

Legislative Consent Memorandum

Commercial Payments Bill

Background

1. This memorandum has been lodged by Stephen Flynn MSP, Cabinet Secretary for Economy, Tourism and Transport, in accordance with Rule 9B.3.1(a) of the Parliament's standing orders.

2. The Commercial Payments Bill ("the Bill") was introduced by the UK Government in the House of Lords on 19 May. The Bill is available on the UK Parliament website via this link: [Commercial Payments Bill \[HL\] - Parliamentary Bills - UK Parliament](#).

Content of the Bill

3. The Bill is intended to tackle poor payment practices in business-to-business contracting and retention practices in relation to construction contracts, alongside reforms to the Small Business Commissioner ("SBC") regime. The Bill is structured as follows:

Part 1 (Commercial Payments)

4. Chapter 1 (Commercial payments) makes amendments to the Late Payment of Commercial Debts (Interest) Act 1998 including: changing the title of that Act to "the Commercial Payments and Interest on Late Payment Act 1998" (CPILPA); introducing a statutory framework for maximum payment terms in commercial contracts (30 days for public authorities, where the contract is not covered by the Procurement Act 2023, and 60 days for non-public authorities), subject to limited exemptions; strengthening the statutory interest regime (including voiding contractual terms in relevant contracts that purport to exclude or alter the right to statutory interest for late payments of qualifying debts); and implying a term into relevant contracts which allows a supplier to recover a fixed sum from a purchaser where the purchaser raises a dispute late or without sufficient information.

5. Chapter 2 (Payments under construction contracts) makes amendments to the Housing Grants, Construction and Regeneration Act 1996 in relation to retentions under construction contracts, including: providing that, after the end of a 2 year "transition period", retention clauses in construction contracts which were agreed by the parties to such a contract after the end of that 2 year period are void; providing that retention clauses agreed or varied by the parties to a construction contract during the 2 year "transition period" are ineffective after a certain period; and implying a term into construction contracts that, after the end of the 2 year "transition

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

period”, where a party is owed a debt (“the supplier”) and the other party is making an unauthorised retention of the sums that they owe, the supplier has an entitlement to a fixed sum in addition to any entitlement to statutory interest and compensation arising.

Part 2 (Small Business Commissioner)

6. Makes changes to the powers of the SBC by: introducing powers for the SBC to investigate larger businesses suspected of persistently engaging in poor payment practices and breaching payments legislation, make recommendations and take enforcement action where appropriate (including the power to give directions and impose financial penalties); introducing powers for the SBC to adjudicate contractual payment disputes between small and larger businesses outside of the court process and making binding interim decisions; and introducing powers for the SBC to take enforcement action against larger businesses that are in breach of their statutory publication requirements.

Part 3 (General)

7. This part makes general provision, including provision in respect of the Bill’s extent, Crown application, powers to make consequential provision and to make commencement, transitional and savings provision, the interpretation of the Bill, and the short title of the eventual Act (the Commercial Payments Act 2026).

Provisions which require the consent of the Scottish Parliament

8. Most of the Bill’s provisions extend to Scotland and, of those provisions, most fall within devolved competence to the extent that they extend to Scotland or confer regulation-making powers which can be used to make provision in or as regards Scotland. The Bill makes provision extending to Scotland in the following areas of devolved competence:- Scots contract law (in connection with specified types of business-to-business commercial contracts in general and in relation to specified types of construction contract in particular); procurement policy; and the powers of the SBC so far as these are exercisable in or as regards Scotland, as these powers relate to business support policy. Examples of the provision being made in respect of the SBC’s powers include the extension of the SBC’s existing power to give, or publish, general advice and information and the creation of new powers for the SBC to adjudicate relevant payment disputes referred to it by small businesses, to investigate the payment practices of larger businesses, to make recommendations, and to take enforcement action where the larger business has persistently engaged in poor payment practices, including giving publication or enforcement directions and issuing financial penalties.

9. In addition, the Bill imposes statutory consent requirements on the Secretary of State’s substantive regulation-making powers within the Bill where the proposed regulations will make provision within devolved competence extending to Scotland

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

and where that devolved provision is not merely incidental to or consequential on reserved provision. In order to comply with such a statutory consent requirement, the Secretary of State must obtain the consent of the Scottish Ministers in relation to the devolved provision within the proposed regulations prior to making the regulations in question. These statutory consent requirements alter the executive competence of the Scottish Ministers and therefore legislative consent is also required in respect of these statutory consent requirements.

