European Construction Sector Observatory

Late payment in the construction sector

Analytical Report

April 2020

DISCLAIMER

This Analytical Report was drafted prior to COVID-19 pandemic in the EU. Therefore, it does not include the reflection or the analysis of the impacts of COVID-19 on the construction sector, such as related unfair long payment terms and late payment issue.

Table of Contents

Table of Figures

Table of Tables

Table of Boxes

Executive Summary

This Analytical Report is part of the European Construction Sector Observatory (ECSO) project run on behalf of the European Commission. This Analytical Report aims to better understand, through national case studies, some of the main causes of late payment, and how policies and instruments are tackling this issue. The report also provides a set of lessons learnt for policy-makers on how to address the problem across European Union Member States (MS).

While unfair long payment terms and late payment affect the entire European economy, the construction sector seems to be suffering the most from late payment issues across the European Union (EU). This Analytical Report, hence, looks at quantitative indicators of late payment in the construction sector of five European countries, i.e. France, Ireland, Italy, Spain and the United Kingdom. Moreover, the report illustrates specific policy responses to the late payment issues across the EU Member States. The approach and methodology of this Analytical Report were tailored to the (limited) statistical data available at the EU level regarding the impacts of late payment in the construction sector. It builds on information and data available at the time of writing obtained from EU and national sources.

State of play and impact of late payment

The differences in payment behaviours jeopardise the proper functioning of the European Market and are increasingly threatening micro, small and medium-sized companies (SMEs). This is especially true in construction. Construction is experiencing the longest payment duration among the different EU economic sectors, reaching up to a 72-day duration in 2016. In order to shorten payment terms and eliminate late payment, the European Union adopted Directive 2000/35/EC on Combating Late Payment in Commercial Transactions in June 2000. However, over a decade after the adoption of this Directive, late payment practices were still profoundly affecting the European economy. In response to the problem, the EC adopted Directive 2011/7/EU on Late Payment, replacing the 2000/35/EC Directive.

> **Directive 2011/7/EU on Late Payment aimed to modernise and to strengthen Directive 2000/35/EC on Combating Late Payment in Commercial Transactions, by making late payment less attractive for debtors, or by compensating the creditors for late payment practices. Directive 2011/7/EU focuses on five main provisions: payments deadlines, statutory interests and flat-rate compensation, enforceable title, the favourability principal for the creditor and finally, provisions on unfair payment practices and clauses.**

The regulatory framework, developed by the transposition of Directive 2011/7/EU, has raised awareness of late payment issues among the EU MS. However, the current legislation does not oblige, nor set a defined methodology for the gathering of data on payment durations. Moreover, many creditors still chose not to enforce their rights in order to preserve their business relationships. As a result, more and more institutions and associations are calling on the development of a modernised and more enforceable directive to combat late payment practices in the EU.

Country-specific analysis reveals that late payment practices remain widespread in business relationships in the construction sector. Furthermore, public authorities in the construction sector tend to have longer-than-average payment terms. Despite late payments having major potential impacts on creditors, a positive trend in the reduction of the duration of payment delays was observed between 2010 and 2017.

Causes of late payment

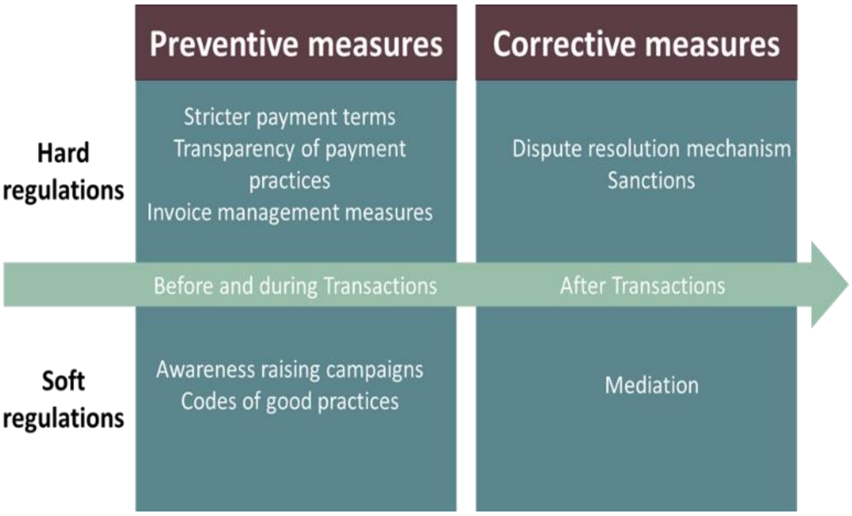
The nature and characteristics of the construction industry contribute to unfair long payment terms and the high number of late payments in the sector. More fundamentally, the causes of late payment are often linked directly to the behaviour of construction enterprises, and in some cases public authorities working with construction companies.

The nature and configuration of the construction supply chain influences the extent and impact of unfair long payment terms and late payments in the sector. Not only is the supply chain fragmented, but its power imbalance—among businesses themselves, and between PAs and businesses—plays a role in contributing to late payments. Unfair long payment terms and late payments are not merely a legal and formal issue, but also a result of informal and unfair business practices.

> **To tackle effectively the payment delays in the construction sector, authorities and economic operators should consider the complex power dynamics in the supply chain. This may lead to further questions, such as: what type of public interventions could effectively shift the power imbalance in the supply chain? How to incentivise companies and PAs to pay on time? At which level should such a public intervention take place – EU or EU MS (or both)?**

Policy initiatives

This Analytical Report specifically looks at policies that focus on late payment in the construction sector in the selected set of countries. A combination of preventive and corrective measures, as well as hard and soft regulations, are commonly used in the analysed European countries to tackle late payment in the construction sector.



Some EU MS have implemented construction-specific preventive policies and instruments, indicating that unfair long payment terms and late payment in the construction sector are a matter of concern for policy-makers.

Countries	Hard regulations				Soft regulations	
	Stricter regulations	Transparency of payment practice	Invoice management practice	Dispute resolution system & sanctions	Awareness-raising activities	Codes of good practices
Spain					√	
France		√	√	√	√	
Ireland	√			√		
Italy						√
United Kingdom	√	√	√	√	√	√

Policy-makers often opt for a dual approach regarding preventive measures. The aim is to improve the effectiveness of using both soft and hard regulations simultaneously. Soft regulations – awareness-raising campaigns and codes of good practices—are relatively common and easier to set up than hard regulations. In many cases, these initiatives can either support or provide a foundation for the implementation of hard regulations. It is important to point out that while soft regulations can be led by construction associations, hard regulations are developed solely by governments (often with pressure from the sector). It is therefore imperative to ensure a level of coordination and coherence while implementing such a dual approach.

Corrective measures such as dispute resolution mechanisms – from mediation to adjudication, arbitration and litigation— are complex processes that are used as a last resort. Businesses, sometimes encouraged by regulations, increasingly favour mediation over adjudication, and adjudication over arbitration and litigation because they take less time and resources while preserving existing business relationships. Arbitration and court litigation are the most severe method to fight late payments and are often reserved for disputes that amount to a significant sum of money.

