



Department
for Business
Innovation & Skills

**DIRECTIVE 2011/7/EU ON
COMBATING LATE PAYMENT IN
COMMERCIAL TRANSACTIONS**

Government Response to
Consultation

FEBRUARY 2013





Department
for Business
Innovation & Skills

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Executive Summary

This consultation sought the views for implementing the recast European Directive 2011/7/EU on combating late payment in commercial transactions (the Directive). It was issued jointly with the Scottish Government, as legislation on late payment in commercial transactions is a devolved matter in Scotland.

The consultation package asked for views on four areas as part of the transposition process. The consultation was held over 4 weeks from 20 September 2012 to 19 October 2012, with comments received from 80 respondents, some representing thousands of stakeholders. We thank all interested parties for taking the time to respond.

The Directive will be implemented on 16 March 2013.

Introduction

Background

The recast Directive is designed to strengthen current legislation and to combat the culture of late payments in commercial transactions within the European Union, by laying down common minimum requirements, essentially extending the protections already enjoyed by UK businesses across the Union.

Government supports the revision of the Directive as it seeks to introduce a number of improvements to the original, providing clarity, saving business money and creating a level playing field for UK suppliers trading across the Single Market.

The recast Directive covers all debts incurred in commercial transactions. It applies to businesses and public authorities. It recognises current UK legislation and practice as an exemplar and essentially mirrors existing UK provisions.

Successive Governments have, since 1998, worked to challenge the long-standing culture of late payment in the UK, through its early adoption of legislation and its wider strategy for improving business awareness and capability. Government has contributed to and supported the new Directive.

In considering the impact of legislation in this area, it is important to note that regulation is not the remedy for late payment.

Most supplier relationships are long-standing and resorting to legal action is therefore not a practical option except as a final alternative. Legislation is intended to create an environment for driving payment on time and best practice dictates that suppliers

reference the costs of missing the due payment date in all written contracts and invoices, setting a clear expectation from the outset.

Legislation is only useful where invoicing is accurate and timely and where terms have been clearly identified before transactions take place. All too often there is an assumption on the part of both the supplier and customer that their standard terms apply and the evidence suggests that over half of all transactions take place with no prior agreement on payment terms. Research also shows that at times, invoicing is often inaccurate and late. That is why Government has promoted advice and [guidance](#)¹ on how to manage customer relationships and cash flow.

Finally, it is important to check that the customer is capable of making payment by undertaking a credit check. Research indicates that only one in ten suppliers regularly credit check customers.

Consultation process

The Department for Business, Innovation and Skills (BIS) ran a public consultation during the period 20 September 2012 to 19 October 2012. Launched by the Minister of State for Business and Enterprise through a press notice, interested parties and their representatives likely to be directly affected by the Regulations were invited to comment on the proposals. These included businesses, individuals and a range of representative bodies and local authorities. The consultation paper and supporting documents were made available through the [BIS website](#)².

The consultation sought views on transposition. It should be noted that not all respondents provided comments to all the questions and others provided comments that fell outside of the remit of this consultation. At the launch, **1,254 emails** were distributed to stakeholders. The launch was picked up and rebroadcast on numerous websites and micro-blogging sites both in the UK and overseas. At the end of the consultation period, BIS had received **80 responses**, from individuals, businesses and their representatives, trade bodies, local authorities and utility companies.

Statistical analysis of responses

The number of overall responses (80) was satisfactory for a consultation of this type. With negotiations already completed and the Directive agreed, comments were invited only addressing UK transposition and UK impact assessment. Not all respondents answered all the questions and some provided only generic comments. We also received many comments that fell outside the narrow focus of this consultation. Those comments have been shared with other parts of Whitehall and with the National Governments of Scotland, Wales and Northern Ireland.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