10. The Scottish Government's view is that the following provisions require legislative consent. The UK Government's analysis of the devolution position has concluded that the subject matter of this Bill is largely devolved and the UK Government has not assessed as being reserved any Bill provisions which the Scottish Government considers make devolved provision. Both the Scottish Government and UK Government are of the view that the following provisions require legislative consent.

Part 1, Chapter 1 (Commercial Payments) - Commercial payment terms and statutory interest

11. Clauses 1 to 10 of the Bill, together with relevant provisions of Schedule 1 Part 1, amend the Late Payment of Commercial Debts (Interest) Act 1998, which the Bill renames the Commercial Payments and Interest on Late Payment Act 1998 ("CPILPA"). The effect of these provisions is to introduce a clearer and more prescriptive statutory framework for payment terms in commercial contracts. Schedule 1 Part 2 makes consequential amendments to other legislation as a result of these amendments to CPILPA.

12. Clause 1 inserts new sections 2B and 2C into CPILPA. The effect of section 2B is to restrict the use of long payment terms in commercial contracts and to encourage parties to have payment terms that are clear. Section 2B establishes statutory maximum payment terms for relevant payments under relevant commercial contracts (including certain contracts in which the purchaser is a public authority) and provides that payment terms which do not comply with the requirements specified in section 2B are void and will be replaced by an implied statutory payment term. This will result in different legal requirements between sub-contractors to public contracts subject to the Scottish procurement regime (60-day maximum payment term) and sub-contractors to higher value public contracts subject to the Procurement Act 2023 (30-day maximum payment term). This difference already exists under the current regime and Scottish procurement policy guidance goes further (though is not enforceable unless the contract includes such terms) than the proposed Bill. Section 2C applies to contracts specifying terms for relevant payments by reference to the completion of an acceptance or verification procedure and regulates acceptance and verification procedures so that they cannot be used unfairly to delay payment. Section 2C implies a term into contracts containing an acceptance or verification procedure (other than a "long acceptance or verification term") which treats that procedure as having been completed by the end of a specified 30 day period, even where the procedure has not been completed by that time. Section 2C defines "long acceptance or verification term" and provides that

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

such terms are void unless the purchaser can show that the term is a “fair and reasonable” term to be included in the contract, having regard in particular to the matters specified in Schedule 2 to the Unfair Contract Terms Act 1977. Clause 1 makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament, in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Clause 1 makes provision applying to certain commercial contracts where the purchaser is a Scottish public authority.

13. Clause 2(1) to (4) makes provision concerning payment terms in construction contracts. Clause 2(1) inserts a new section 2D into CPILPA which imposes maximum payment terms for payments under construction contracts (other than a contract covered by the Procurement Act 2023, with limited exceptions), provides an implied standard payment period under the Scheme for Construction Contracts if the contract’s existing payment term is void, and ensures that the final date for payment cannot be postponed beyond the maximum payment term. Clause 2(2) to (4) amends the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”). Section 110(1) of HGCRA is amended to cross-refer to the new section 2D of CPILPA to provide that parties to a construction contract must now agree the payment period within the period permitted under CPILPA. New subsections (3A) and (3B) are inserted into section 110B of HGCRA to provide that the final date for payment cannot be postponed beyond the permitted period of 30 days (where the purchaser is a public authority) or 60 days (where the purchaser is not a public authority). Clause 2(1) to (4) makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament, in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts and provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Clause 2 makes provision applying to certain construction contracts where the purchaser is a Scottish public authority.

14. Clause 3 inserts a new section 2E into CPILPA. That section specifies types of contracts to which the maximum payment terms under sections 2B and 2D of CPILPA do not apply. The types of contracts which may be exempted under section 2E are: contracts where the purchaser is the smaller party; contracts where both the supplier and the purchaser are large undertakings, and contracts of a description specified in regulations made by the Secretary of State (for example, to provide industry or sector-specific flexibility, while retaining safeguards for smaller businesses). The policy intention is to preserve a degree of contractual freedom where bargaining power between the parties is comparable and also where the purchaser is the smaller party and the supplier is willing to agree a longer payment term. Clause 3 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business commercial contracts and to specified types of construction contracts in particular.