> **Soft and hard corrective measures mutually reinforce each other. However, there is evidence that dispute resolution mechanisms are sparsely used by construction stakeholders, due to the fear of harming business relationships with more powerful actors, no matter if these are main contractors or public and private clients. Therefore, more needs to be done to provide additional and practical dispute resolution mechanisms to the construction sector.**

Lessons Learnt

There are two principle observations made from the analysis in this report: the need for more data that is regular and consistent, and for more coordination among policies and between public and private sector actors. Firstly, developing data collection, analysis and harmonisation (across the EU MS) on unfair long payment terms and late payments in the construction sector will better inform the design and implementation of unfair long payment terms and late payment policies and instruments. So far, data on late payments from B2B and PA2B in the construction sector is relatively scarce (especially on the impacts of late payments) and scattered (collected by different public and private organisations, sometimes following a different methodology). Secondly, public procurement and late payment policies need to be coherent and complementary to each other. Public procurement can act as an incentive for companies to improve their payment practices and behaviours, by rewarding good payers. Thus, coordination between policy-makers and construction sector initiatives is an important aspect that will help maximise impact on unfair long payment terms and late payments.

The EC developed several initiatives tackling late payments, including Directive 2000/35/EC and Directive 2011/7/EU. The latter helped set up a comprehensive regulatory framework at the EU and EU MS levels, emphasising the value of an EU approach to late payment. In addition, the EC also uses indirect policies, such as the EU Directive on Public Procurement to challenge the issue of late payments. While its impact on late payment has not been assessed, public procurement regulations provide incentives to influence the payment behaviour of construction companies. In addition, Directive 2014/24/EU gives subcontractors the opportunity to claim payment from the contracting authority directly.

Some EU MS went beyond implementing general cross-sectoral long and late payment policies and instruments by putting in place specific tools to tackle unfair long payment terms and late payment in the construction sector specifically. They used cross-sectoral policies and adapted them to the construction industry and its supply-chain characteristics. Most of the analysed policies and instruments focus on preventive measures and combine both hard and soft regulations. It is further proof that these are not mutually exclusive but rather complementary. Soft regulations include awareness-raising campaigns and codes of good practices that can be led by either the policy-makers or the construction associations.

Corrective measures, developed by policy-makers, consist of mediation (soft regulation), dispute resolution mechanisms (hard regulation) and sanctions (hard regulation). Preventive hard regulations include stricter or shorter payment terms; electronic invoicing systems and Project Bank Accounts; and payment performance reporting.

Closer monitoring and reporting of payment behaviour in the construction sector, accompanied by potential sanctions, also seem to be an effective mechanism to tackle late payments. As the construction sector is particularly affected by late payments, it may be beneficial to set up a multi-stakeholder platform to exchange information and good practices at EU level. Such a platform could be a sub-group of the existing European Late Payment Expert Group and could include public authorities and construction associations. The link with the Late Payment Expert Group would ensure a regular exchange of information about other sectoral practices that could be relevant for the construction sector. The sub-group could provide and share insight about possible preventive and corrective measures for late payments, and guidance to implement them through either soft or hard regulations, or both.

List of abbreviations

Abbreviation	Definition
ANCE	Associazione Nazionale Costruttori Edili (Italy)
B2B	Business to Business
B2C	Business to Consumer
BEIS	Business, Energy & Industrial Strategy (UK)
BTP Bank	Corporate Bank of Public Building and Labour (France)
DGCCRF	Directorate-General for competition, consumer affairs and fraud control (France)
DSO	Days Sales Outstanding
EC	European Commission
ECB	European Central Bank
EBPC	Expert Body for Performance Certification (Hungary)
EU	European Union
EUR	Euro
EVOSZ	Hungarian National Construction Association
FFB	French Building Federation
FNTP	National Federation of Public Works (France)
FSB	Federation for Small Business (UK)
GBP	Pound Sterling
KPI	Key Performance Indicators
LME	Economic Modernisation Act (France)
LPA	Late Payment Act (UK)
MKIK	Hungarian Chamber of Commerce and Industry (Hungary)
EU MS	Member States of the European Union
MSME	Micro, Small and Medium-sized Enterprises
PAs	Public Authority
PA2B	Public Authorities to Business
PBA	Project Bank Account
PMcM	Platforma Multisectoral contra la Morosidad (Spain)
SME	Small and Medium-sized Enterprise
UK	United Kingdom
UNTEC	National Union of Construction Economists (France)
VAT	Value-Added Tax

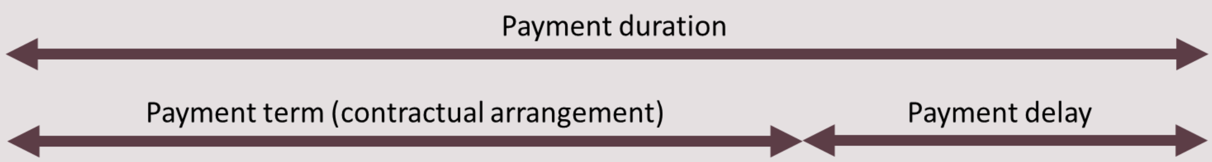
1.
Setting the scene

Introduction

Late payment and unfair long payment terms are a challenge affecting the entire European economy, causing administrative and financial burden especially to SMEs, that can lead to bankruptcies and loss of jobs[1]. While late payments and unfair long payment terms are not novel in the industry, they are continuously present in the construction sector. In Europe, bad payment practices worsened in 2019 for both business to business (B2B) and public authorities to business (PA2B) transactions, reaching 40 days and 42 days respectively in comparison to 34 days and 40 days respectively in 2018. In turn, businesses, and especially SMEs (small and medium-sized enterprises), experience loss of income, indebtedness and cashflow issues that limit their sustainable growth and expansion, and their ability to hire employees[2]. For instance, 6.5 million jobs could have been created in 2017 if there had been less late payment[3].

Box 1: Clarification of the payment terminology

The payment duration, i.e. the total period of time required for the payment to reach the creditor, is defined as the sum of the payment term (what is agreed by the parties in the contract) and the payment delay (the period starting after the due date according to the contract until the payment is received).



Source: Adapted from EC, 2018.

The payment terms need to comply with the EU Directive on Late Payment, which stipulates that B2B and PA2B invoice payment must be completed within 60 days and 30 days respectively. The Directive also allows for exceptions whereby B2B invoice payment can be done beyond 60 days (if expressly agreed and provided it is not grossly unfair); and PA2B payment can be made within 60 days (e.g. for hospitals).

As a result, unfair long payment terms and late payment have gained increasing attention among policy-makers and private sector associations. They developed policies and initiatives to combat this issue. One of the most prominent initiatives is the European Union (EU) Directive on Late Payment adopted in 2011 to protect businesses and help them grow sustainably[4]. The Directive was transposed in all EU Member States (MS) by March 2013, thus establishing a regulatory framework specifically tackling late payments both at the EU and EU MS levels.

1 European Commission, Late Payment Directive, 2020. https://ec.europa.eu/growth/smes/support/late-payment_en
2 Intrum, European Payment Report 2019, 2019. https://www.intrum.com/media/5755/intrum-epr-2019.pdf
3 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1
4 European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

While unfair long payment terms and late payment affect the entire European economy, the construction sector seems to be suffering the most from late payment issues across the EU[5]. Despite the relatively few studies looking specifically at the challenge of late payment in the construction sector, the media has reported several instances where late payment led to the insolvency of businesses, including SMEs, downstream in the supply chain. One of the most noticeable examples was the collapse of a large construction company named Carillion in the United Kingdom (UK), which caused the loss of 75,000 jobs in its supply chain, and financial losses for more than 30,000 subcontractors, thus highlighting the cascaded impact of late payment[6,7,8]. Moreover, late payments have even been identified as one of the main reason for bankruptcy in the construction industry, according to studies conducted in this sector[9,10,11]. The challenge of late payment is expected to gain importance as the EU construction sector's growth is slowing down[12,13].