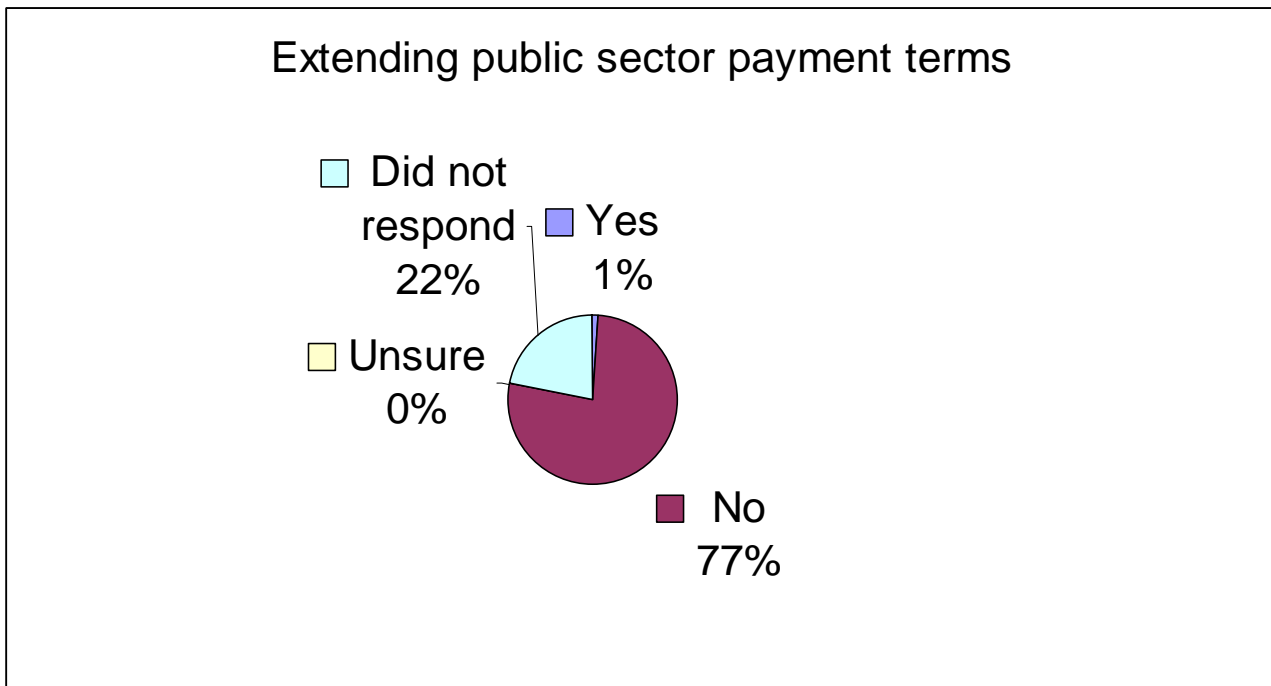
¹ <http://www.creditmanagement.org.uk/bisguides.htm>

² <https://www.gov.uk/government/publications/directive-2011-7-eu-on-combating-late-payment-in-commercial-transactions-consultation>

The Government of the United Kingdom and Scottish Government thank all interested parties for taking the time to respond to the consultation. The Governments' response to the four issues raised can be found below in the summary of responses and separately on page 12.

Summary of responses

1. Should UK public sector payment terms involving healthcare or where the public authority carries out economic activities of an industrial or commercial nature by offering goods or services on the market be extended beyond 30 calendar days to up to 60 days?



Most responses were fully or broadly against an extension to 60 days

Respondents acknowledged that central Government already pays its bills quicker than the current or the proposed legislation suggests; by paying uncontested invoices within five days and ensuring that its prime contractors pay their supply chain within 30 days.

Seventy seven percent of replies received did not want Government to adopt 60 day payment terms for the public sector, as suggested above. They argued that there was no persuasive argument for the period to be increased from 30 to 60 days and agreed with the Government's position that extending the public sector payment terms to 60 days would be a retrograde step.

