implemented and reviewed. Table 2 below presents the delivery plan and outlines a UK Government summary of the process:

⁸ The Cabinet Office, Framework Analysis 2021 (9 Nov 2021)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ <https://www.legislation.gov.uk/ukpga/2018/16/schedule/3/enacted>

¹² UK Government, The European Union (Withdrawal) Act and Common Frameworks: 26 June to 25 September 2021 (9 December 2021) <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-june-to-25-september-2021/the-european-union-withdrawal-act-and-common-frameworks-26-june-to-25-september-2021>

Table 2: Frameworks Delivery Plan ¹³

Phases	UK Government Summary of Process
Phase One – Principles and proof of concept	<i>Consists of engagement between the government and devolved government officials (also referred to as multilateral deep dives) to focus on Frameworks, as well as to establish some of the key interdependencies that affect multiple Frameworks.</i>
Phase Two - Policy development,	<i>Detailed policy development takes place, including joint work between the UK government and devolved government officials to agree policy approaches and operational and governance arrangements for each policy area. Initial stakeholder engagement also takes place where appropriate. This results in jointly drafted and agreed outline Frameworks.</i>
Phase Three – Review and Consultation	<i>The UK government and devolved governments collaborate to further develop and finalise policy approaches, explore interactions with cross-cutting workstreams, and agree operational and governance arrangements. Technical engagement takes place with sector-specific stakeholders. Towards the end of Phase 3, in-depth review and assessment takes place, conducted jointly at official level. This phase results in cross-departmental collective agreement on the policy approach within the government, and provisional confirmation of Frameworks by each administration. This in-depth review and joint confirmation ensures that a minimally operable framework, recognised as a 'provisional framework', is developed.</i>
Phase Four – Preparation and Implementation (Scrutiny Stage) At the time of writing, this is the current stage of the LPCF.	<i>The UK government and devolved government officials work jointly on any ongoing reappraisals of cross-cutting issues, present the Frameworks for parliamentary scrutiny and review parliamentary recommendations in order to finalise individual Frameworks. At the end of this phase, the provisional framework receives ministerial approval from the intergovernmental forum responsible for the Common Frameworks programme. [emphasis added]</i>
Phase Five – Post –implementation	<i>Post-implementation arrangements take place, including regular cycles of review and, if appropriate, amendment. These vary between Frameworks and details continue to be developed as the Common Frameworks programme progresses.</i>

Source: UK Government (2021)

It should also be noted that once the scrutiny process is completed and CFs are implemented, they may continue to be jointly updated by UK Government and Devolved Administration Ministers.¹⁴

¹³ <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-june-to-25-september-2021/the-european-union-withdrawal-act-and-common-frameworks-26-june-to-25-september-2021>

¹⁴ *Ibid*

2 Key issues arising for CFs

This section seeks to address key issues arising for all CFs - namely, whether the CF:

- Adheres to three agreed principles that are to underpin all CFs?
- Interacts with the Protocol on Ireland/Northern Ireland?
- Interacts with the Internal Market Act?
- Facilitates ongoing NI Assembly Scrutiny of its future operation and amendment?
- Facilitates transparent stakeholder consultation?
- Incurs reasonably identifiable financial implications?

Depending on the content of the particular CF and availability of other information, it may not be possible to fully address all the noted issues. Where there is insufficient information from which more questions arise, a range of scrutiny points are provided below in blue boxes. The Committee may wish to direct those points to the relevant Executive Department(s).

2.1 Underlying CF Principles

As noted above in sub-section 1.2, three Principles – as agreed by the UK Government and the Devolved Administrations - underpin all CFs. As such, each CF should be assessed using that Framework of Principles, to determine whether the CF fully adheres to those Principles.

Taking the Principles in turn, this sub-section considers the LPCF. Starting with Principle 1, which states CF frameworks are to be developed only where needed. The Principle also outlines six different reasons explaining why a CF could be required (see the reasons outlined at sub-section 1.2 of this paper):¹⁵

Potential scrutiny point:

- 1) Is the DfE satisfied that the development of the LPCF meets at least one of the six stated reasons for CF development under Principle 1, as agreed by the Devolved Administrations? Please detail to fully explain response.

Principle 2 maintains that all CFs are to “respect the devolution settlements” and are to be “based on established conventions and practices”. Moreover, it states that the CF should deliver “a significant increase in decision-making powers for the devolved administrations”:¹⁶

¹⁵ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](#)

¹⁶ *Ibid*

Potential scrutiny point:

2) Is the DfE satisfied that the LPCF meets Principle 2, as agreed, in that it:

- respects NI’s prevailing devolution settlement;
- is based on established conventions and practices; and,
- delivers “a significant increase in decision making powers” for the Executive?

Please detail to fully explain response.

Principle 3 has a specific NI focus. It states that: CFs are to recognise the “social linkages” between NI and the RoI; NI is the only part of the UK sharing a land frontier with the EU; and, CFs are to adhere to the Belfast/Good Friday Agreement:¹⁷

Potential scrutiny point:

3) Is the DfE satisfied that the LPCF:

- recognises the social linkages between: NI and the RoI;
- recognises that NI is the only part of the UK sharing a land frontier with the EU; and,
- adheres to the Belfast/Good Friday agreement?