This Analytical Report hence looks at the issue of late payment in the construction sector in five European countries, to better understand late payments and how they can be tackled by policy-makers and the sector's associations. Chapter 2 provides an overview of the EU regulatory framework and its impact on late payment. Chapter 3 dives into the main reasons for late payment, namely the characteristics of the construction sector's supply chain, which help explain why late payment is a widespread (and critical) issue in the sector. Chapter 4 focuses on the policy initiatives that combat late payment in the construction sector across Europe. Finally, the report draws insights that will be presented in the concluding Chapter 5 as "Lessons learnt".

Methodology

The approach and methodology of this Analytical Report were tailored to the (limited) EU statistical data available on late payment (and especially its impacts) in the construction sector. It hence builds on EU and national knowledge, information and data available at the time of the writing. Whenever relevant and possible, primary data were collected through semi-structured interviews with relevant stakeholders from the public and private sectors, at both the EU and national levels. Data collection was conducted before January 31st, 2020 and hence the Brexit, which helps explain why the UK is part of the countries selected for the purpose of this report (more details below on the selection of countries).

This study does not aim to provide a comprehensive EU-level overview of late payments in the construction sector; but rather illustrates, through national-level case studies, some of the main causes of late payments, and how policies and instruments are tackling this issue. Focusing on a set of countries allowed for more in-depth and robust analysis of the scattered data. The case studies in this Analytical Report cover five countries: France, Ireland, Italy, Spain and the UK. The selection of countries analysed in

5 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

6 Pymnts.com, Finding the Right Incentive for Faster B2B Construction Payments, 2019. https://www.pymnts.com/news/b2b-payments/2019/levelset-finding-right-incentives-faster-construction-payments/

7 Neate & Davies, Carillion collapse: two years on 'government as learned nothing', 2018. https://www.theguardian.com/business/2020/jan/15/carillion-collapse-two-years-on-government-has-learned-nothing

8 Kenzie Consulting Group, What Impact Will the Collapse of Carillion Have on The Construction Industry? 2018. https://www.kenziegroup.co.uk/what-impact-will-the-collapse-of-carillion-have-on-the-construction-industry/

9 BauIndustrie, Deutsche Bauwirtschaft zum Zahlungsverzug, 2014. https://www.bauindustrie.de/presse/presseinformationen/gemeinsame-presseinfo-von-hdb-und-zdb-1-4/

10 Federation of Small Businesses, Pay it Forward - Lessons and recommendations for Europe from the UK payment landscape, 2018. https://amaiz.com/documents/pay_it_forward.pdf

11 Federation of Small Businesses, Time to Act - the economic impact of poor payment practice, 2016. https://www.fsb.org.uk/static/517120db-2555-473f-a6ceb5c661d569fb/Time-to-Act.pdf

12 GWMI, Euroconstruct: Growth in the European construction sector forecast to decrease in the next two years, 2019. https://www.globalwoodmarketsinfo.com/euroconstruct-growth-european-construction-sector-forecast-decrease-next-two-years/

13 Knaufinsulation, High-Speed construction growth set to slow in 2020, 2020. https://www.knaufinsulation.com/news/high-speed-construction-growth-set-to-slow-2020

this report follows a combination of three criteria: i) the existence of direct (and to a lesser extent indirect) policies and instruments tackling late payment specifically in the construction sector; and ii) the availability of data at the time of writing. Although the UK withdrew from the EU in January 2020, its policy and regulatory framework on late payment in the construction sector remains of particular interest in Europe. It was hence selected as it can provide useful inspiration, experience and lessons learnt for EU MS. This also helps explain why some polices and instruments' illustrations and examples come from the UK. Furthermore, additional data and examples from Denmark, Belgium, Czechia, Estonia, Germany, Hungary, the Netherlands, Poland and Slovakia are also provided in this report.

In this context, this Analytical Report should be considered as a milestone, on which further studies and reports can build on to dig into specific issues, using e.g. a survey or statistical evidence. Although we acknowledge the importance of unfair long payment terms, this report solely presents a high-level analysis of the topic. This is explained by the lack of data and specific research on unfair long payment terms and cross-border payments in the construction sector. Late payments can be tackled through a specific (direct) type of policies such as the EU Directive on Late Payments, and indirect policies such as the EU Directive on Public Procurement[14]. The present report focuses first and foremost on direct policies at EU and EU MS levels, while it also considers indirect policies – especially those relating to public procurement, as public actors often have a direct impact on late payment in the construction sector.

Terminology

To ensure a common understanding of the analysis and takeaways presented in the report and to facilitate its reading, we provide below a set of definitions and concepts used in the report.

- **Client** is the start of the subcontracting chain, who is often called "Investor". The investor commences a project (for example a building project) by hiring a principal contractor, who hires different subcontractors to carry out paid specialised tasks[15]. A client can be both a public and private body.
- **Contractor** is a person or a company that seeks to do business by obtaining contracts and carrying them out[16].
- **Corrective measure** is a policy or instrument aiming to tackle late payments after they happen[17].
- **Enforceable title** refers to any decision, judgment or order for payment issued by a court or other competent authority, including those that are provisionally enforceable, whether for immediate payment or payment by instalments, which permits the creditor to have his claim against the debtor collected by means of forced execution[18].
- **Grossly unfair payments** include circumstances related to:
    a) any gross deviation from good commercial practice, contrary to good faith and fair dealing;
    b) the nature of the product or the service; and

[14] Direct policies refer to policies that are specifically and only set up to address late payments while indirect payments are not specifically and only set up to address late payments. Indirect policies address late payments on a more general basis.

[15] European Parliament, Liability in subcontracting chains: national rules and the need for e European framework, 2017. http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf

[16] eSUB Construction Software, Definition of Subcontractor and Contractor. https://esub.com/resources/subcontractor-vs-contractor-understanding-the-difference/

[17] Quality progress, Corrective Vs Preventive actions, 2015. http://asq.org/quality-progress/2005/03/problem-solving/corrective-vs-preventive-action.html

[18] European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

c) whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment, or from a generally accepted payment period[19] (i.e. between 30 and 60 days according to Article 3 of the Directive 2011/7/EU).

- **Hard regulation** refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court[20].
- **Late payment** is a payment not made within the contractual or statutory period of payment.[21]. A payment delay is thus the period starting after the due date agreed in the contract (payment terms), until the payment is received[22].
- **Unfair long payment terms** are defined in this report as any contractual payment terms exceeding 30 days and 60 days in PA2B and B2B transactions in the construction sector respectively, based on Directive 2011/7/EU[23].
- **Main contractor** hires different subcontractors to carry out specialised task[24].
- **Payment delay** refers to the number of days by which the payment is late[25].
- **Payment duration** is the total period of time required for the payment to reach the creditor, i.e. from the beginning of the payment term until the payment is received (total sum of payment term and potential delay)[26].
- **Payment terms** are the time period set out in the contract and agreed by the two parties. It is thus the period allowed for a buyer to pay off the amount due[27].
- **Preventive measure** is a policy or instrument aiming to tackle late payments before they happen[28].
- **Soft regulation** is used to denote agreements, principles and declarations that are not legally binding (guidance, recommendations etc.)[29].
- **Subcontractor** is any natural person or any legal entity, to whom the execution of all or part of the obligations of a prior contract is assigned[30].
- **Trade credit** can be seen to be equivalent, in several respects, to short-term loans provided by suppliers to their corporate customers upon an agreement to purchase their products and to settle the payment at a later stage. Such credit is created automatically whenever customers delay payment of their suppliers' bills[31].