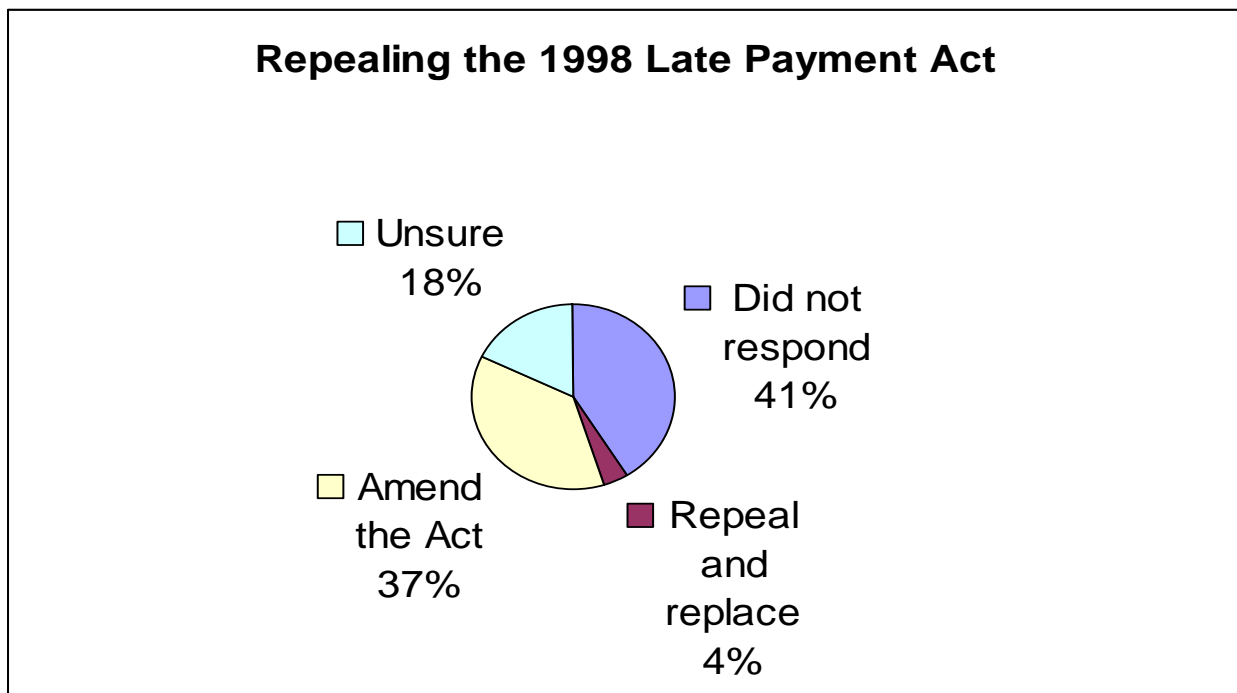
Responses received from public bodies were also against extending the time period, arguing that having robust systems in place enabled them to pay on time and did not see the need for extra time. Others were also confident of their systems and told us that they

had committed themselves to prompt payment practices by signing up to the [Prompt Payment Code](#)³.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

Central Government (Whitehall) already goes further than the revised Directive by committing to paying its uncontested invoices within 5 days. The Scottish Government aims to pay all uncontested invoices within 10 working days. The devolved administrations of Wales and Northern Ireland set their own prompt payment terms, within the limits of the Late Payment Act. The UK Government and the Scottish Government will not seek to extend the period to 60 days and will retain the current 30 day payment period.

2. To transpose (implement) the Directive should we should repeal the existing Late Payment of Commercial Debts (Interest) Act 1998 and replace it with secondary legislation (statutory instruments) or amend the Late Payment of Commercial Debts (Interest) Act 1998?



There was a broad consensus that the existing act should be amended, as opposed to being replaced.

The majority of responses that commented on this issue were in favour of amending the current Act as the most appropriate way of dealing with transposition. Arguments to keep it ranged from business had been using it since 1998 and respondents could see no benefit by removing it – going as far to say that its name was familiar and continues to gain wider and greater recognition in business circles and that respondents felt that losing the name would be a major set back to business. Other comments ranged from: it's a simpler process; the changes are small; it's a tightening up of the current regulations;