Please detail to fully explain response.

2.2 The Protocol on Ireland/Northern Ireland

In addition to those broader principles discussed above, NI is in a unique position within the UK. Article 12 of the Protocol¹⁸ - a part of the Withdrawal Agreement between the UK and the EU – states that the Protocol provides for the continued application of a specified range of EU law in NI, following the UK’s exit from the EU and subsequent NI post-transition period. At the Protocol’s Article 12, the following EU law continues to apply in NI post-transition:

- EU Customs Code;¹⁹
- EU product standards and regulations;²⁰
- EU rules on Value Added Tax (VAT) and excise;²¹

¹⁷ *Ibid*

¹⁸ HM Government, New Protocol on Ireland/Northern Ireland (18 October 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

¹⁹ *Ibid* Article 5

²⁰ *Ibid*

²¹ *Ibid* Article 8

- EU rules on State Aid – with respect to trade in goods and wholesale electricity,²² and,
- A range of EU law with respect to wholesale electricity.²³

As noted in sub-section 1.1 above, a key driver of the CF process is to ensure that a “*common approach*” to policy is maintained across the UK – i.e. maintain common approach in the specified policy areas where EU law created common approaches across UK nations – England, Scotland, Wales and NI. The Protocol is to ensure the continued application of EU law in NI in specified areas, but not in Great Britain – namely England, Scotland and Wales. That means if any CFs impact on Protocol-related matters, those CFs are to comply with the Protocol.

It, however, needs to be highlighted that ongoing Protocol- related negotiations continue at the time of writing this paper. The outcome of those negotiations – i.e. the implications arising from them - remains to be seen, including implementation of that outcome when formulating “common” CF approaches in the UK.

As such, important considerations arise for NI when considering CFs – i.e.:

- Whether, and how, a particular CF interacts with the Protocol? and,
- Whether a CF impacts on the application of the Protocol – either directly or indirectly?

The Committee may wish to note that the Whitehall Department of Business Energy and Industrial Strategy (BEIS) stated no Protocol issues arise for the LPCF.

In December 2021, it stated:

*There is no conflict in these Framework proposals with the relevant provisions of the Belfast/Good Friday agreement, and there is no linkage in this Framework to the operation of the Ireland/Northern Ireland Protocol. As the Protocol evolves, this will be kept under review.*²⁴

Going forward, however, if any potential impacts were to arise, they are to be considered during the review process outlined in LPCF itself. (That process is explained in greater detail in Section 3 of this paper.) That includes:

- An annual review of the agreed LPCF is to be undertaken; and,
- Ad hoc reviews are to be undertaken when one party to the agreed LPCF raises an issue.²⁵

²² *Ibid* Article 10

²³ *Ibid* Article 9

²⁴ Department for Business, Energy and Industrial Strategy (2021) *Late Payments: Provisional Common Framework*. Page 8: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041173/Late_Payments_Provisional_Common_Framework.pdf

²⁵ *Ibid*

Potential scrutiny points:**4) Is the DfE satisfied with the assessment that:**

- there is “no linkage” between the LPCF and the Protocol?
- there are no indirect interactions between Late Payments (commercial transactions) and the Protocol?
- the LPCF’s proposed review mechanisms are sufficient to address any future possible interactions between the CF and the Protocol?

Please detail to fully explain response.

2.3 Interactions with the Internal Market Act

While the UK Government and the Devolved Administrations have been developing the CFs, the UK Government has introduced and enacted the UK Internal Market Act 2020 (the Act).²⁶ In the December 2020 update on the CF process (prior to enactment of that Act), the UK Government noted that:

... the UK Internal Market legislation will intersect with frameworks that have a ‘market’ component (i.e. policy areas that include regulation of services or goods production or sale), many of the components of each framework, or in many cases entire frameworks, will fall out of scope of the legislation.²⁷

And:

Whilst the devolved administrations have been clear that they disagree with the UK Government’s approach to the internal market, discussions between the UK Government and the devolved administrations on the interaction between the UK Internal Market Bill and Common Frameworks continue.²⁸

In regard to the above, devolved legislatures disagreed with the proposed market access principles when the Internal Market Bill - which ultimately became the Act - went through the UK Parliament.²⁹ The devolved legislatures argued such provisions would constrain their ability to utilise the new powers gained from the EU at the end of the transition period – i.e. 31 December 2020. In particular, the Scottish Government had argued that the Bill also undermined “the agreed process of negotiating and

²⁶ [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

²⁷ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

²⁸ [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk)

²⁹ The principles of mutual recognition and the principle on discrimination with respect to the flow of goods and services across the UK.

agreeing common UK frameworks where these are required to replace existing EU structures”.³⁰

