



Department for
Business, Energy
& Industrial Strategy

Late Payment: Provisional Common Framework

December 2021



Late Payment: Provisional Common Framework

Presented to Parliament
by the Secretary of State for Business, Energy and Industrial Strategy
by Command of Her Majesty

December 2021



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Late Payment: Provisional Common Framework

This document sets out a provisional Common Framework Agreement on Late Payment between the UK Government (Department for Business, Energy and Industrial Strategy), the Northern Ireland Executive (Department for the Economy), the Welsh Government and the Scottish Government (hereafter referred to as the Parties):

Outline

Section 1: What we are talking about

1. Policy area

Late payment (commercial transactions)

Late Payment Directive (2011/7/EU) was designed to protect European businesses against late payment in commercial transactions.

2. Scope

The United Kingdom first implemented late payment legislation in 1998 (Late Payment of Commercial Debts (Interest) Act 1998). This saw a statutory right to interest for late payment for small businesses from large firms and the public sector, and from small firms since 2002 (Late Payment of Commercial Debts Regulations 2002). 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. This replaced the original Late Payment Directive 2000/35/EC. 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) Regulations 2018 to ensure that the EU Directive was correctly implemented.

The main provisions of the Late Payment Directive (2011/7/EU) are as follows:

- 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.
- Automatic entitlement to interest for late payment and €40 minimum as compensation for recovery costs - the UK position is a fixed charge of £40, £70 or £100 depending on the size of the debt (under £1,000, under £10,000, and higher), plus additional reasonable costs incurred.
- Statutory interest of at least 8% above the European Central Bank's reference rate - the UK position is the Bank of England reference rate plus at least eight percentage points.

- 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.

Legislative competence for legislation relating to Late Payments is devolved in Scotland (under the Scotland Act 1998), Wales (under the Government of Wales Act 2006), and Northern Ireland (Northern Ireland Act 1998). The UK Government has laid regulations on behalf of Northern Ireland (NI) and Wales, and Scotland have made their own legislation.

As a result of the EU directive, the existing legislation has been applied uniformly across the four nations. This has limited the ability of the Parties to independently set policy in this space, as they were required to remain compliant with the standards set in the overarching EU directive. Following EU Exit, the EU directive no longer applies, creating increased scope for variation in policy. As a result, this Framework will apply UK-wide.

The Reporting on Payment Practices and Performance Regulations (2017) and Small Business Commissioner (Scope and Scheme) Regulations (2017) are out of scope for this Framework, as they are not devolved.

This Framework operates in accordance with the principles outlined in the overarching intergovernmental Memorandum of Understanding on Devolution (henceforth 'intergovernmental MoU on Devolution') and is consistent with, and complemented by, other guidance on common working arrangements, notably the principles described in the Joint Ministerial Committee (EU Negotiations) communique of 16 October 2017.

In October 2017, the Joint Ministerial Committee (EU Negotiations) (JMC(EN)) agreed principles to guide the work to create Common Frameworks. These principles are set out below:

1. *Common Frameworks will be established where they are necessary in order to:*
 - *Enable the functioning of the UK internal market, while acknowledging policy divergence.*
 - *Ensure compliance with international obligations.*
 - *Ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.*
 - *Enable the management of common resources.*
 - *Administer and provide access to justice in cases with a cross-border element.*
 - *Safeguard the security of the UK.*
2. *Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:*
 - *Be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent.*
 - *Maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory, as is afforded by current EU rules.*

- *Lead to a significant increase in decision-making powers for the devolved administrations.*
3. *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.*

The Late Payment Framework has been established to enable the functioning of the UK internal market, while acknowledging policy divergence.

The area of policy covered by this Common Framework does not fall directly within the provisions of the Trade and Cooperation Agreement, although both the Common Framework and that agreement will impact significantly on devolved and reserved responsibilities. Agreed outcomes of the ongoing intergovernmental relations review will be reflected in this Framework.

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.