³ Prompt Payment Code website <http://www.promptpaymentcode.org.uk/>

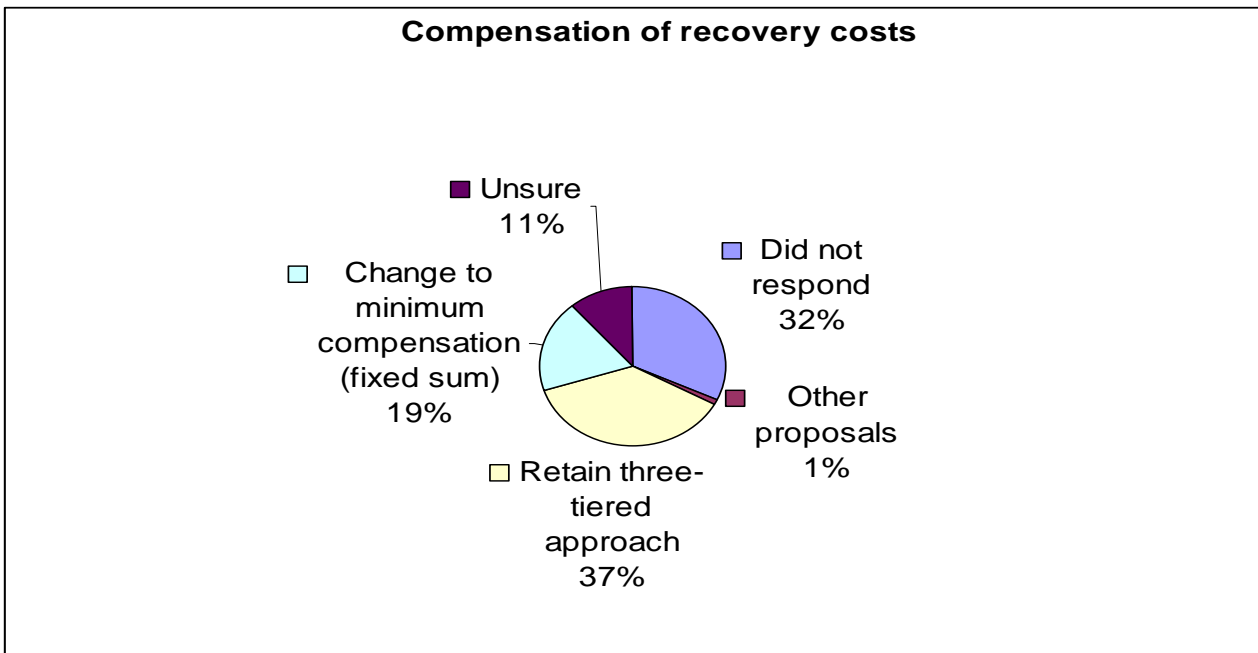
implementation of the Directive presented an opportunity to increase awareness of the Act, making it easier for small businesses to benefit.

Respondents also urged us to add stricter measures not featured in the amended Directive. This we cannot do as it is coalition Government policy to adopt a straight “copy-out” process in regard to transposing European regulation to avoid gold-plating.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

For England, Wales and Northern Ireland, Government will transpose Directive 2011/7/EU on combating late payment in commercial transactions (recast) by amending the Late Payment of Commercial Debts (Interest) Act 1998 by Statutory Instrument, coming into effect on 16 March 2013. The Scottish Government will transpose the Directive by amending the 1998 Act by Scottish Statutory Instrument.

3. Compensation for recovery costs (Article 6): The current Late Payment of Commercial Debts (Interest) Act 1998, suggests a fixed charge of £40, £70 or £100 depending on the size of the debt (under £1,000, under £10,000, and higher) as compensation for recovering costs. The revised directive propose a creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of €40, as compensation for recovery costs, plus additional costs incurred.



The majority of responses showed a preference for retaining a three-tiered approach to compensation, as opposed to a change to a minimum compensation (fixed sum) system.

The majority of responses were in favour of retaining the current three tier charge of £40, £70 or £100, depending on the size of the debt, as it is reasonable and has merit to be precise, and does not leave any party in doubt as to the compensation due to the creditor, when a payment is not made on time. It is also felt to be less costly to administer. Others suggested that reverting to a minimum of €40 would reduce the amount of compensation for the creditor and it was felt it would weaken the Act, sending the wrong message to

debtors. There were comments also welcoming the introduction of a provision where additional costs incurred can also be recovered.