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

15. Clauses 4 to 6 strengthen the statutory regime for interest on late payments. Clause 4 inserts a new section 2F into CPILPA, which provides that it is an implied term of relevant commercial contracts to which CPILPA applies (including such contracts where the purchaser or supplier is a public authority) that a qualifying commercial debt carries simple statutory interest, with that interest running at the statutory rate of 8% above the Bank of England base rate. Clause 5 substitutes in a new UK-wide extent text for section 4 of CPILPA to make provision about when statutory interest begins to run in relation to qualifying debts. Clause 6 inserts a new section 6A into CPILPA which renders void contractual terms which exclude or vary the right to statutory interest. The effect of Clause 6 is to ensure that all contracts to which CPILPA applies will carry statutory interest and that parties cannot contract out of that protection by including an alternative remedy or changing how the right to statutory interest applies. Clauses 4 to 6 make provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and to specified types of construction contracts in particular and provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Clauses 4 to 6 make provision applying to such contracts where one of the parties is a Scottish public authority.

16. Clause 7 inserts a new section 11A into CPILPA. This section introduces a further protection for suppliers by implying a term into relevant contracts allowing the supplier to recover a fixed sum from the purchaser where the purchaser raises a “relevant dispute” late or without sufficient information. The policy intention is to discourage the use of late or inadequately explained disputes as a means of delaying payment. This provision does not apply to construction contracts as defined under HGCR. Clause 7 makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Clause 7 makes provision applying to such contracts where one of the parties is a Scottish public authority.

17. Clause 8 inserts a new section 15A into CPILPA, which defines terms relating to construction contracts for the purposes of that Act. Clause 8 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

18. Clause 9(1) gives effect to the change in title of the Late Payment of Commercial Debts (Interest) Act 1998 (“LPA”), providing that, from the time that the eventual Commercial Payments Act is passed, the new title of the LPA will be the “Commercial Payments and Interest on Late Payment Act 1998” (“CPILPA”) and Clause 9(2) updates references to the title of that Act in other legislation. Clause 9(3) gives effect to Schedule 1. Clause 9 makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

making provision in relation to Scots contract law and procurement policy in Scotland (further details are in paragraph 51).

19. Schedule 1, Part 1 makes further amendments to CPILPA in connection with provision made by Chapter 1 of the Bill. Schedule 1, Part 1 makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and making provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Schedule 1, Part 1 makes provision applying to such contracts where one of the parties is a Scottish public authority. In addition, Schedule 1, Part 1, paragraph 10 inserts a new section 15 into CPILPA. The new section 15(7)(a) and (3) being inserted into CPILPA imposes a statutory pre-condition that, before making regulations under their powers under any of the new sections 2B(7)(b), 2D(7)(b), 2E(4) or 2E(7) of CPILPA which make provision within devolved competence extending to Scotland and where that devolved provision is not merely incidental to or consequential on reserved provision, the Secretary of State must obtain the consent of the Scottish Ministers in relation to that devolved provision in those proposed regulations. By virtue of creating these statutory consent requirements in the new section 15(7)(a) and (3) being inserted into CPILPA, Schedule 1, Part 1, paragraph 10 alters the executive competence of the Scottish Ministers.

20. Schedule 1, Part 2 makes consequential amendments to other legislation which are necessary as a result of the amendments being made to CPILPA elsewhere in the Bill. Paragraph 13(a), (b), (e) and (f) and paragraph 14(a) revoke specific provisions within, or the whole of, Scottish Statutory Instruments (“SSIs”) which amended the Scottish-extent text of either section 4 or section 5A of CPILPA, as those amendments will be superseded by the amendments which this Bill will make to CPILPA. Schedule 1, Part 2, paragraph 13(a), (b), (e) and (f) and paragraph 14(a) make provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and making provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Schedule 1, Part 2 revokes a provision within a procurement-related SSI.

21. Clause 10 provides that the amendments made to CPILPA and HGCRA by any provision in Clauses 1 to 8 and Schedule 1 will not affect existing contracts entered into before the date on which the provision making the amendment comes into force. Clause 10 makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of business-to-business and public authority to business commercial contracts and making provision in relation to procurement policy in Scotland (further details are in paragraph 51), to the extent that Clause 10 determines the application of applicable legislative amendments set out in Clauses 1 to 8 and Schedule 1 to specified commercial contracts where one of the parties is a Scottish public authority.

Part 1, Chapter 2 (Payments under construction contracts) - Construction contracts and retention practices

22. Clauses 11 to 17, together with Part 1 of Schedule 2, make further provision in relation to construction contracts. Clauses 11 to 16 and Part 1 of Schedule 2 amend HGCRAs as it extends to Scotland. The policy intention is both to align construction payment rules with the new late payment framework to be implemented by the Bill and to address the practice of retention clauses in construction contracts.