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19 European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

20 ECCHR, Definition of Hard and Soft Law. https://www.ecchr.eu/en/glossary/hard-law-soft-law/

21 European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

22 Ibidem.

23 The definition of unfair long payment terms is based on extensive consultations with main construction sector associations at the European level, and is based on the intrinsic characteristics of the construction sector (high interdependencies along the value chain and fragmented supply chain).

24 European Parliament, Liability in subcontracting chains: national rules and the need for e European framework, 2017. http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf

25 Bplan, What Is Payment Delay?, as accessed as of march 2020. https://articles.bplans.com/what-is-payment-delay/

26 Ibidem.

27 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

28 Quality progress, Corrective Vs Preventive actions, 2015. http://asq.org/quality-progress/2005/03/problem-solving/corrective-vs-preventive-action.html

29 Ibidem.

30 European Parliament, Liability in subcontracting chains: national rules and the need for a European framework, 2017. http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf

31 European Central Bank, The use of trade credit by Euro area non-financial corporations, 2011. https://www.ecb.europa.eu/pub/pdf/other/mb201104_focus02.en.pdf

2.
State of play and impact of late payment

Chapter 2 presents the state of play and the impacts of late payment on the construction sector, in five European countries selected for the purpose of this study, i.e. France, Ireland, Italy, Spain and the UK (Please refer to the Methodology section for more information). This chapter is centred around three main themes. First, it presents the European regulatory framework in place regarding late payment. Particular attention is paid to the main provisions of the 2011/7/EU Late Payment Directive and how they were transposed into the national regulations of the five countries. Second, Chapter 2 moves from regulatory framework to the construction market and what happens in practice, by providing an overview of the trends and practices in place in each of the countries regarding payment practices. Last, this chapter presents some of the consequences and impacts of late payment practices on the construction sector and the economy based on the analysis of the selected countries.

EU regulatory framework on late payment

Regulatory framework

Differences between payment practices in EU MS prompted the harmonisation of payment rules at the European level[32]. The variations in payment practices often jeopardise the functioning of the European market, increasingly threatening SMEs[33]. In June 2000, in order to improve the situation, the EU first adopted Directive 2000/35/EC on Combating Late Payments in Commercial Transactions[34].

> **The construction is one of the sectors suffering most from late payment practices. In fact, the construction sector is amongst those experiencing the longest payment durations, reaching 72 days in 2016 (3.6 days less than in 2012)[35].**

More than a decade after the adoption of Directive 2000/35/EC, late payment practices were still profoundly affecting the European economy. The EU thus adopted Directive 2011/7/EU on Late Payment replacing Directive 2000/35/EC. Directive 2011/7/EU was due to be transposed into national law by EU MS by March 2013. It aimed to modernise and to strengthen the previous directive by preventing companies from using late payments as a cheap source of finance, or by compensating creditors for late payment practices. Directive 2011/7/EU is centred around six main provisions: payment deadlines, statutory interests, compensation for recovery costs, enforceable title and favourability principal for the creditor[36].

1. **Payment deadlines**: Directive 2011/7/EU introduced a maximum payment duration, depending on the type of contract. Transactions between enterprises (B2B contracts) have a maximum payment duration of 60 days, and contracts between Public Authorities and companies (PA2B contracts) have

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32 European Commission, Ex-post evaluation of Late Payment Directive, 2015 https://op.europa.eu/en/publication-detail/-/publication/400ecc74-9a54-11e5-b3b7-01aa75ed71a1

33 European Commission, Late Payment Directive, 2020. https://ec.europa.eu/growth/smes/support/late-payment_en

34 European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

35 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

36 European Union, Directive 2011/7/EU of the European parliament and of the council on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007

a maximum standard payment duration of 30 days with a possible extension to 60 days in specific cases (unless both parties expressively agreed to a different timeline that was not grossly unfair).

2. **Statutory interest for late payments**: The interest is the ECB rate increased by at least 8% for countries within the Eurozone (for countries outside of the Eurozone, this is the reference rate established by their central bank increased by at least 8%). This percentage could be additionally charged on the value of the late payment, thus increasing the total cost for the debtor. Some countries, such as France or Bulgaria, have even increased the additional interest to more than 8% (see section Implementation of Directive 2011/7/EU in EU Member States and in the United Kingdom for more information). Although, the Directive only entitles the creditor to claim interests for late payment, it does not make it obligatory.
3. **Compensation for recovery costs**: The Directive introduced a minimum fixed sum of compensation for the administrative and internal costs linked to the recovery of the late payments. The amount of compensation for recovery costs is at least EUR 40.
4. **Enforceable title**: As debt recovery can be a very long procedure, EU MS must ensure that, in the cases of undisputed debts, an enforceable title can be obtained within 90 calendar days[37].
5. **Grossly unfair clauses and practices**: If a practice is grossly unfair to the creditor, the latter has the right to claim damages from the debtors.
6. **Favourability for creditors**: EU MS have the authority to maintain or bring into force national law and regulations that are more favourable for the creditor than the provisions presented in the Directive. According to Article 12 of the 2011/7/EU Directive, EU MS may enforce provisions that are stricter (for debtors) than the provisions necessary to comply with the Directive[38].

Although the provisions laid down in Directive 2011/7/EU aim to favour creditors and reduce payment durations, in practice B2B contracts often experience longer payment terms.

It is also important to highlight that Directive 2011/7/EU is not only applied to the construction sector, but across all sectors in Europe. Moreover, while late payment practices are often addressed and tackled directly by national regulations and European Directives, late payments and unfair long payment terms could also be constrained through indirect measures (such as public procurement policies), addressing the issue of late payment indirectly only (see Box 2 below).

Box 2: Indirect measures targeting the problem of late payments

One of the provisions of Directive 2014/24/EU on Public Procurement[39] can be used by EU MS to enable direct payments to subcontractors.

According to Article 71, paragraph 3, "*Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents*".

Such an initiative could have a direct positive impact on the reduction of late payment durations. By implementing this provision, the EU drastically reduces the payment chain and thus has the ability to reduce payments durations in public procurements.

Source: EUROPA, EUR-Lex.

[37] European Commission, Late Payment Directive 2011/7/EU FAQs, 2016. https://ec.europa.eu/docsroom/documents/16222/attachments/1/translations/en/renditions/pdf

[38] European Union, Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, 2011. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0007&from=EN

[39] EUR-Lex, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, 2014. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024

Implementation of Directive 2011/7/EU in EU Member States and in the United Kingdom

This sub-section will present how some EU MS transposed and implemented the European Directive into their national regulations. This sub-section also highlights how some EU MS went further than the Directive's provision by putting in place and enforcing stricter measures to combat late payment.

In France, the regulation of payment duration was first enforced by the Law on the Modernisation of the Economy, that was adopted in 2008[40], and updated following the adoption of Directive 2011/7/EU, which was transposed in the French legislation in 2012. It is important to note that French legislation contains several laws to combat late payment practices which are stricter than Directive 2011/7/EU. For example, in France, stricter rules on interest rates, payment terms and dedicated bodies for undertakings[41] apply. According to the Commercial Code, parties can agree on an interest rate applied to late payments[42]. If no agreement is foreseen in the contract, the rate shall be equal to the interest rate applied by the European Central Bank to its most recent refinancing operation, plus 10 percentage points (as compared to the interest of 8% mentioned in Directive 2011/7/EU)[43]. In addition, regarding the payment duration in a B2B contract, if no payment duration was agreed upon between the parties, the time limit for payment may not exceed 30 days after the date of receipt of the goods or performance of the service requested. An agreed upon payment duration between the parties cannot exceed 60 days after the invoice date[44,45]. In the latter case, if a debtor is non-compliant with the maximum 60 days payment deadline laid down in the Commercial Code, they can incur a fine of up to EUR 75,000 for a natural person, and up to EUR 2 million for a legal entity[46]. Lastly, France has put in place a dedicated body for undertakings, that aims to resolve disputes between parties. This procedure is free of charge for the parties, voluntary and non-binding[47].