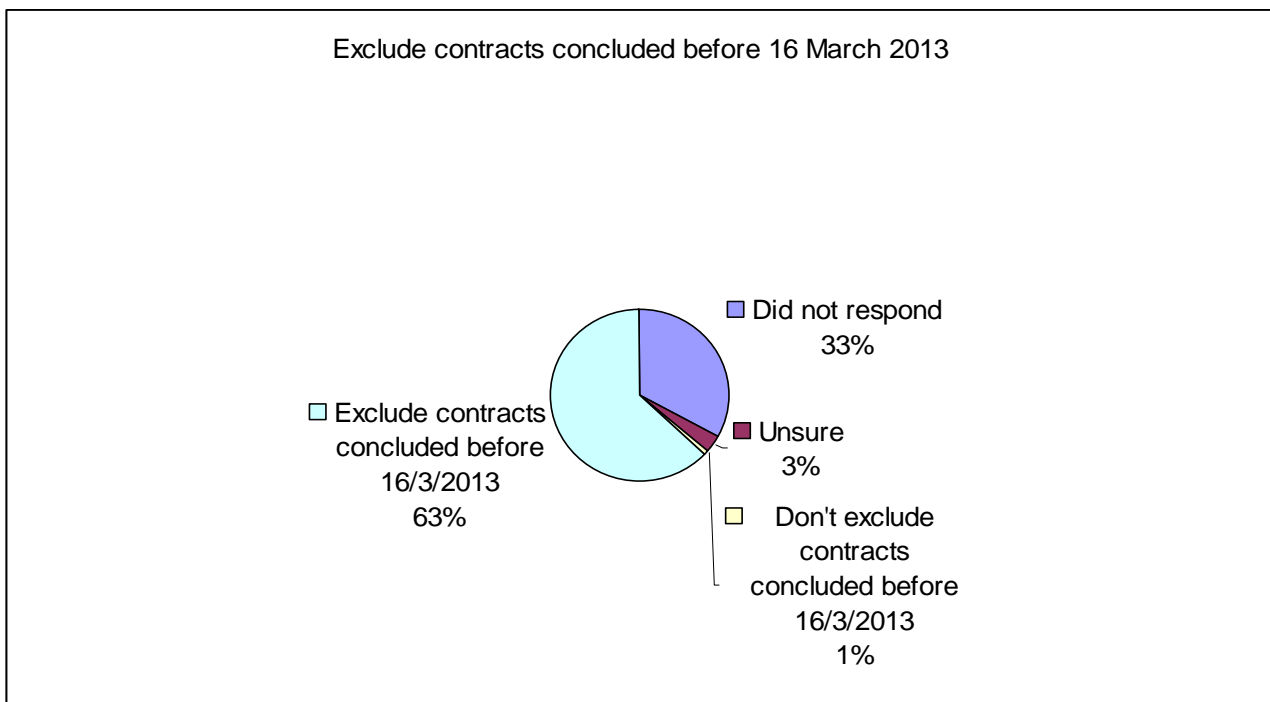
Other comments welcomed the implementation of the Directive as an opportunity to raise awareness of “a positive piece of legislation”, that makes it easier for SMEs and subcontractors to benefit from the rights this legislation gives them.

Some of the responses called for the rates to be increased and although not an issue for this consultation, we have shared the responses with colleagues in the Department for Business, Innovation and Skill’s Prompt Payment team.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

We will retain the current three tier charge of £40, £70 or £100, depending on the size of the debt, plus any additional reasonable costs.

- When the Directive is transposed (implemented) on 16 March 2013, our proposal is to exclude contracts concluded before 16 March 2013 from being subject to the Directive, given the changes introduced are not sufficiently substantive to warrant retrospective application and that retrospective application will incur a costly process of contract review – is this the correct choice?



A considerable majority of responses considered that contracts concluded before 16th March 2013 should be excluded from the legislation set out in the Directive.

The majority of responses agreed that it is reasonable that we should exclude contracts concluded before 16 March 2013 from being subject to the amended Directive, as to amend existing contracts would be a costly and unnecessary burden to business.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

Contracts concluded before 16 March 2013 will be excluded from the amended provisions.

Summary of Impact Assessment responses

IA Q1: Do you have any further evidence about problems created by late payments, particularly where this potentially impacts on business survival/insolvency?

Feedback on this issue confirmed that the uncertainty of getting paid is hampering expansion and growth plans, stifling employment and leading to insolvency. The lack of cash flow leads to a lack of investment and an increase in borrowing, which, over time, makes businesses uncompetitive. The impact of the culture of late payment, reported by some of the specific sector organisations must not be underestimated, with bad practices being reported such as being “paid when paid”, or only 5% of businesses are receiving payment in full within 30 days, 73% are paid between 30 and 60 days, and an unacceptable 22% still have to wait for over 60 days. Some are never paid in full for their work. Others reported that when they are paid late, they have to pay late, which places a strain on their suppliers and damages business relationships. All this impacts on the ability of businesses to pay staff and the time spent chasing bad debts that could be more usefully used being spent on core business.

IA Q2: Do you have any further evidence about the incidence or magnitude of write-offs associated with late payment debts?

We had individual responses to this question that ranged from “we never write-off a debt” to cases where businesses quoted the sums they have written off in the past. Many responses pointed us to recent surveys such as those undertaken by the Federation of Small Business Voice of Small Business Survey 2011, who reported that two thirds of their members had written off invoices, with a fifth having written off £5,000 or more; and a survey of specialist construction contractors that reported write-offs were costing 36% their businesses up to £20,000 in the last 12 months, 34% between £20,000 and £50,000, 21% between £50,000 and £100,000 and 8% over £100,000. Others reported that they tended not to write off monies properly due to them rather, they will endeavour to collect it using court processes.