23. Clause 11 inserts a new section 113A into HGCRAs, which defines (among other defined terms) retention practices in the context of construction contracts, which is where one party to a construction contract deducts or retains sums of money under that contract until any condition for the full or partial release of the sums is met. Clause 11 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

24. Clause 12 inserts a new section 113B into HGCRAs which makes provision in relation to the legal effect of “retention clauses” in construction contracts. The new section 113B defines a “retention clause” for the purposes of that section as any term in a construction contract, or in another agreement linked to amounts payable under a construction contract, that permits one party to a construction contract to deduct or hold back money in the way described in section 113B(1) (i.e. a contractual provision which permits the practice of deducting a retention sum). To fall within the definition of a “retention clause”, the term in the construction contract or other agreement does not need to be in writing. The new section 113B will create a transition period for retention clauses before a full ban takes effect at the end of that transition period. After the end of the transition period, retention clauses will be ineffective and section 113B provides for the treatment and repayment of any sums retained under a retention clause during the transition period and which have not been paid after the end of the transition period. The effect is to move the sector gradually away from retention practices while setting out how retained sums must be returned. Clause 12 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

25. Clause 13 inserts a new section 113C into HGCRAs, which will ban the use of retention clauses in construction contracts which would otherwise permit the deduction and withholding of a retention sum. The ban will apply to retention clauses agreed by the parties to a construction contract after the end of the transition period, and will apply to retention clauses in new construction contracts and agreements concluded after the end of the transition period, as well as to new retention clauses which are inserted into existing contracts and agreements which were entered into prior to or during the transition period. Clause 13 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

26. Clause 14 inserts a new section 113D into HGCRA, which provides that where a retention clause is agreed before the coming into force of the ban but is then varied after the ban has come into force, such a variation will be void, unless the effect of the variation is for the clause to be more favourable to the payee. Clause 14 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

27. Clause 15 inserts a new section 113E into HGCRA, which introduces an implied contractual term into construction contracts entitling the supplier to the payment of a fixed sum where there has been an unauthorised deduction of a retention sum. That fixed sum would be in addition to the supplier's entitlements to repayment of the retained amount itself, to statutory interest and to compensation in accordance with section 5A of CPILPA. Clause 15 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

28. Clause 16 inserts a new section 113F into HGCRA, which provides the Secretary of State with a regulation-making power at section 113F(1) to make regulations amending any provision of section 113A, section 113B(1) and section 113C(1) of HGCRA, which contain key definitions connected with retention practices. Clause 16(2) amends section 146(3)(a) of HGCRA to insert a cross-reference to the new section 113F(5). Clause 16 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts. In addition, the new section 113F(3)(a) imposes a statutory pre-condition that, before making regulations under the section 113F(1) power which make provision within devolved competence extending to Scotland and where that devolved provision is not merely incidental to or consequential on reserved provision, the Secretary of State must obtain the consent of the Scottish Ministers in relation to that devolved provision in those proposed regulations. By virtue of creating this statutory consent requirement, Clause 16(1) alters the executive competence of the Scottish Ministers.

29. Clause 17 gives effect to Schedule 2. Clause 17 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in so far as Clause 17 gives effect to Schedule 2 Part 1. which makes provision in relation to Scots contract law as it applies to specified types of construction contracts.

30. Schedule 2 Part 1 makes further amendments to HGCRA in connection with payments under a construction contract. Schedule 2 Part 1 makes provision applying

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in relation to Scots contract law as it applies to specified types of construction contracts.

Part 2 (Small Business Commissioner) - Adjudication, investigations and related functions

31. Part 2 of the Bill expands the role and powers of the SBC. Of these, Clauses 18 to 22 and 25 make provision within devolved competence so far as the provisions extend to Scotland.