The subsequent Act – entitled *Internal Market Act 2020* - included provisions empowering the UK Secretary of State to make regulations that exclude CF areas from the Act’s market access principles.³¹ In that regard, the Scottish Parliament’s Finance and Constitution Legacy Expert Panel Report recommended the Scottish Parliament should clearly define its scrutiny role in response to Brexit. That included consideration of the “appropriate and proportionate level of scrutiny” of “common frameworks and the market access principles and how these interact”.³² In this context, the following issues merit the Committee’s consideration:

Potential scrutiny points:

- 5) **What is the DfE’s assessment of the potential interactions between the LPCF and the Internal Market Act?**
- 6) **If any such interactions have been identified by the DfE, what are they? Please detail to fully explain response.**
- 7) **If so, what is the DfE’s assessment as to whether any regulation is required to exclude the LPCF from the market access principles specified in the Internal Market Act? Please detail to fully explain response.**

2.4 Ongoing NI Assembly Scrutiny

As noted in subsection 1.1 of this paper, the LPCF is currently at Phase 4 of its development. Phase 4 provides legislatures across the UK with an opportunity to scrutinise CFs. All CFs are “living documents” in two senses. First, they set in place practices and procedures that will govern how the UK Government and the Devolved Administrations interact in specific areas going forward. Second, they are open to future revision and refinement. The LPCF, for example, includes an explicit provision for its future review and amendment.³³

Both these points suggest the need for ongoing scrutiny of CFs by legislatures across the UK. Such scrutiny could to enable continued assessment of how the CFs are functioning and of any proposed CF changes. It is unclear, however, as to how that ongoing scrutiny will take place; what will be the process? The House of Lords Common Frameworks Scrutiny Committee (CFSC) has taken up that point.

³⁰ [The UK Internal Market Bill – The Devolved Administrations Responses – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](#)

³¹ [United Kingdom Internal Market Act 2020 \(legislation.gov.uk\)](#)

³² [Legacy_Final.pdf \(parliament.scot\)](#)

³³ Department for Business, Energy and Industrial Strategy (2021) *Late Payments: Provisional Common Framework*. Page 12: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041173/Late_Payments_Provisional_Common_Framework.pdf

In its March 2021 report entitled “Common Frameworks: building a cooperative Union”,³⁴ the CFSC concluded:

*Parliamentary scrutiny of common frameworks will need to continue even after they have been finalised to ensure that important policy decisions are made transparently. Parliamentary committees will need to have information on how the individual frameworks are operating in their respective policy areas, as well as on the common frameworks programme as a whole. We recommend that, to facilitate this, the four administrations should provide regular updates to their legislatures and publish reports as part of their planned reviews of the frameworks.*³⁵

The House of Lords CFSC added that:

*As joint agreements between the four administrations of the UK, common frameworks provide a clear opportunity for closer cooperation between the four legislatures of the UK. This could facilitate the sharing of information and ideas, and enable legislatures to hold their governments to account more effectively. As part of this, the House of Lords and its committees could play a valuable role in providing a neutral forum for receiving the views of devolved legislatures and facilitating closer interparliamentary cooperation.*³⁶

Commenting on this topic in its response to that CFSC report, the UK Government stated:

*The Government agrees with the Committee’s recommendation that regular updates should be provided to legislatures, but notes the specifics of this are a matter for the individual UK Government and devolved administration departments which are parties to Common Frameworks to agree with the relevant Committees. The Government further notes that work is underway to develop guidance on the format for future routine reviews of Common Frameworks. Once complete, departments and their counterparts in the devolved administrations will be in a position to communicate the format for future reviews and updates to committees.*³⁷

It appears that the LPCF does not include any provisions – explicit or implicit – in relation to its scrutiny.

³⁴ The House of Lords Common Frameworks Scrutiny Committee: Common Frameworks: Building a cooperative Union (31 March 2021) https://publications.parliament.uk/pa/ld5801/ldselect/ldcomfrm/259/25910.htm#_idTextAnchor051

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ UK Government, Government Response to the House of Lords Common Frameworks Scrutiny Committee report: ‘Common Frameworks: building a cooperative Union’ (May 2021) <https://committees.parliament.uk/publications/6175/documents/68906/default/>

Potential Scrutiny Points:

- 8) How does the DfE plan to ensure that the Assembly, including the Committee for the Economy, will be informed of both the functioning and the amendment of the LPCF on an ongoing basis?
- 9) Has the DfE received any direction from the UK Government in that regard – either via the Executive or other? Please detail to fully explain response.

2.5 Stakeholder consultation

Phase 3 of the CF process provides an opportunity to consult sector stakeholders on the development of specific CFs. The LPCF states:

There is no regular planned Parliamentary or stakeholder engagement for this policy area. Communication takes place on an ad hoc basis.³⁸

It is unclear, as to what, if any, stakeholders have been consulted. With regard to general stakeholder consultation, in March 2021, the House of Lords CFSC (Common Framework Scrutiny Committee) noted that:

Common frameworks are weakened by the lack of inclusion of external stakeholders and should have been transparent from their inception. We were told that this process has been less transparent than the EU system it has replaced. Greater transparency could have been achieved through the publication of framework summaries during the initial development of each common framework and having an open stakeholder consultation process that reached out beyond the ‘usual suspects’.