Additionally, in 2014, the Hamon Law[48] was introduced to enable officials of the Directorate-General for competition, consumer affairs and fraud control (DGCCRF) to impose fines against undertakings that do not comply with payment deadlines. The Hamon law also introduced a maximum payment duration for summary invoices[49] of 45 days after the invoice issue date[50]. The Macron Law[51], in November 2015, further implemented a provision that requires companies[52] to mention the number and the total amount of the

[40] Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie, Journal officiel de la République Française du 5 août 2008. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019283050

[41] The Decree of 14 January 2016 appointing the ombudsman for undertakings created the ombudsman for undertakings. Mediation is an alternative dispute resolution (ADR) system which can be used to solve disputes between two economic actors with the help of a third party, the ombudsman. Decree of 14 January 2016 appointing the ombudsman for undertakings (décret du 14 janvier 2016 portant nomination du médiateur des entreprises), Official Journal of the French Republic of 14 January 2016.

[42] The interest rate should not be lower than 3 times the legal interest rate.

[43] Code du Commerce, 2020. https://www.legifrance.gouv.fr/affichCode.do;jsessionid=C9126CCA10DE1CB786B754BBD7262E7B.tplgfr25s_3?idSectionTA=LEGISCTA000038411055&cidTexte=LEGITEXT000005634379&dateTexte=20200127

[44] Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratique prohibées – Article 1, 2019. https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=C9126CCA10DE1CB786B754BBD7262E7B.tplgfr25s_3?cidTexte=JORFTEXT000038410002&idArticle=LEGIARTI000038410746&dateTexte=20190426

[45] By way of derogation, a maximum of 45 days from the end of the month (following the issue date of the invoice) may be agreed between the parties, only in the case when this period is expressly stipulated in the contract and is not grossly unfair for the creditor.

[46] Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratique prohibées – Article 1, 2019. https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=C9126CCA10DE1CB786B754BBD7262E7B.tplgfr25s_3?cidTexte=JORFTEXT000038410002&idArticle=LEGIARTI000038410746&dateTexte=20190426

[47] Décret du 14 Janvier 2016 portant nomination du médiateur des entreprises - M Pelouzet (Pierre), 2016. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031844854&categorieLien=id

[48] Loi n° 2014-344 du 17 mars 2014 relative à la consommation. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036&categorieLien=id

[49] More than one supply of goods or services to the same customer in the same month.

[50] Village de la Justice, Loi Hamon: Réglementation plus stricte des délais de paiement entre professionnels, 2014.https://www.village-justice.com/articles/article17440,17440.html

[51] Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030978561&categorieLien=id

[52] For the companies whose annual accounts are certified by an auditor.

unpaid invoices of their suppliers and of their clients in their management report[53].

In Ireland, the issue of late payment has been on the Government's agenda since 1997, with the Prompt Payment of Account Act 1997. However, this legislation was amended and replaced by the transposition of Directive 2000/35/EC and Directive 2011/7/EU on combating late payment in commercial transaction. The Irish regulations on late payments are therefore similar to Directive 2011/7/EU[54]. Only two Irish provisions are stricter than the ones defined in Directive 2011/7/EU: one provision regarding the recovery costs and another provision regarding the payment durations for PAs. In terms of compensation for recovery costs, the Irish late payment regulations define three levels of compensation amounts for recovery costs. The recovery cost of EUR 40 only applies when the debt is below EUR 1,000. The recovery costs reach EUR 70 when the debt[55] is between EUR 1,000 and EUR 10,000; and increases to EUR 100 when the value of the debt is above EUR 10,000[56]. The second stricter provision of the Irish regulations are shorter payment terms for PAs to their suppliers, decreasing the period of 30 days to 15 days (Prompt Payment Returns Regulation)[57]. In addition, and as part of this measure, government and public sector bodies are required to publish their quarterly payment performance reports on their respective websites. Based on the analysis of those reports, the shorter payment period for PAs seems to be a successful measure. The reports show that most of the PAs are effectively paying within 15 days[58,59].

The average payment duration in Italy, while it decreased in 2018, is still one of the longest among Western European countries[60]. Prior to the transposition of Directive 2000/35/EC and of the latest 2011/7/EU Directive, the Italian Civil Code[61] and the law on subcontracting in the production activities[62] were the primary force to try to regulate late payment practices in the country. However, in practice, these regulations do not seem to have had the expected impact. In 2014, due to the systematic delays in payment from PAs in commercial transactions, the EC decided to seek clarification on the way Italy implemented and applied Directive 2011/7/EU[63]. They sent a letter of formal notice under EU infringement procedures and followed with a procedure for the unsatisfactory application of the Directive in the country. In December 2017 (more than three years after the launch of the infringement procedure) the EC decided to refer Italy to the Court of Justice of the EU as there was no improvement to the systemic payment delays from the Italian PAs in their commercial transactions. On average, the Italian authorities still take about 100 days to pay their invoices[64]. The judgment from the Court of Justice was delivered on the 28th of January 2020 and stated that Italy had infringed Directive 2011/7/EU[65].

In addition, in June 2018, the European Commission notified a reasoned opinion to Italy as its national law on public works contracts introduces an additional period between the end of the certification procedure to

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53 Décret no. 2017-350 de mars 2017 modifie le décret no. 2015-1553 de novembre 2015 et autorise les entreprises à présenter ces informations avec ou sans taxe. http://www.bibliobaseonline.com/notice.php?NUMERO=130707&OLD=%7C126177%7C132425

54 Irish Department of Business, Enterprise and Innovation, Late Payment in Commercial Transactions, 2013. https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Late-Payments/Late-Payment-in-Commercial-Transactions/#

55 The debt refers to the value of the late payment which is considered as a debt.

56 Electronic Irish Statute Book, S.I. No. 580/2012 – European Communities (Late Payment in Commercial Transactions) Regulations, 2012. http://www.irishstatutebook.ie/eli/2012/si/580/made/en/print

57 Enterprise Ireland, Prompt Payment Policy, 2020.https://www.enterprise-ireland.com/en/About-Us/Services/Prompt-Payment-Policy/

58 Department of Business, Enterprise and Innovation, as accessed on March 2020. https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Late-Payments/Prompt-Payment-Returns/

59 Enterprise Ireland, Prompt Payment Procedure Regulation, as accessed on March 2020. https://www.enterprise-ireland.com/en/About-Us/Services/Prompt-Payment-Policy/

60 Atradius, Italy: still the highest DSO in Western Europe, 2018. https://atradius.nl/rapport/payment-practices-barometer-italy-2018.html

61 Codice civile, approvato con regio decreto del 16 marzo 1942, No. 262. https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1942-04-04&atto.codiceRedazionale=042U0262&elenco30giorni=false

62 Law No. 192 of 18 June 1998 on subcontracting in the production activities.https://en.agcm.it/en/about-us/legislation-agcm/detail?id=04566191-adb3-4b31-81bb-ba3a8f9e8f3e&parent=Competition&parentUrl=/en/about-us/legislation-agcm/index

63 European Commission, Late payments: Commission seeks clarifications from Italy and Slovakia, 2014. https://ec.europa.eu/commission/presscorner/detail/en/IP_14_689

64 European Commission, Late payment: Commission refers Italy to Court of Justice for failing to ensure suppliers are paid on time, 2017. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_4770

65 Court of Justice of the European Union, Press Release No 7/20 Judgment in Case C-122/18 Commission v Italy, 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200007en.pdf

verify the compliance of the works and payment term established in the contract, thus artificially extending the payment duration. This national law does not comply with Directive 2011/7/EU. This second infringement procedure against Italy currently remains open[66].