32. Clause 18 inserts new sections 2A to 2G into the Enterprise Act 2016 which make provision in respect to a new adjudication scheme under which small businesses may refer certain payment disputes with larger businesses for adjudication by the SBC (or by a person appointed by the SBC). The parties to a relevant payment dispute may agree in writing at any time to accept a decision determining the dispute under the SBC adjudication scheme as finally determining that dispute. In the absence of such agreement, the decision is binding on the parties unless and until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by the parties reaching a different agreement in writing. The inserted sections 2A to 2G make provision in respect of: the adjudication and decision under the scheme; the enforcement of the adjudicator's decision; a power conferred on the SBC to decline to adjudicate a relevant payment dispute on specified grounds; disputes which are excluded from the adjudication scheme; the use by the SBC of information given to them for the purposes of, or in connection with, adjudicating a relevant payment dispute; and a regulation-making power at section 2G(1) enabling the Secretary of State to make regulations making further provision about the SBC adjudication scheme. Clause 18 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

33. Clause 19 inserts new sections 2H to 2P into the Enterprise Act 2016 in connection with empowering the SBC to investigate the payment practices of larger businesses, to make recommendations, and to take enforcement action where the larger business has persistently engaged in poor payment practices, including giving publication or enforcement directions and, where the SBC is satisfied beyond reasonable doubt that the larger business has persistently engaged in poor payment practices, to issue a financial penalty to that business. The inserted section 2P(1) confers a regulation-making power on the Secretary of State enabling them to make regulations making further provision about investigations, recommendations under section 2J(3), publication directions and enforcement directions, reports under section 2M, and the SBC's power to require information under section 2N. Clause 19 also gives effect to Schedule 3 of the Bill. Clause 19 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

34. Schedule 3 inserts a new Schedule 1A into the Enterprise Act 2016, which makes further provision about the imposition of financial penalties on larger businesses by the SBC. Paragraph 8(1) of Schedule 1A confers a regulation-making power on the Secretary of State to make regulations making further provision in connection with the imposition of financial penalties by the SBC. Schedule 3 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

35. Clauses 20 and 21 relate to the Commissioner's wider functions. Clause 20 substitutes a new section 3 into the Enterprise Act 2016 and expands the Commissioner's existing function to provide general advice and information to businesses (regardless of size) about matters relating to transactions between businesses and transactions between businesses and public authorities. The general advice and information provided by the SBC may cover a number of specified topics. Clause 20 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

36. Clause 21 inserts a new section 3A into the Enterprise Act 2016 which enables the SBC, at the request of a business, to prepare and deliver, or arrange for another person to prepare and deliver, training about transactions between businesses and transactions between businesses and public authorities. The SBC may charge a fee for preparing and delivering such training. The policy effect is to move the Commissioner's role beyond complaint handling and into a broader preventative and educational function. Clause 21 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

37. Clause 22 inserts new sections 12A and 12B into the Enterprise Act 2016. The new section 12A(1) confers a regulation-making power on the Secretary of State to make regulations transferring some or all of the SBC's functions to the Secretary of State or to a body which exercises public functions (i.e. functions of a public nature for the purposes of the Human Rights Act 1998) prior to any transfer of functions from the SBC under section 12A. Regulations under section 12A(1) may abolish the office of the SBC if all of the SBC's functions are transferred. The new section 12B(2) confers powers on the Secretary of State to make one or more schemes ("transfer schemes") for the transfer of property, rights and liabilities between the SBC and either the Secretary of State or a person to whom some or all of the SBC's functions are being transferred (in connection with regulations made under section 12A(1)). From a policy perspective, the Clause provides a mechanism for future institutional reform of the Commissioner's functions if that is considered appropriate. To the extent that regulations under section 12A(1) could transfer some or all of the SBC's functions, in so far as those functions are exercisable in or as regards Scotland and that such regulations could transfer some or all of those functions to a Scottish public body with mixed functions or no reserved functions, such regulations could make provision within devolved competence in relation to Scotland. To the extent that a transfer scheme could be made by the Secretary of

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

State under section 12B(2) to transfer property, rights and liabilities between the SBC and a Scottish public body with mixed functions or no reserved functions to which some or all of the SBC's functions were being transferred under regulations under section 12A(1), such a transfer scheme could fall within devolved competence in relation to Scotland. Clause 22 therefore makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy.

38. Clause 25 gives effect to Schedule 4. Clause 25 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament to the extent that Schedule 4 makes provision in respect of business support policy.