...We recommend that the UK Government should make up for the lack of involvement of stakeholders in the initial development of common frameworks by revising them based on stakeholders’ feedback. Future reviews of the frameworks should include an open and well-publicised stakeholder consultation process that reaches beyond the small number of stakeholders previously consulted, so as to ensure that all those directly affected have a meaningful opportunity to contribute.³⁹

Responding to the CFSC, the UK Government stated:

The Government notes that a wide range of stakeholders have been involved in both the initial design of the policy approach covered by the individual Frameworks, and also the specific ways of working envisaged in the Common Frameworks. The Government nevertheless agrees with the

³⁸ Department for Business, Energy and Industrial Strategy (2021) *Late Payments: Provisional Common Framework*. Page 12: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041173/Late_Payments_Provisional_Common_Framework.pdf

³⁹ The House of Lords Common Frameworks Scrutiny Committee: *Common Frameworks: Building a cooperative Union* (31 March 2021) https://publications.parliament.uk/pa/ld5801/ldselect/ldcomfrm/259/25910.htm#_idTextAnchor051

Committee's recommendation that Common Frameworks should be revised based on stakeholders' feedback, and notes that there is already a jointly agreed, intergovernmental process allowing for Common Frameworks to be revised subject to industry experts' views. This takes place during Phase 3 of Framework delivery as part of technical stakeholder engagement. For instance, the Parliamentary Secretary to the Cabinet Office noted in her letter to the Public Administration and Constitutional Affairs Committee of 12 April 2021, that the Public Procurement Framework had been revised following views of stakeholders gathered through consultation in late 2020.

...Looking ahead, additional technical stakeholder engagement can take place as any Framework continues its development, or is subsequently reviewed, as required on a Framework by Framework basis. Any longer term engagement will form part of departmental business as usual policy review work.⁴⁰

The UK Government also stated that:

... stakeholders should continue to be meaningfully engaged throughout the development of a UK Common Framework, including through periodic reviews where appropriate. However, since Common Frameworks are primarily about establishing and maintaining intergovernmental ways of working, rather than developing the policy itself, a full stakeholder consultation may not always be required. Stakeholder consultation on a 'ways of working' document is a different task to a more general consultation on policy development. As Common Frameworks are not themselves policy documents, external stakeholder consultation has been undertaken jointly by the relevant departments in the UK Government and the devolved administrations in a targeted and specific way, to meet the unique needs of each Framework. To date, this targeted approach has enabled the most relevant and appropriate expertise to be brought to bear on each Framework, in preparation for the Framework to be published once it has been provisionally confirmed and sufficiently developed.⁴¹

Potential Scrutiny Points:

- 10) Does the DfE know what stakeholders were consulted at Phase 3 of the development of the LPCF, and when?**
- 11) What was the underpinning rationale for their inclusion in the consultation process?**

⁴⁰ ⁴⁰ UK Government, Government Response to the House of Lords Common Frameworks Scrutiny Committee report: 'Common Frameworks: building a cooperative Union' (May 2021)

<https://committees.parliament.uk/publications/6175/documents/68906/default/>

⁴¹ *Ibid*

- 12) What role did the DfE play in shortlisting those stakeholders, including, but not limited to, developing the underpinning shortlisting criteria, undertaking the shortlisting and other? Please detail to fully explain response.**
- 13) Does the DfE believe there were gaps in that consultation process, including the planning and implementing of that process? Please detail to fully explain response.**

2.6 Financial implications

As noted in section 1 of this paper, according to the underlying Principles for CFs, those Principles are to deliver “a significant increase in decision-making powers for the devolved administrations”. It seems reasonably foreseeable that a “significant increase” in powers could necessitate an increase in Devolved Administrations’ public expenditure.⁴²

It therefore appears important to examine the contents of a particular provisional CF and their potential financial implications for the “public purse”, i.e. those that could be incurred to implement the CF, including both “one-off” and recurrent identifiable costs potentially incurring to the public purse. The LPCF does not include any detailed analysis of such potential financial implications:

Potential Scrutiny Points:

- 14) What is the DfE’s assessment of potential financial implications arising for the public purse to implement the LPCF, including those that could be one-off and recurrent? Please detail to fully explain response.**
- 15) What consideration has the DfE given to the matter of potential LPCF financial implications for the public purse?**
- 16) Has that consideration involved engagement/discussion with the DoF and/or the Executive; and if so, when did that occur; and what did it entail? Please detail to fully explain response.**

⁴² [The European Union Withdrawal Act and Common Frameworks.pdf \(publishing.service.gov.uk\)](#)

3 Overview of the LPCF

This section focuses on the LPCF itself. First, it examines the legislative context in which the LPCF was drafted, including amendments to the retained EU late payments law that have been introduced to create “unified body of law” within the policy area. Thereafter, it details key LPCF provisions and outlines operational elements such as, decision making, roles and responsibilities, and the review process.