3. Definitions

Not applicable.

Section 2: Proposed breakdown of policy area and framework

4. Summary of proposed approach

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.

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.

The Parties considered whether a concordat was required as part of the development of this Common Framework. It has been agreed by all parties that a separate concordat is not required in this instance as it would duplicate information that is already in the framework outline agreement.

Whilst Parties have had the powers to diverge within their existing competence, a common UK approach has been maintained to date with recognition of the importance of maintaining a level

playing field across the existing body of late payment legislation, providing consistency and a uniform approach to the benefit of businesses across the UK.

5. Detailed overview of proposed Framework: legislation (primary or secondary)

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.

6. Detailed overview of proposed Framework: non-legislative arrangements

Existing joint working relationships have been satisfactory for all parties. Previous conversations between officials have highlighted a preference for maintaining the current degree of coordination now that the UK is outside the EU. This outline agreement, covered by an exchange of ministerial letters, will constitute the Framework.

The development of the Late Payment Framework is part of the wider programme of engagement on Common Frameworks jointly undertaken by all Parties, as agreed at the Joint Ministerial Committee in October 2017.

Several key principles have been proposed that will set out required ways of working, consistent with what is in place now, to support the Parties' work on late payment, and ensure a joined-up approach is maintained:

1. All parties agree that it is beneficial for all UK businesses that there is a Common Framework for late payment policy.
2. 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.
3. 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.
4. 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.
5. 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.

6. 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.

Terms of Reference for the Late Payment Working Group and Late Payment Programme Board can be found at Annex A.

7. Detailed overview of areas where no further action is thought to be needed

Not applicable.

Operational detail

Section 3: Proposed operational elements of framework

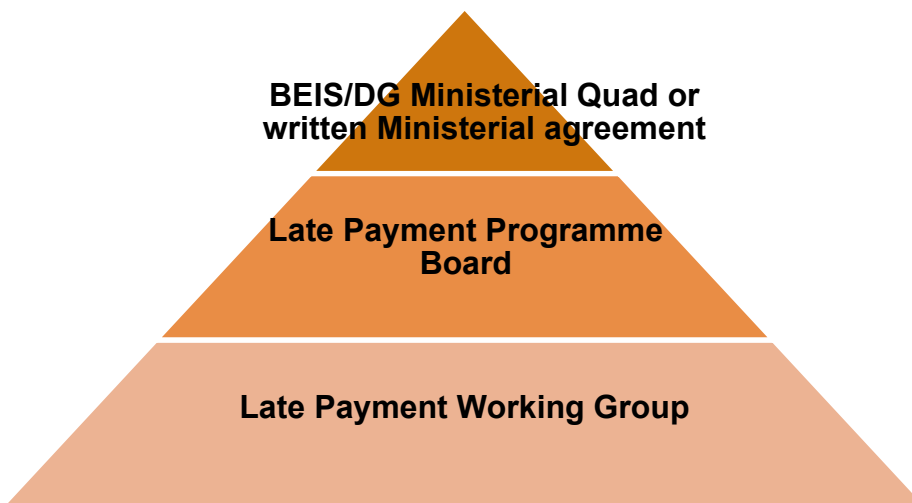
8. Decision making

The principles were agreed through exchange of letters drafted in cooperation between the Parties. The Common Framework will only be put in place once there is unanimous agreement between all Parties.

Decisions will be made in accordance with the principles outlined in “6. Detailed overview of proposed Framework: non-legislative arrangements”, as well as the Common Framework principles agreed at JMC(EN). The agreed quarterly meetings of the Late Payment Working Group will involve all four governments to ensure joint working and information sharing is conducted for this policy area. All parties will have equal decision-making standing.

Decisions will pass through the Late Payment Working Group to the Late Payment Programme Board, made up of senior officials from all four governments, and then ministers. However, not every decision will need to be escalated to the Late Payment Programme Board, nor to ministerial level. Below is a diagram which outlines how decisions are expected to be made, where required. In the unlikely event that a decision cannot be made at ministerial level, the matter will be referred to the dispute resolution mechanism.