39. Schedule 4, Part 1 makes consequential and further amendments to Part 1 of the Enterprise Act 2016 in connection with the provision made by Part 2 of the Bill. Schedule 4, Part 2 amends other legislation in connection with the provision made by Part 2 of the Bill. Schedule 4 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament in terms of making provision in respect of business support policy. Schedule 4, Part 1, paragraph 11 inserts a new section 12E into the Enterprise Act 2016. The new section 12E(1)(a) (as read with section 12E(3)) imposes a statutory pre-condition that, before making regulations under their powers under any of the new sections 2G(1), 2P(1) and 12A(1) or under the new paragraph 8(1) of the new Schedule 1A of the Enterprise Act 2016 which make provision within devolved competence extending to Scotland and where that devolved provision is not merely incidental to or consequential on reserved provision, the Secretary of State must obtain the consent of the Scottish Ministers in relation to that devolved provision in those proposed regulations. By virtue of creating these statutory consent requirements in the new section 12E(1)(a) and (3) being inserted into the Enterprise Act 2016, Schedule 4, Part 1, paragraph 11 alters the executive competence of the Scottish Ministers.

Part 3 (General provision) - General and ancillary provisions

40. The Bill also contains general provisions that are relevant to the operation of the substantive measures in Parts 1 and 2 extending to Scotland, of which Clauses 27-32 require consent.

41. Clause 27 makes provision about the application to the Crown of the amendments made in Parts 1 and 2 of the Bill. To the extent that the provisions being amended by Parts 1 and 2 extend to Scotland, Clause 27 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament for the reasons outlined above in the explanation of the relevant provisions in Parts 1 and 2 of the Bill requiring legislative consent.

42. Clause 28 confers a power on the Secretary of State to make regulations making provision which is consequential on any provision within the Bill, including amending, repealing or revoking any provision made by primary legislation (including provision made by Acts of the Scottish Parliament) that is passed or made before the

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

end of the Session in which the eventual Commercial Payments Act is passed. To the extent that regulations made under Clause 28 could be used to make provision extending to Scotland which is consequential on the relevant provisions in Parts 1 and 2 of the Bill which have been identified above as requiring legislative consent, Clause 28 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament for the reasons outlined above in the explanation of those relevant provisions in Parts 1 and 2 of the Bill.

43. Clause 29 contains the interpretation provision for this Bill. To the extent that Clause 29 defines terms used in the relevant provisions in Parts 1 and 2 of the Bill which have been identified above as requiring legislative consent, Clause 29 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament for the reasons outlined above in the explanation of those relevant provisions in Parts 1 and 2 of the Bill.

44. Clause 30 sets the territorial extent of the Bill, including which provisions extend to Scotland. To the extent that Clause 30 provides that the relevant provisions in Parts 1 and 2 of the Bill which have been identified above as requiring legislative consent extend to Scotland, Clause 30 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament for the reasons outlined above in the explanation of those relevant provisions in Parts 1 and 2 of the Bill.

45. Clause 31 sets out the manner in which provisions of the eventual Act will be commenced and confers powers on the Secretary of State to make commencement regulations and to make regulations making transitional or saving provision in connection with the coming into force of any provision of the eventual Act. To the extent that Clause 31 makes provision concerning the commencement in relation to Scotland of the relevant provisions in Parts 1, 2 and 3 of the Bill which have been identified above and below as requiring legislative consent, Clause 31 makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament for the reasons outlined above and below in the explanation of those relevant provisions in Parts 1, 2 and 3 of the Bill.

46. Clause 32 sets the short title for the eventual Act (the Commercial Payments Act 2026). Clause 32 therefore makes provision applying to Scotland for a purpose within the legislative competence of the Scottish Parliament.

Reasons for recommending legislative consent

Current position

47. The Scottish Government supports the overall policy intent of the Commercial Payments Bill to improve payment practices, strengthen protections for small and medium-sized enterprises (SMEs), and address persistent issues with late payment across supply chains. Evidence from UK-wide consultation, including responses from Scottish businesses, indicates broad support for the majority of the Bill's proposed

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

measures, with no significant divergence in views between Scotland and the rest of the UK.

48. The Bill is expected to deliver tangible benefits for Scottish businesses by introducing statutory maximum payment terms, strengthening statutory interest provisions, improving transparency, and enhancing the enforcement role of the SBC. These measures are anticipated to improve cashflow, reduce business uncertainty, and support wider economic productivity.

49. Most of the Bill's provisions fall within devolved competence so far as the relevant provisions extend to Scotland, however, the Scottish Government is content that appropriate safeguards have been secured. All of the Secretary of State's substantive regulation-making powers within the Bill which can be exercised within devolved competence in relation to Scotland have been made subject to statutory pre-conditions that the Secretary of State must obtain the consent of the Scottish Ministers prior to making regulations under those powers which contain devolved provision extending to Scotland, unless the devolved provision is merely incidental to or consequential on reserved provision. While it is disappointing that the UK Government has not agreed to provide the Scottish Ministers with corresponding regulation-making powers in the Bill enabling the Scottish Ministers to make provision within devolved competence in relation to Scotland, the Scottish Government's view is that these statutory consent requirements would provide Scottish Ministers and the Scottish Parliament with an acceptable level of control and oversight over the use of the Secretary of State's substantive regulation-making powers within the Bill in devolved areas in relation to Scotland.