3.1 LPCF: Legislative context

The LPCF relates to provisions contained in the EU Late Payment Directive (2011/7/EU) (the EU Directive) that aim to protect small and medium-sized businesses from late payment by public authorities and by other businesses. Key provisions of the EU Directive include:⁴³

- Public authorities have to pay for the goods and services that they procure within 30 days or, in very exceptional circumstances, within 60 days;
- Enterprises have to pay their invoices within 60 days, unless they expressly agree otherwise and provided it is not grossly unfair;
- Automatic entitlement to interest for late payment and €40 minimum⁴⁴ as compensation for recovery costs;
- Statutory interest of at least 8% above the European Central Bank’s reference rate; and,
- EU countries may continue maintaining or bringing into force laws and regulations which are more favourable to the creditor than the provisions of the directive.

When the UK was a Member State of the EU (pre-31 January 2020) and during the transition period (i.e. 31 January 2020 – 31 December 2020), the EU Directive was transposed and implemented into UK domestic law.⁴⁵, The following extract from the LPCF explains:

*Amended late payment legislation came into force on 16 March 2013 under the Late Payment of Commercial Debts Regulations 2013, **implementing recast European Directive 2011/7/EU on combatting late payment in commercial transactions.** [...] Amendment Regulations were made in 2015 (SI no 1336 and SSI no 226) and minor amendments were made in 2018, under The Late Payment of Commercial Debts (Amendment)*

⁴³ https://ec.europa.eu/growth/smes/sme-strategy/late-payment-directive_en#:~:text=To%20protect%20European%20businesses%2C%20particularly%20SMEs%2C%20against%20late,bankrupt%20waiting%20for%20their%20invoices%20to%20be%20paid.

⁴⁴ In the UK, a fixed charge of £40, £70 or £100 depending on the size of the debt, plus additional reasonable costs incurred.

⁴⁵ Legislative competence for legislation relating to Late Payments is devolved in Scotland, Wales and Northern Ireland. The UK Government has laid the regulations on behalf of Northern Ireland and Wales, and Scotland have made their own legislation e.g. SSI no 226.

*Regulations 2018 to ensure that the EU Directive was correctly implemented.*⁴⁶

The above noted regulations, transposing and implementing the EU Directive into UK domestic law, have been retained following the end of the transition period. However, legislative competence for legislation relating to Late Payments is devolved to Scotland, Wales and NI. Therefore, the Devolved Administrations have scope to diverge from the regulatory timescales and statutory interest rates set out in the EU Directive and the amending (transposing) regulations (cited in the above extract from the LPCF).

The LPCF aims to ensure that any potential divergence in this policy area across the four UK regions is limited and managed. As the LPCF summarises:

*A business operating across different parts of the UK would be directly affected by divergent regulations. For example, each of the four Parties could choose to implement different regulatory timescales for repayment or introduce different statutory interest rates on late payments. As a result, there would need to be clear-cut criteria to ascertain which regulations apply to businesses operating across different parts of the UK, and to avoid some businesses being presented with a competitive advantage or disadvantage. To manage divergence, the Parties have agreed to develop a common UK-wide approach to maintain a level playing field for business which will maintain the functioning of the UK internal market.*⁴⁷

Additionally, the LPCF states:

*There is currently effectively a level playing field across the UK in respect of Late Payment of Commercial Debts legislation, which provides for payment periods between businesses of 60 days (or more by agreement), and 30 days for public bodies to businesses. **No new legislation is considered necessary to maintain this approach.** [emphasis added].*⁴⁸

Consequently, the UK Government and the Devolved Administrations categorised the LPCF as a **non-legislative** CF, setting out common rules or ways of working in specific policy areas. Subsequently, the LPCF seeks to establish agreed late payment-related working practices between the Whitehall Department BEIS and the Executive's DfE.

Furthermore, the LPCF states:

⁴⁶ Department for Business, Energy and Industrial Strategy (2021) *Late Payments: Provisional Common Framework*. Page 6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041173/Late_Payment_Provisional_Common_Framework.pdf

⁴⁷ Ibid.

⁴⁸ Ibid, Page 9.

This is a non-legislative Framework, underpinned by an exchange of ministerial letters. This approach will maintain existing mutual understanding and joint ways of working between the Parties. It will provide a forum to consult on developments within, or between, the Parties, and to manage any divergence. The Parties have jointly agreed that legislation is not required to deliver this, with an exchange of letters being deemed appropriate to formalise existing ways of working.⁴⁹

Potential Scrutiny Points:

17. What is the DfE’s assessment of the level of formality attached to the LPCF and the appropriateness of an “exchange of ministerial letters” as a means of underpinning intergovernmental relations in this policy area? Please detail to fully explain response.

The LPCF states that the governments will ‘seek to maintain a level playing field across the existing body of late payment legislation’.

18. Does the DfE consider that the LPCF affords the NI Executive and the Assembly sufficient scope to meet NI-specific needs, even if that could result in some level of divergence with other parts of the UK in this area? Please detail to fully explain response.

19. What is the DfE’s assessment of the LPCF’s impact on existing or planned NI legislation in this policy area?

3.3 Operational Detail

This sub-section summarises the operational detail of the LPCF in the following areas:

- Underpinning Principles;
- Decision making;
- Roles and Responsibilities;
- Monitoring and Enforcement;
- Review and Amendment; and,
- Dispute resolution.