Figure 1: Decision making diagram



9. Roles and responsibilities of each party to the Framework

The following sets out the role and responsibilities of officials and ministers in this Framework.

Officials

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.

Senior Officials

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.

Ministers

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.

Information sharing

As per the current MoU on Devolution and with regard to the outcomes of the Intergovernmental Relations Review, each Party will aim to provide each other with as full and open as possible access to policy information including statistics and research and, where appropriate, representations from third parties.

Parliamentary and stakeholder communication and engagement

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

10. Roles and responsibilities of existing or new bodies

There are no existing or new bodies that have a formal role with respect to the operation of this Framework.

11. Monitoring and enforcement

Monitoring

The Late Payment Working Group will oversee the functioning of the Framework, and any request to amend any element of the Framework will be considered at this group. The group will agree what information it will need to see to provide assurance that the Framework is operating effectively, and on what frequency the information should be collected and reviewed.

Enforcement

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.

12. Review and amendment

This Framework will be reviewed annually with all Parties through the Late Payment Working Group. The review will look at compliance with the Framework, as well as evaluating whether it is still suitable to ensure all Parties can achieve their aims on late payment policy. Ad-hoc reviews can also be scheduled on the request of any Party if a substantial issue arises.

Review Stage

1. The Late Payment Working Group will review the Framework one year after final sign off, and every three years thereafter, to ensure it is working effectively, or if any amendments should be made. If changes to the Framework are required, senior officials and ministers will need to agree to triggering the amendment stage.
2. An exceptional review can be triggered by a *significant issue*:
 - a. To constitute a significant issue, an issue must be time-sensitive, and fundamentally impact on the operation and/or the scope of the Framework.

- b. An example would be an issue that means the Framework no longer adheres to the Common Frameworks principles agreed at JMC(EN) in October 2017.

Amendment Stage

3. The amendment stage can only be triggered through unanimous agreement by ministers. The existing Framework will remain in place until a final amendment has been agreed.
4. All amendments to the Framework must be agreed by ministers from all parties, and a new non-legislative agreement signed.

Third parties can be used by any party to the Framework to provide advice at any stage in the review or amendment process. If agreement is not reached in either the review or amendment stage, parties to the Framework can raise it as a dispute through the Framework's dispute avoidance and resolution process.

13. Dispute resolution

Disputes could potentially arise at official level (i.e. where officials cannot agree to either recommending a common approach, or recommending that divergence is appropriate, and outlining the impact that this may have on the internal market); or at ministerial level (where Ministers cannot agree on the response to the recommendation put forward to them by officials, or where a dispute cannot be resolved at official level and is escalated to Ministers, who can also not reach a decision).

Dispute resolution processes should only be used if resolution through normal working processes has not been possible. The Late Payment governance provides mechanisms for good communication and cooperation, which should reduce the likelihood of disputes arising. In some areas, commonality of approach will not be needed to meet the JMC principles and therefore an "agreement to diverge" would be acceptable.

Ministerial dispute resolution

In rare instances where Ministers do not reach unanimous agreement on a joint recommendation, or where officials cannot agree an approach (and the dispute is escalated to Ministers for a decision), then a ministerial dispute resolution mechanism will be required at the portfolio level (i.e. there should be a process for Ministers to seek to resolve dispute and reach agreement). Where disputes do arise, they should be handled with adherence to the same principles as the officials' dispute resolution process. In the first instance, the matter should return to officials (with a steer on areas of further work), who should review the available technical material and present further advice to Ministers as appropriate. If this is not sufficient to resolve the dispute, a panel of senior officials from the four nations could meet to discuss possible approaches and a way forward.

Once all of the other options outlined above have been exhausted, and if a disagreement has still not been resolved, the disagreement will be referred to the appropriate intergovernmental structures.