50. Providing legislative consent would enable Scottish businesses to benefit from a consistent UK-wide framework, reducing the risk of regulatory fragmentation and supporting cross-border trade. It would also align with the principles of the Late Payment Common Framework, maintaining a coordinated approach across the UK while preserving Scottish Ministers' ability to influence implementation and future development of the regime.

51. There is currently no statutory requirement for maximum payment terms in Scotland for business-to-business contracts. For public contracts, the Procurement Reform (Scotland) Act 2014 sets out provisions to encourage, as far as reasonably practicable, 30-day payment terms in the supply chain for contracting authorities with larger spend. Scottish Government policy guidance¹ further encourages 30-day payment terms throughout all public sector contract supply chains. While the provisions of the Bill relating to payment terms are not fully aligned with Scottish Government procurement policy (as the provisions do not require 30-day payment terms the supply chain of public authorities generally), these provisions do not create a direct conflict.

52. On balance, the Scottish Government considers that the benefits of a consistent UK-wide legislative framework, combined with the safeguards secured to

¹ [Public procurement - prompt payment in the supply chain: SPPN 2/2022 - gov.scot](#)

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

ensure that the devolution settlement is respected, support its recommendation that legislative consent be given.

Consultation

53. The UK Government (“UKG”) Department of Business and Trade consulted UK businesses on a series of measures to improve payment practices and tackle late payment, including proposals affecting statutory payment terms, enforcement and retention practices in construction contracts between July and October 2025. [UKG’s results and response were published in March 2026](#). The UKG had 867 formal responses, from businesses of every size, sector, region and nation in the UK. The consultation found widespread support for the majority of UKG’s proposals.

54. Although Scotland-specific results were not formally published alongside the UKG’s consultation response, the UKG have indicated that the responses received from Scottish businesses were closely aligned with UK-wide positions.

55. The UKG has since sought to amend those proposals that attracted a lower level of support, as indicated in the table below.

56. A summary of the consultation findings and response is included below.

Measure	UK-wide	UKG Response
Measure 1 (Part A) - board-level scrutiny of payment practices (Part A)	71% agree	Take measures forward with some limited changes following feedback.
Measure 1 (Part B) - SBC writes to boards/audit committees	76% agree	Take forward measure.
Measure 2 - Maximum payment terms	66% agree	Take forward stricter maximum payment terms, while allowing for limited exemptions and flexibility.
Measure 3 – a deadline for disputing invoices	72% agree	Introduce a time limit for raising disputes. Separate measure taken forward for construction contracts.
Measure 4 – mandatory statutory interest	80% agree	Take forward measure.
Measure 5 – additional reporting on statutory interest	77% agree	Take forward measure.
Measure 6 – financial penalties for persistent late payers	89% agree	Take forward measure.
Measure 7 – expanded powers for the SBC	76% agree	Take forward, SBC to have significant new powers.
Measure 8 – retention payments under construction contracts : Option A prohibit retention clauses	62% agree	Take forward a legislative measure to prohibit the deduction and withholding of retention payments. Consult further with interested parties on when the ban clauses should be commenced.
Measure 8 – retention payments under construction contracts : Option B protect retention clauses	65% agree	See above.

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

Financial implications

57. At this stage, no additional direct programme expenditure for the Scottish Government is expected as a result of the Bill's provisions.

58. However, there may be indirect financial and operational impacts arising across the public sector and wider economy. In particular, Scottish public bodies will be required to comply with statutory 30-day payment term requirements, which may necessitate limited adjustments to internal financial processes and systems, although these are expected to be manageable within existing resources.

59. More broadly, the introduction of statutory maximum payment terms in relevant commercial contracts (30 days for public authorities, where the contract is not covered by the Procurement Act 2023, and 60 days for non-public authorities, subject to limited exemptions), alongside mandatory interest on late payments, may have cashflow implications for suppliers, particularly those currently operating with longer credit terms or reliance on practices such as retention in the construction sector. These changes are expected to improve payment discipline and SME cashflow overall, but may create short-term adjustment costs in some sectors.