In 2019, the Italian government implemented a new law as a complementary regulation of Directive 2011/7/EU. The new law states that, in B2B transactions, payments terms cannot exceed 60 days (no possibility of derogations) when the transaction involves SMEs[67].

Lately, Belgium, the Netherlands and Italy have been increasingly active in addressing late payment issues, especially those involving SMEs. In these countries, there is no derogation possible around the payment terms introduced by Directive 2011/7/EU, i.e. B2B and PA2B payment terms can never exceed more than 60 days. As an example, the Belgian government adopted the Law of 28 May 2019, amending the law of 2 August 2002 concerning the fight against late payment in commercial transactions. Entered into force in April 2020, this law clearly stipulates that the maximum payment terms between SMEs and larger enterprises shall not exceed 60 days[68]. Stricter payment terms, especially transactions involving SMEs, seem to generate traction among EU MS (see cases of IT, BE and NL). While it will take time to be able to see and assess the impacts of these measures, the effort is a step in the right direction, which may also influence a future revision of Directive 2011/7/EU.

Directive 2011/7/EU was transposed into Spanish law through the Act on Late Payment in Commercial Transactions[69] (3/2004 Law of December 29th, 2004). The 3/2004 law was first adopted in 2004 to implement Directive 2000/35/EC on late payments in commercial transactions and then amended to transpose Directive 2011/7/EU. The Spanish law to combat late payment practices was further amended by Act 15/2010[70], and Act 11/2013[71] on entrepreneurship, growth and job creation, and, finally, by Final Provision 6 of Act 17/2014[72] on urgent measures in refinancing and restructuring corporate debt. The Spanish law on late payments, including the related amendments, established stricter regulations in comparison with Directive 2011/7/EU. According to the 3/2004 Law, any agreement between parties that excludes the payment of the statutory interest rate for late payment is considered null and void. Parties can, however, agree on their own interest rate applied on late payments, but it cannot be less than 70% of the statutory rate (the statutory rate corresponds to 8 percentage points higher than the interest rate applied by the European Central Bank to the most recent main financing operations). In addition, under very specific conditions, Directive 2011/7/EC allows contracts to extend the payment duration to over 60 days, in contrast the Spanish regulation does not allow for any extension to payment terms in B2B transactions (60 days maximum). Finally, the Law states that the Spanish government must issue yearly reports assessing the enforcement of the provisions and the consequences of unfair long payment terms in the country to monitor the evolution of payment durations in Spain. Despite all these measures, in February 2017, the European Commission (EC) urged Spain to comply with Directive 2011/7/EU, as its legislation was systematically

66 European Commission, June infringements package: key decisions, 2018. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3986

67 Decreto-legge n. 135/2018 Articolo 3 comma 1-terdecies. https://www.leggioggi.it/wp-content/uploads/2019/02/legge-decreto-semplificazioni.pdf

68 Etaamb, Loi modifiant la loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales, 2019. https://www.etaamb.be/fr/loi-du-28-mai-2019_n2019015154.html

69 Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales. Boletín Oficial del Estado,2004. https://www.boe.es/buscar/act.php?id=BOE-A-2004-21830

70 Ley 15/2010, de 5 de Julio, por la que se modifica la Ley 3/2004 de modificación de la Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales, Boletín Oficial del Estado, 2010. https://www.boe.es/buscar/doc.php?id=BOE-A-2010-10708

71 Ley 11/2013, de 26 de Julio, de medidas de apoyo al emprendimiento y de estímulo del crecimiento y de la creación de empleo, Boletín Oficial del Estado, 2013. https://www.boe.es/buscar/pdf/2013/BOE-A-2013-8187-consolidado.pdf

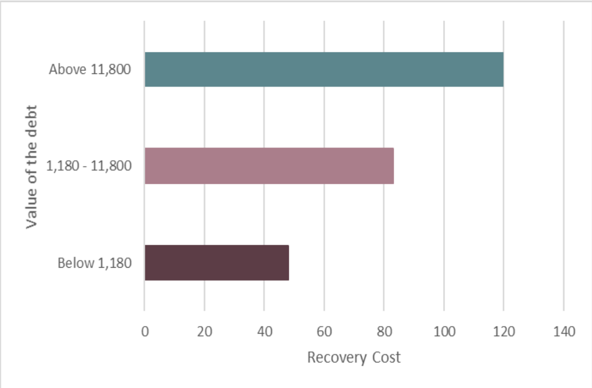
71 Ley 17/2014, de 30 de septiembre, por la que se adoptan medidas urgentes en materia de refinanciación y reestructuración de deuda empresarial, Boletín Oficial del Estado, 2014. https://www.boe.es/buscar/doc.php?id=BOE-A-2014-9896

72 Ley 17/2014, de 30 de septiembre, por la que se adoptan medidas urgentes en materia de refinanciación y reestructuración de deuda empresarial), Boletín Oficial del Estado, 2014. https://www.boe.es/buscar/doc.php?id=BOE-A-2014-9896

extending the statutory payment terms for PAs by 30 days[73]. The Spanish regulation was thus modified, and provisions added to limit the payment duration from PAs to 30 days, and the case was closed[74].

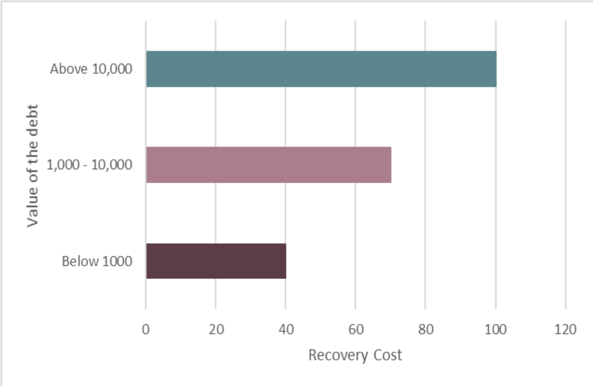
The UK was one of the first countries in Europe to implement late payment regulations and promote the importance of prompt payment practices. Since 1998 (enforced since November 2000), the Late Payment Act (LPA) has been the main legislative act that regulates late payments in the UK. In the UK, European Directive 2011/7/EU was transposed in March 2013. However, many of the measures contained in the Directive were already in place within UK legislation, by 2013 and few articles of the UK law differ – UK law being stricter—from the Directive. Indeed, in contrast with Directive 2011/7/EU that defines a minimum amount of EUR 40 for recovery costs, and similar to the legislation implemented in Ireland, the LPA defined three different levels of compensation amounts, depending on the total value of the debt: 1) GBP 40 (EUR 48) when debt is below GBP 1,000 (EUR 1,180); 2) GBP 70 (EUR 83) when the debt ranges between GBP 1,000 and GBP 10,000, (EUR 1,180– EUR 11,800); and 3) GBP 100 (EUR 120), when the debt is above GBP 10,000 (EUR 11,800)[75]). In addition, the LPA introduces the notion of "substantial remedy" as an alternative available for companies in place of the statutory interest. The substantial remedy corresponds to an alternative to the statutory interest, that parties agree on in the contract, that must be "substantial" in the case of late payment[76,77].