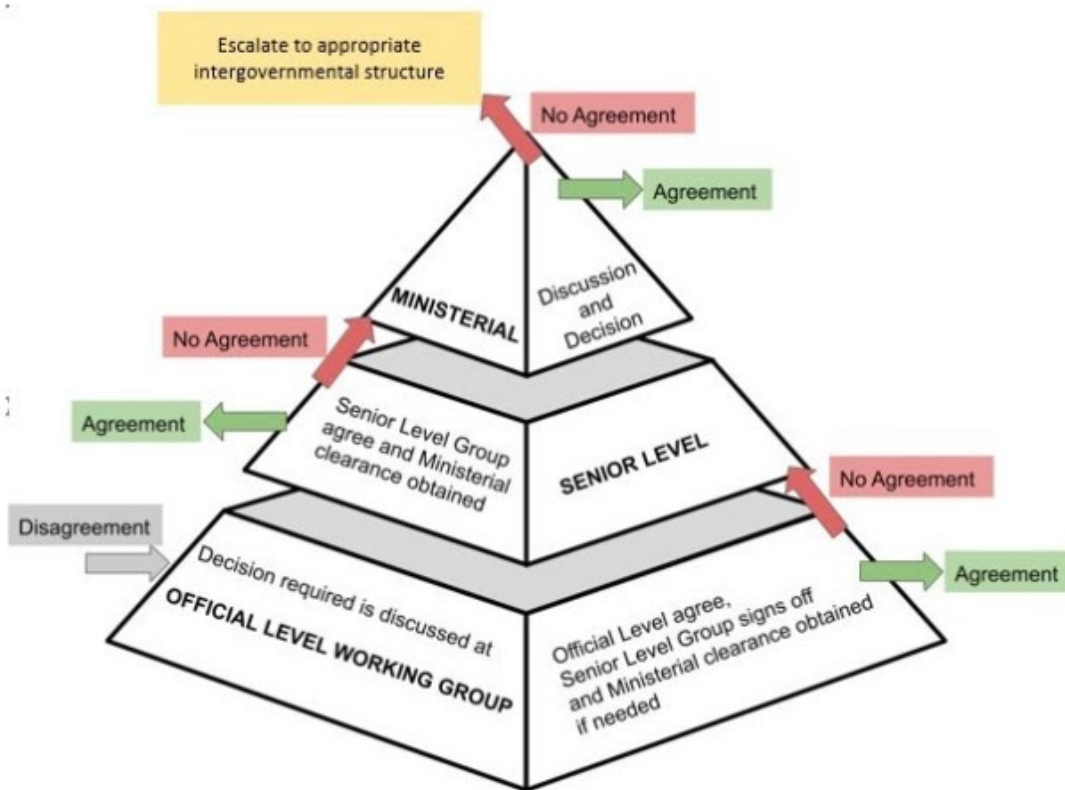
Decisions will be made in accordance with the key principles in "*6. Detailed overview of proposed Framework: non-legislative arrangements*", as well as the Common Framework principles agreed at JMC(EN) in October 2017. The Late Payment governance provides mechanisms for good communication and cooperation, which should reduce the likelihood of

disputes arising. In the unlikely event that a disagreement does arise, a resolution will be sought by following the below principles:

- It does not always follow that, where disagreements emerge, they will need to be escalated or a 'solution' established. This Framework will not prejudice the right of Parties to opt to 'agree to disagree' in certain circumstances.
- In the unlikely event that a common approach cannot be agreed, and divergence is not considered acceptable by one or more of the Parties, the dispute resolution mechanism should be engaged. This should only happen if:
 - genuine agreement cannot be made;
 - one or more party considers the core principles or terms of reference agreed for the Framework to have been breached; or
- One party considers that a Common Framework principle has not been respected, or undue weight has been placed on one principle (or part of a principle) at the expense of another.
- This process will be guided by the principle to resolve at the lowest possible level of governance. If a satisfactory resolution cannot be agreed at working level, the matter will be escalated to senior officials, before being escalated to Ministers. Issues will be referred to the overarching dispute avoidance and resolution mechanism outlined in the MoU on Devolution.
- Actions under dispute should be paused pending resolution through the dispute resolution mechanism.