Post EU Scrutiny

60. The provisions in the Commercial Payments Bill relate to domestic regulation of payment practices in commercial transactions, including statutory payment terms, dispute mechanisms and enforcement arrangements. The policy area was previously informed by EU Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, which established a baseline framework for payment terms, statutory interest and protections for businesses which EU Member States were required to give effect to in their own domestic legal systems. While the UK was an EU Member State, that Directive was transposed into UK law through secondary legislation² which amended the Late Payment of Commercial Debts (Interest) Act 1998 to implement the requirements of that Directive for each of the UK jurisdictions.

61. The Bill builds on this existing framework but primarily reflects domestic policy development, rather than the implementation of new or updated EU legislation. As such, the provisions are not directly linked to current EU legislative developments, and the Scottish Government does not consider the Bill to be incompatible with its policy commitment to maintain alignment with EU law.

² The Scottish Statutory Instruments which implemented the requirements of Directive 2011/7/EU in relation to Scotland were: the Late Payment of Commercial Debts (Scotland) Regulations 2013 (SSI 2013/77); the Late Payment of Commercial Debts (Scotland) (No. 2) Regulations 2013 (SSI 2013/131); the Late Payment of Commercial Debts (Scotland) Regulations 2015 (SSI 2015/226); and the Late Payment of Commercial Debts (Scotland) Amendment Regulations 2018 (SSI 2018/160).

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

62. The measures in the Bill can be characterised as broadly consistent in principle with the objectives of the original EU Directive, but they go beyond the Directive in several areas, including the introduction of maximum payment terms, strengthened enforcement mechanisms, and expanded powers for the SBC. To that extent, the Bill may be considered to represent policy divergence from EU law in terms of the requirements of Directive 2011/7/EU, although this technically represents divergence it reflects domestic priorities to strengthen enforcement and address persistent market failures in the UK context. This is therefore in line with the alignment policy commitment to maintain and advance high standards shared with the EU.

63. There are no constraints arising from international law that would limit the approach taken in the Bill. The provisions relate to domestic commercial practices and do not engage materially with the UK's international obligations.

64. The Bill applies only to UK-to-UK business transactions and therefore is not expected to have a direct impact on access to EU markets for goods, services or people. There may be indirect effects where UK-based businesses operate in both domestic and EU markets, but these are expected to be limited and manageable.

65. The UK Internal Market Act 2020 market access principles are not considered to impact on the policy objectives of the Bill. The measures within the Bill establish statutory requirements which (with a small number of exceptions) will be applicable across the UK, supporting a consistent approach to payment practices and reducing the risk of internal market distortion. An exclusion from the market access principles is not considered to be necessary.

66. The policy area is already subject to the Late Payment Common Framework, which provides a mechanism for coordination between the UK Government and the Devolved Administrations in a devolved policy area with UK-wide implications. The Bill's provisions are broadly consistent with the framework's objectives of maintaining coherence while managing divergence where appropriate. The Framework will continue to provide a forum for ongoing engagement and oversight as the regime is implemented.

67. The Bill's provisions are not considered to fall directly within the provisions of the UK–EU Trade and Co-operation Agreement (TCA). The measures in the Bill relate to domestic commercial practices and do not materially affect trade arrangements or regulatory commitments under the TCA.

Conclusion

68. The Scottish Government recommends that the Scottish Parliament provides its consent to the relevant provisions of the Commercial Payments Bill.

This Legislative Consent Memorandum relates to the Commercial Payments Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2026

69. The Scottish Government will continue to engage with the UK Government during the Bill's passage and reserving the option to lodge a supplementary Legislative Consent Memorandum should material amendments be made to relevant provisions of the Bill.

Draft motion on legislative consent

70. The draft motion, which will be lodged by the Cabinet Secretary for Economy, Tourism and Transport, is:

“That the Parliament, noting that the Commercial Payments Bill, introduced in the House of Lords on 19 May 2026, makes provision that falls within the legislative competence of the Parliament and alters the executive competence of the Scottish Ministers, agrees to give consent to such provision as is made by Clause 1, Clause 2(1) to (4), Clauses 3 to 22, Clause 25, Clauses 27 to 32, Schedule 1 Part 1, Schedule 1 Part 2 paragraph 13(a), (b), (e) and (f) and paragraph 14(a), Schedule 2 Part 1, Schedule 3 and Schedule 4.”

Scottish Government
June 2026

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Commercial Payments Bill – Legislative Consent Memorandum

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