IA Q3: Do you have any further evidence about the incidence of firms chasing late payments outside of existing legislation?

The consensus was that payment periods in the public sector are reported to be more favourable than the private sector with most being paid within 30 days. Responses from some of the credit agencies reported that many small businesses are unaware of the existence of the Late Payment Act and when informed about it, start to use it. Other individual responses say they use the act effectively but some responses from small business suggest that the Act is ineffective, with one reporting that when they have tried to use it as a threat to recover debt, it resulted in a threat back from the larger debtor that they (the debtor) will counter sue for work deficiencies – suggesting that the expense of a protracted court case will put off legal action. Another suggested that they dare not resort to legislation for fear of losing future contracts. Factoring invoices was reported as an effective method of mitigating the impact of late payment. One respondent drew our attention to research undertaken by Bacs where businesses claim to invest more than 14 days chasing payments at an estimated cost of nearly £700 million. To speed up payment, others claim to offer discounts for early settlement/early payment whilst others

incorporate late payment interest and penalties within their contractually agreed terms and conditions, but this becomes less prevalent as the size of the customers increases, due to their ability to impose their own trading terms. Other comments suggested the use of debt collection agencies is on the increase.

IA Q4: Do the assumptions underpinning the estimates of costs and benefits in the IA seem sensible? Do you have any evidence that could help to refine these estimates?

Generally the comments received agreed that the assumptions we made were sensible if low, pointing out that the small business owner/manager is spending his/her time chasing the debtor, which could lead to a loss of profit, as this time should be spent generating business. Others were of the view that it was difficult to measure impact accurately as it will vary widely between firms due to size of debt in relation to turnover; or the need to take into account the need to seek additional overdraft facilities or other short term funding; or that the costs of recovery being too high therefore dissuading them from pursuing the debtor. A response from a local authority suggested that they too incur significant administration charges in supporting a high volume of contracts, to confirm status or chase up payments from creditors or dealing with the presentation of incorrect invoices, requiring corrective action before successfully matching against purchase orders.

IA Q5: Do you agree with the assumptions in the IA regarding the calculations of written off debt? Do you have any further evidence that could help to refine the estimates about the potential reduction in administrative costs associated with chasing late payments?

Generally the comments received agreed that the assumptions we made were sensible. Some further evidence provided indicated that time dedicated to chasing late payments leaves them unable to undertake their contractual obligations to their client, leaving them at risk from losing the client, resulting in loss of income.

IA Q6: Do you agree with the assumptions in the above calculations? Do you have any further evidence that could help to refine the estimates about the potential reduction in write-offs?

Again, the majority of the comments received agreed that the assumptions we made were a fair attempt to estimate the current position and that evidence in this area would be difficult to gather. Other comments suggested that we should take into account the costs of insolvencies and the subsequent impact of lost jobs resulting in the impact of Government having to pay unemployment benefits.

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

The government sought views on 4 questions (below):

1. Should UK public sector payment terms involving healthcare or where the public authority carries out economic activities of an industrial or commercial nature by

offering goods or services on the market be extended beyond 30 calendar days to up to 60 days?

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Should the three tiered approach be retained or changed to a minimum compensation?

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

Government will retain the current three tier charge of £40, £70 or £100, depending on the size of the debt.

4. When the Directive is transposed (implemented) on 16 March 2013, our proposal is to exclude contracts concluded before 16 March 2013 from being subject to the Directive, given the changes introduced are not sufficiently substantive to warrant retrospective application and that retrospective application will incur a costly process of contract review – is this the correct choice?

Central Government (for England, Wales and Northern Ireland) and Scottish Government's Response

Contracts concluded before 16 March 2013 will be excluded from the amended provisions.

Next steps

The Regulations for England, Wales and Northern Ireland will be laid before Parliament on 22 February 2013 and enter into force, in line with the Coalition Government policy, on **16 March 2013** (the transposition deadline for the Directive). Guidance will be available in February.

Annex A: Responses by type of organisation or respondent

Type of Organisation	
Business representative organisations and Trade bodies	21
Professional bodies / Professionals / Consultancies	9
Legal Bodies / Legal Firms / Solicitors / Barristers/adjudicators/arbitrators	7
Local Authorities and Utility companies	18
Other	25

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