3.3.1 Underpinning Principles

Several key Principles are to underpin the operation of the LPCF; as presented in Table 3 below:

⁴⁹ Ibid.

Table 3: Principles underpinning the operation of the LPCF⁵⁰

Principle 1
<i>All parties agree that it is beneficial for all UK businesses that there is a Common Framework for late payment policy.</i>
Principle 2
<i>Parties will consider the impact of decisions on other Parties and the UK internal market and provide time for meaningful engagement on the issue in quarterly meetings of the Late Payment Working Group, containing policy leads from each of the Parties. This working group will meet regularly when required, for example for information sharing, decision-making or dispute resolution purposes. Meetings of the working group may also be convened outside the regular schedule if a substantial issue arises.</i>
Principle 3
<i>Any proposed legislative changes should be shared with the other Parties at an official level at the earliest possible point, typically through email exchange initially. The party or parties proposing to diverge from existing arrangements will notify and consult the other parties in respect of their intended action. Should any of the other governments object to the proposed action, the parties will endeavour to identify a mutually acceptable common approach which would achieve an equivalent, or preferably identical outcome. If no mutually acceptable resolution is found, the objecting party or parties may initiate the formal dispute resolution procedure set out in point 5. This Framework will not prejudice the right of Parties to opt to 'agree to disagree' or 'agree to diverge' in certain circumstances</i>
Principle 4
<i>Future collaborative meetings will be conducted at official level and without prejudice to ministerial views. Official level meetings will be scheduled quarterly to foster regular engagement and ensure Parties do not lose touch with key officials. Additional meetings will be scheduled on an ad hoc basis if any significant issues arise.</i>
Principle 5
<i>Whilst it is not anticipated that any dispute will arise, any action under dispute should be paused pending resolution through the dispute resolution mechanism. This process will be guided by an agreement to resolve disputes at the lowest possible level of governance. If one Party wishes to diverge, the Party must first see if a common approach can be agreed that accommodates that individual Parties' desired outcomes and does not disproportionately impact on the UK internal market.</i>
Principle 6
<i>Escalations, if necessary, should be done first at official level via the Late Payment Working Group. If a satisfactory resolution cannot be found, the matter should then be escalated to the Late Payment Programme Board, made up of senior officials. If a resolution cannot be reached, it will be escalated to Ministers to provide input or hold a multilateral discussion. Existing routes of multilateral engagement between the Parties should be used for this process. If a resolution cannot be reached at this level, the matter may be referred to appropriate intergovernmental structures – although both parties will strive to resolve issues at official or ministerial level between Departments</i>

Source: BEIS: LPCF 2021

Potential Scrutiny Point:

20. What is the DfE's assessment of the Principles that are to underpin the LPCF and DfE's future working relations with the Whitehall Department of BEIS in the area of late payments? Please detail to fully explain response.

⁵⁰ Ibid.

3.3.2 Decision making

All decision making regarding the LPCF are to be based on the above underpinning Principles and the three JMC (EN) Principles (outlined in subsection 1.2 of this paper). Figure 1 below outlines the LPFC hierarchy of decision making:

Figure 1: Decision making diagram



Source: BEIS/LPCF 2021

The LPCF hierarchy of decision making is further explained as follows:

- At official level, the **Late Payment Working Group** is to meet regularly for officials to “engage on policy development, provide updates on progress, and raise concerns and awareness of cross-cutting issues”. Core membership is to be made up from officials representing the UK Government (namely BEIS officials), the Scottish and Welsh Governments and the NI Executive. It is to be chaired by a UK Government official;
- At senior official level, the **Late Payment Programme Board** is to meet as needed, to maintain oversight of the Late Payment Working Group, and consider any decisions and disputes that are escalated to it. Core membership is to be made up from senior officials representing the UK Government (BEIS), the Scottish and Welsh Governments and the NI Executive. Its chair is to be rotated between the four governments;
- **Ministers** from the four governments are to consider decisions and disputes that are escalated to them.

3.3.3 Roles and Responsibilities

Table 4 below presents the roles and responsibilities of officials, senior officials and ministers as outlined in the LPCF:

Table 4: LPCF Roles and Responsibilities⁵¹

Officials	<i>Policy officials will hold regular discussions on the policy covered by the Late Payment Framework, and put advice to ministers with the rationale for the approach taken within the policy area (e.g. a UK/GB-wide approach), or why divergent policies may be necessary. Officials across Parties will convene to discuss policy issues as appropriate and will discuss any ramifications that policy will have across different parts of the UK. If officials do not agree when making decisions, issues discussed at the Late Payment Working Group can be escalated to senior officials in the Late Payment Programme Board, in line with the Framework's dispute avoidance and resolution mechanism.</i>
Senior Officials	<i>Senior officials (e.g. Deputy Directors and Directors) will provide strategic direction on the policy areas governed by the Late Payment Framework and take key operational decisions. They may review an issue as per the Framework's dispute avoidance and resolution mechanism if officials are not able to agree an approach, or if ministers have disagreed with advice from officials in the first instance, in another attempt to reach agreement. Senior officials will convene to discuss issues as appropriate, on an ad hoc basis, through the Late Payment Programme Board.</i>
Ministers	<i>Ministers may receive advice from their officials either concurrently across Parties as issues arise, or in the course of business as usual for individual Parties. Ministers may accept advice, or they may reject it. If work is remitted to senior officials and an issue remains unresolved, the issue may be escalated to ministers. Where ministers are considering issues as part of the Framework's dispute avoidance and resolution mechanism this could be via several media, including inter-ministerial meetings or by correspondence.</i>