The Dispute Resolution Mechanism is outlined below:

Figure 2: Dispute resolution diagram



Section 4: Practical next steps and related issues

14. Implementation

The final framework will be fully in place once scrutiny has been completed across all legislatures and Ministerial letters exchanged.

Annex A: Late Payment Framework Groups Terms of Reference

Late Payment Working Group Terms of Reference

Purpose

The purpose of the Late Payment Working Group is to bring together the four Parties to:

- Facilitate multilateral policy development.
- Seek to maintain a level playing field across the existing body of late payment legislation, providing consistency and a uniform approach to the benefit of businesses across the UK.
- Manage potential divergence in a way that respects the devolution settlements.

Scope & Objectives

While policy on late payment is a devolved matter, there are a number of wider policy initiatives and regulations that operate on a UK-wide basis. The Late Payment Working Group will be a collegiate group which facilitates collaboration across the Parties within this policy area. It will provide a forum for policy officials to engage on policy development, provide updates on progress, and raise concerns and awareness of cross-cutting issues.

Membership

Core membership:

- Department for Business Energy and Industrial Strategy (BEIS)
- Scottish Government (SG)
- Welsh Government (WG)
- Department for the Economy (NI)

Rules of procedure

- BEIS will chair and provide secretariat support for the group. However, this will be kept under constant review by the members.
- Regular meetings will be scheduled to take place, with ad-hoc meetings when required.
- The meeting date, time and location will be agreed with all Parties.
- The Group will review its Terms of Reference against its objectives on a 12-month basis or more regularly if required to ensure it continues to add value.

Late Payment Programme Board Terms of Reference

Purpose

The purpose of the Late Payment Programme Board is to bring together the four Parties to:

- Facilitate multilateral policy development by resolving disputes relating to the Late Payment Working Group.
- Make decisions, by consensus of the Parties, on recommendations made by the Late Payment Working Group.
- Provide strategic planning decisions as identified by the Late Payment Working Group.
- Provide a mechanism of dispute resolution as needed and as referred by the Late Payment Working Group.
- Decide, by consensus of the Parties, to refer disputes of the Late Payment Working Group to Ministers.
- Manage potential divergence in a way that respects the devolution settlements.

Scope

While policy on late payment is a devolved matter, there are a number of wider policy initiatives and regulations that operate on a UK-wide basis. The Late Payment Programme Board will be a collegiate group which has oversight over the Late Payment Working Group within this policy area. It will, where identified by the Late Payment Working Group, act as a key mechanism of the dispute resolution procedure within the Common Framework Agreement.

The Late Payment Programme Board maintains an oversight of relevant decisions of the Late Payment Working Group, and the scope of the Late Payment Programme Board is inclusive of relevant matters as identified by the Late Payment Working Group. Specifically, the Late Payment Programme Board will meet where dispute resolution is needed.

The primary objectives of the Late Payment Programme Board are to resolve disputes arising from to the Late Payment Working Group. The Late Payment Programme Board may decide, by consensus of the Parties, to refer matters to Ministers in each Party.

Membership

Core membership:

- Department for Business Energy and Industrial Strategy (BEIS)
- Scottish Government (SG)
- Welsh Government (WG)
- Department for the Economy (NI)

Rules of Procedure

- The position of chair will rotate among members at each meeting.
- BEIS will provide secretariat support for the group. However, this will be kept under constant review by the members.
- The Group will meet where dispute resolution is needed or for financial and/or strategic planning decisions.
- The meeting date, time and location will be agreed with all Parties.
- The Group will review its Terms of Reference against its objectives on a 12-month basis or more regularly if required to ensure it continues to add value.

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