Figure 1: Value of the recovery costs enforced in the UK depending of the value of the debt



Source: Late Payment Act, UK

Figure 2: Value of the recovery costs enforced in Ireland depending of the value of the debt



Source: Late Payment in Commercial transaction, Regulations 2012 – SI 580 of 2012[78]

Late payment practices strongly affect the entire European economy and the EU understood the importance to shorten payments durations. Therefore, to protect large and especially small European businesses, the EU proposed the two Directives on late payments in commercial transactions. By implementing the directives, the EU enforced direct approaches for targeting late payments. Most of the analysed EU MS also went beyond the mere transposition of the Directive, by implementing stricter regulations in their national laws, emphasizing the importance of the late payment issue for European

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73 European Commission, Late payment: Commission urges 4 Member States to comply with the Late Payment Directive to protect SMES in their commercial relations, 2017. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_239

74 European Commission, May infringement package: key decisions, 2018. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3446

75 Sec. 5A (2) LPA.

76 Sec. 8 LPA.

77 A remedy is substantial if it provides sufficient compensation for late payment. The High Court has held that interest on late payments of 0.5% over base rate is not a substantial remedy under the Late Payment of Commercial Debts (Interest) Act 1998. Thomson Reuters, 2020. https://uk.practicallaw.thomsonreuters.com/7-502-3451?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

78 Department of Business, Enterprise and Innovation, Ireland, Late Payment in Commercial transaction, Regulations 2012 – SI 580 of 2012, 2012. https://dbei.gov.ie/en/What-We-Do/Supports-for-SMEs/Late-Payments/Late-Payment-in-Commercial-Transactions/

economies. However, an effective implementation of the Directive's provisions remains a challenge in many EU MS. Last, direct measures tackling payment delays can also be complemented by indirect measures, such as those relating to public procurement as in the case of Directive 2014/24/EU on public procurement.

Box 3: Stricter provisions in the German legislation

In the German law, the Civil Code enforced two specific provisions that are stricter than Directive 2011/7/EU (Article 12(3) that allow companies to implement stricter regulations than the ones presented in the Directive). The German law specifies that:

- When the client is not a consumer or when the client receives an invoice upon delivery and/or performance and does not pay within 30 days upon receiving such invoices, a payment time period of more than 30 days upon delivery and/or performance is presumed to be unduly long;
- When the client is not a consumer, an inspection and acceptance period of more than 15 days upon delivery and/or performance is presumed unduly long.

Therefore, if longer periods are mentioned in a contract between suppliers and clients, the mentioned contractual provisions will be null.

Up to now, these two rules have been displaying positive effects on the late payment practices in the country. Indeed, in terms of payment duration in 2019, Germany is one of the best performing countries in the EU. For the second semester of 2019 in the construction sector in Germany, 98.4% of the business clients were paying within 30 days (average of 94.9% in the overall German economy). 85.7% of the PAs clients in the construction sector in 2019 were paying within 30 days (compared to 85.9% in the overall Germany economy).

Source: German Civil Code[79], Interviews with stakeholders in the construction sector.

Analysis of the Late Payment Directive and its implementation in the Member States

On average across all sectors, the payment duration has decreased over the last few years in the EU (the overall EU payment duration fell from 56 days in 2011 to 34 days in 2018[80]), even though the direct impacts of Directive 2011/7/EU enforced in 2013, are difficult to assess among the EU MS. The Directive created the basis for a better and a more regulated environment for payment practices in each of the EU MS. Indeed, the transposition of the Directive into national legislations has increased awareness at the European level and among MS, that late payment practices strongly affect economies and must be addressed as a top priority. Besides, the directive contributed to reducing firms exit rates, especially in countries where there was a longer average payment period before the adoption of Directive 2011/7/EU[81]. Moreover, the transposition of Directive 2011/7/EU into national regulations has led some EU MS to go even further and to implement stricter regulations and additional soft measures[82] to reduce payment durations.

79 Federal Ministry of Justice, German Civil Code BGB, 2008. http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Alemao-BGB-German-Civil-Code-BGB-english-version.pdf

80 European Parliament, Directive 2011/7/EU on late payments in commercial transactions European Implementation Assessment, 2018. http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/621842/EPRS_IDA(2018)621842_EN.pdf

81 The Competence Centre on Microeconomic Evaluation, Highlights of a year of activity, July 2017. https://publications.jrc.ec.europa.eu/repository/bitstream/JRC107563/kjna28715enn.pdf

82 According to the Organisation for Economic Cooperation and Development, soft measures are defined as other actions than taxes, regulations or provision of infrastructure or transport supply, taken by government to change behaviour. OECD, Issue Paper - Soft measures and transport behaviour, 2002. https://www.oecd.org/env/greening-transport/16199621.pdf

Box 4: Example of good practice in the Netherlands

In the Netherlands, a law to protect SMEs has been approved by the Senate of the Dutch parliament in March 2017. According to this law, clients cannot offer to their SMEs suppliers more than 60 days payment terms. Companies are defined as SMEs when they meet at least two out of the three criteria described below[83]:

1. Less than 250 employees;
2. A turnover (net) of maximum EUR 40 million;
3. EUR 20 million of maximum asset value on the balance sheet.

Companies had one year (starting on July 2017) to adapt their contractual payment terms, and on the 1st of July 2018, the law was enforced for all the payment terms between clients and their SMEs contractors. This law only applies for large companies and interests are due to SMEs in the case of late payments. SMEs in the construction sector were consulted about the impacts of the application of the new legislation, one year after its entry into force. For 90% of SMEs in the construction sector, no significant reduction in payment delays has been observed. The Dutch authorities are currently exploring to reduce further payment terms to 30 days.

Source: Monitor MKB Bouw & Infra, December 2018[84].

One of the main challenges of Directive 2011/7/EU is the fact that the current legislation does not oblige nor set a defined methodology on gathering data on payment durations. It is not only difficult to measure the real impacts of the Directive on payment durations but also difficult to evaluate EU MS regulations and environments to create a virtuous circle that would enable to leverage the current situation and set-up clear targeted improvements. Indeed, a yearly or biannual measurement of the incidence and length of late payments across EU MS would enable to monitor progress in achieving the goals of the Directive.

The second challenge in the enforcement of Directive 2011/7/EU is that many creditors still do not uphold their rights. Businesses are often afraid to deteriorate business relations with their clients. Indeed, both public and private clients, often take advantage of their stronger positions on the market and smaller businesses therefore tend to accept longer payment terms from their debtors, or do not exercise their right to claim interests or recovery costs, or are let alone to initiate court proceedings to claim what is due to them. Additional exchanges of legislations' best practices among EU MS to limit payment durations, and further guidance on implementation of Directive 2011/7/EU from the European Institutions could facilitate the monitoring of payment durations in Europe. Lastly, Directive 2011/7/EU does not currently define an obligatory maximum period of payment, in B2B transactions. In these contracts, parties can still agree on contractual payment terms longer than 60 days under the condition that it is not "grossly unfair" to the creditor. Unfortunately, Directive 2011/7/EU does not contain a clear and unambiguous definition of the concept of "grossly unfair". In its Strategy for SMEs adopted in March 2020[85], the Commission committed to address this specific gap to ensure a more efficient application of the Directive.