Source: BEIS/LPCF 2021

Potential Scrutiny Points:

21. What is the DfE's assessment of the decision-making process contained in the LPCF ? Please detail to fully explain response.

3.3.4 Monitoring and Enforcement

The Late Payment Working Group is to oversee the functioning of the LPFC and consider any request to amend it. With regard to enforcement, the LPCF states:

Enforcement needs further consideration, and the mechanisms available for providing assurance that the Framework will be adhered to will depend on the way in which the Framework is implemented. The dispute resolution mechanisms provide the first means for ensuring that the Framework is adhered to, with issues to be referred to overarching intergovernmental dispute resolution mechanisms where appropriate.

⁵¹ Ibid. Page 11.

Potential Scrutiny Points:

22. What is the DfE’s assessment of the above comments on enforcement contained in the LPCF ? Please detail to fully explain response.

23. Has the DfE considered how enforcement of the LPCF could be conducted in NI? If so, would it share this with the Committee for the Economy?

Please detail to fully explain response.

3.3.5 Review and amendment

The LPFC is to be reviewed annually *via* the Late Payment Working Group. Reviews are to 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 LPFC’s operation and is time-sensitive.

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

Potential Scrutiny Point:

24. What is the DfE’s assessment of the LPCF provisions specifying review and amendment of the LPCF’s implementation? Please detail to fully explain response.

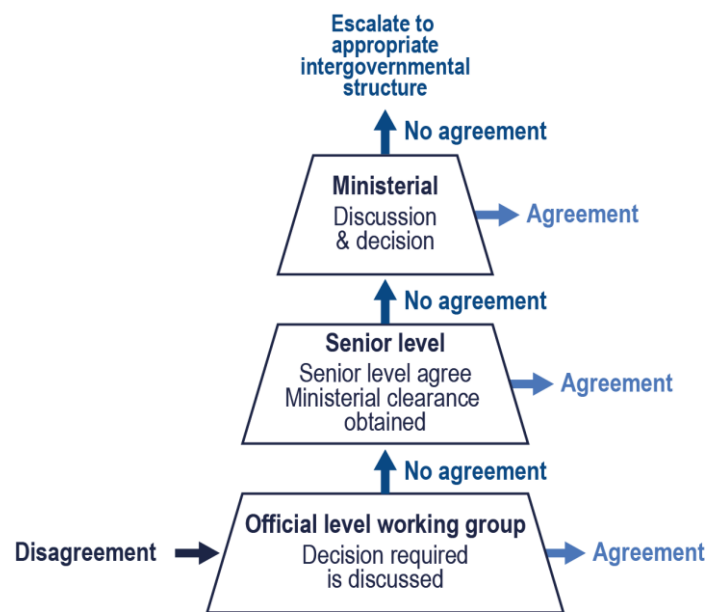
3.3.6 Dispute resolution

The LPCF sets out a dispute resolution process. Simply put, if the UK Government and the Devolved Administrations do not agree on whether to take the same approach, they will seek to resolve the disagreement at the lowest possible level.

They may then escalate the disagreement to senior officials in the and to Ministers.

Figure 2 below provides an illustration of the LPCF’s escalation procedures:⁵²

⁵² *Ibid*

Figure 2: LPCF escalation procedures⁵³

Source: BEIS (December 2021)

Potential Scrutiny Point:

25. What is the DfE's assessment of: the above provisions specifying escalation procedures relating to LPCF implementation? Please detail to fully explain response.

The LPCF does not clearly specify the “appropriate intergovernmental structure” to address unresolved disagreements beyond Ministerial level. In that regard, it is relevant to note the UK Government published findings of its “Review of intergovernmental relations”⁵⁴ dated 13 January 2022. Therein, on the issue of dispute resolutions, the Review stated:

All governments are committed to promoting collaboration and the avoidance of disagreements, facilitated by the new intergovernmental machinery in which engagement will normally take place at the lowest appropriate level possible. Any government may refer a disagreement to the IGR [intergovernmental relations] Secretariat as a dispute. Escalation of a disagreement between governments as a dispute will only be considered after due and full consideration has been given at portfolio-level (including FIMSC [the Finance Interministerial Standing Committee] regular engagement), where a disagreement cannot be resolved at portfolio level, and has significant implications for the relationship between two or more governments. This will include circumstances where governments disagree

⁵³ *Ibid*⁵⁴ UK Government, Review of Intergovernmental relations (13 January 2022) <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations/review-of-intergovernmental-relations-html#annex-d-dispute-avoidance-and-resolution-process>

about the interpretation of, or actions taken in relation to, matters governed by intergovernmental agreements, rules or procedures (including Common Framework Agreements). This is without prejudice to the legal provisions within the devolution settlements which govern matters relating to legislative competence. The resolution process (set out in Annex D) should be seen as part of a much wider system of active IGR, and as a process of last resort.⁵⁵

Annex D, referenced above, sets out three dispute stages, which are to trigger if a disagreement is referred to the IGR (inter-governmental relations) Secretariat. Those stages are:

- **Stage 1** - The IGR Secretariat are to consider the disagreement, assessing whether it should be escalated to the level of a “dispute”. It does so considering whether:
 - the disagreement was discussed “extensively” at senior civil servant level;
 - an unsatisfactory solution was proposed at the senior civil servants’ discussion;
 - the disagreement was discussed extensively by the relevant portfolio Ministers or Her Majesty’s Treasury (HMT) and the DAs’ Finance Ministers; and,
 - the disagreement has implications beyond its policy area; impacting the wider relationships between the parties involved.

If the above criteria are met, the disagreement is to be escalated as a “dispute”, to either the Interministerial Standing Committee (IMSC) or the Finance Interministerial Standing Committee (FIMSC) – **see Box 1 below** for explanation of these and other bodies used in the following bullet points.

- **Stage 2** - The “dispute” is to be considered by either the IMSC or the FIMSC, which is to seek to agree to resolve the issue. Should they fail to find a resolution, the dispute is to be escalated to the Council (**see Box 1**). At that point, all parties may agree not to escalate; and instead may report the outcome to their respective legislatures. During Stage 2, third-party mediation may be sought ahead of escalation to the Council, if that would be appropriate in the given circumstances – i.e. the dispute does not involve commercially sensitive information or national secrets.
- **Stage 3** - The Council is to consider the dispute. If the governments cannot find a resolution, they “must make a statement to their respective legislatures setting out the circumstances for the failure to reach a solution”.⁵⁶

⁵⁵ *Ibid*

⁵⁶ *Ibid*

Box 1: IGR dispute bodies

Bodies related to the IGR dispute process are:

- The **Council** - the “top tier of engagement” consisting of the Prime Minister of the UK GOVERNMENT and the Heads of the DAs.
- The **IMSC** - One of two middle tiers of engagement. It is to be established to “consider issues which cannot be considered at the portfolio-level within the relevant IMG [Interministerial Groups]”. It is to consist of relevant IGR ministers from all governments, and is to be staffed by its own secretariat.
- The **FIMSC** – It concerns the second of the two middle tiers of agreement and is to be focussed on finance- related issues. It is to sit alongside the IMSC, comprising the representative of HMT and the DA’s Finance Ministers.
- The **IGR Secretariat** - A standing secretariat is to be established to provide “administrative support and promote the efficient and effective maintenance of relations at each tier and for the handling and resolution of disputes”. It is to consist of officials from all governments, who are to be accountable to the Council, rather than their individual sponsoring governments.¹

Potential Scrutiny Points:

26. What is the DfE’s assessment of the LPCF’s provisions specifying the escalation of LPCF-related issues in this area? For example, does the DfE believe those provisions will fully and properly comply with the process outlined in the UK Government’s “Review of intergovernmental relations”, when implementing the LPCF?

27. What is the DfE’s assessment of the process outlined in the UK Government’s “Review of intergovernmental relations”, in the context of LPCF implementation? Please detail to fully explain response.

4 Concluding remarks

As noted in section 3 above, the LPCF will not introduce new legislation, processes or ways of working into the how the UK Government and the NI Executive will work together in the area of late payments law. Instead, it seeks to add an increased level of formality to the existing working relationship between the UK Government and the Executive, specifically the DfE and the Whitehall Department for BEIS. In many respects, it represents “business as usual”; albeit formalising current arrangements through an “exchange of letters” and establishing underpinning principles to inform its implementation.

Based on the available information at the time of writing this paper (including ongoing Protocol-related negotiations), a number of potential considerations arise. Some of arise out of the general CF process and others are specific to the LPCF.

With regard to the CF process in general, those considerations include:

- The extent to which the LPCF meets the three underlying CF Principles endorsed by the JMC(EN);
- How future Assembly scrutiny of the operation and amendment of the LPCF, and other CFs, could be facilitated; and,
- Whether there is sufficient transparency on the stakeholder consultation processes forming Phase 3 of any CF development.

With regard to the LPCF’s provisions, the Committee may wish to consider:

28. Does the LPCF give the NI Executive sufficient scope to create new laws that present an element of divergence from existing UK-wide legislation in policy areas relating to late payments?

29. The proportionality of the proposed level of formality in the LPCF, which is to be attached to ongoing engagement between the BEIS and the DfE in the area of late payments.

30. The adequacy of the proposed system of review and amendment set out in the LPCF.

31. The appropriateness of the proposed system of enforcement and dispute resolution that is to apply to the working relations between BEIS and DfE if the processes set out in the LPCF are agreed and adopted.