Today, several institutional bodies and entities (private sector associations), while not questioning the essence of the Directive, are calling for its modernisation to reflect the lessons learnt and the experiences in MS. In this sense, the EC has set up a late payment expert group[86] to discuss and exchanges best practices put in place to combat late payment[87]. Additionally, on 17th of January 2019, the European Parliament

[83] SCF Briefing, Dealing with the new payment terms law for Netherlands SMEs, 2017. https://www.scfbriefing.com/dealing-with-the-new-dutch-payment-term-law/

[84] Aannemersfederatie Bouw&Infra Nederland, monitor MKB Bouw & infra, 2018. https://www.aannemersfederatie.nl/index.php/documenten/2018/956-c12042-monitormkb-bouwinfra-jan-2018-def-ex

[85] COM (2020) 103

[86] This expert group met twice in 2012, once in 2013 and 2014, twice in 2015, once, in November 2017, twice in 2018 and twice in 2019. European Commission, Register of Commission expert groups and other similar entities, 2019. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2710

[87] European Commission, 9th meeting of the "Late Payment Directive" Expert group, 2019. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=33551

adopted a Resolution on the implementation of Directive 2011/7/EU on combatting late payment[88]. The resolution presents key recommendations to the Commission and to the EU MS to improve the enforcement of Directive 2011/7/EU, to enhance the payment behaviour in the EU and to encourage the EU MS to implement a combination of legal and voluntary measures to better and more effectively enforce Directive 2011/7/EU and national regulations on late payment practices.

Takeaways

The regulatory framework developed by the transposition of Directive 2011/7/EU in the EU MS in March 2013, has managed to raise awareness about the issue of late payments in commercial transactions across the EU. It further enhanced the common EU framework, and a harmonised understanding (through a set of definitions and standards) of late payment. However, the Directive still has some weaknesses, especially when going from the regulation in theory to the application of the national regulations in practice, such as the lack of monitoring of the directive or the lack of enforcement from creditors that do not want to deteriorate business relationships. In addition, many institutions and associations are calling for a review of the Directive to modernise it and better enforce it to combat late payment practices in the EU.

Late payments in the construction sector – state of play

The construction sector is a key pillar of the European economy, with an annual turnover of above EUR 1.707 trillion[89], and a total workforce of almost 15 million employees[90]. The construction sector represents 43.7%[91] of the EU-28 Gross Fixed Capital Formation (investment) and the whole sector also contributes to about 10% of the European GDP. It is also mainly constituted of SMEs, their number reaching up to 99,9% of the total number of enterprises in the sector[92].

When looking at payment delays practices in the construction sector after the introduction of the Directive, it can be observed that while B2B payment practices decreased by around 1 or 2 days in average payment delays between 2011 and 2014, the average payment delays from PA2B have largely increased by 9 days between 2010 and 2014[93]. In Europe, the construction sector is deeply affected by late payment practices, with poor results in terms of payment durations, including a significant amount of time between the delivery of the goods and services and the payment of the invoices to the supplier (see Chapter 3. Causes of late payment for more information).

In the EU-28, 47% of all SMEs reported problems linked to late payments in 2018. Among SMEs that reported problems due to late payments, 15% reported that they experienced late payment issues regularly, and 32% reported that they experienced problems with late payments occasionally. In comparison, SMEs in the construction sector in 2018 are the most exposed to late payments practices. 17% of the SMEs reported to experience late payments regularly and 39% of SMEs reported problems with late payments on an occasional basis[94].

63% of the EU construction companies report that they have been asked to accept longer payment terms than the ones they would have felt comfortable with, and 58% of the construction companies acknowledged

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88 European Parliament, P8_TA (2019) 0042 Combating late payment in commercial transactions, 2019. http://www.europarl.europa.eu/doceo/document/TA-8-2019-0042_EN.html?redirect

89 Eurostat as accessed on March 2020.

90 Eurostat as accessed on March 2020

91 Ibidem.

92 European Commission, Internal Market, Industry, Entrepreneurship and SMEs, as accessed on March 2020. https://ec.europa.eu/growth/sectors/construction_en

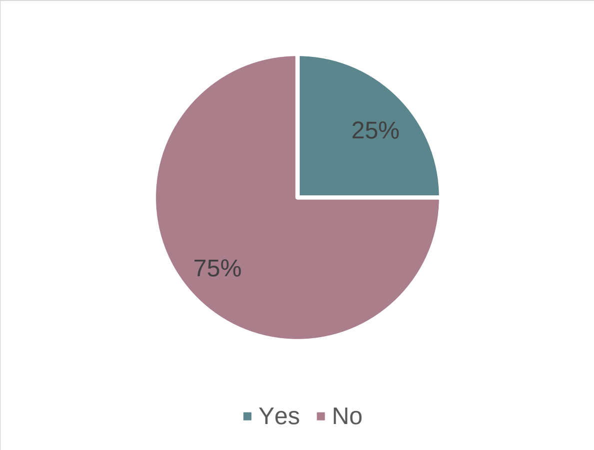
93 European Commission, Ex-post evaluation of Late Payment Directive, 2015. https://op.europa.eu/en/publication-detail/-/publication/400ecc74-9a54-11e5-b3b7-01aa75ed71a1

94 European Central Bank, Survey on the access to finance of enterprises, 2019. https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/index.en.html

to have accepted longer payment terms than those they felt comfortable with[95]. Those numbers signal that unfair long payment terms are thus a significant issue in the construction sector. As importantly, (too) few construction companies in the sector are familiar with Directive 2011/7/EU, with only 25% of the companies being aware of it[96]. Finally, about 40% of the companies in the construction sector would favour the introduction of a new legislation against late payment practices to fight invoices paid after the due date[97].

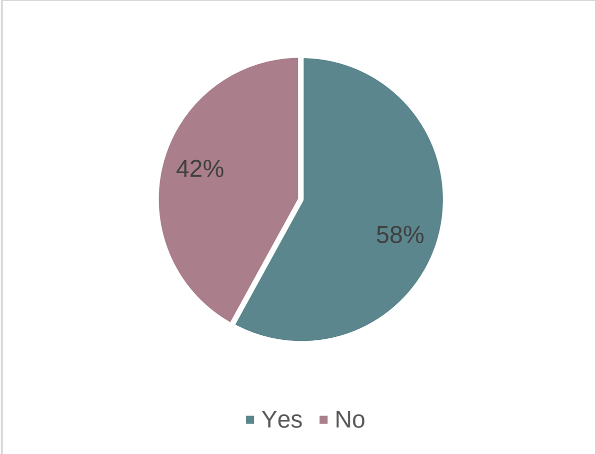
Among the EU MS, Germany, the Netherlands and Sweden have the lowest proportion of SMEs reporting problems due to late payments. In these three countries, up to 66% of the SMEs declared not to have experienced issues due to late payments from private and public entities in 2018[98].

Figure 3: Construction companies being aware of the 2011/7/EU Directive



Source: Adapted from Intrum, 2018.

Figure 4: Companies accepting longer payment terms than those they feel comfortable with



Source: Adapted from Intrum, 2018.

The analysis in the following sub-sections presents the state of play of payment practices in the construction sector in the five countries of the selected sample, respectively France, Ireland, Italy, Spain and the UK. To provide a global overview of the situation in the five countries, we compare the data specific to the construction sector in each country with the national average of late payment durations. We analyse the data for three different years, driving the trend from 2010 to 2017.

France

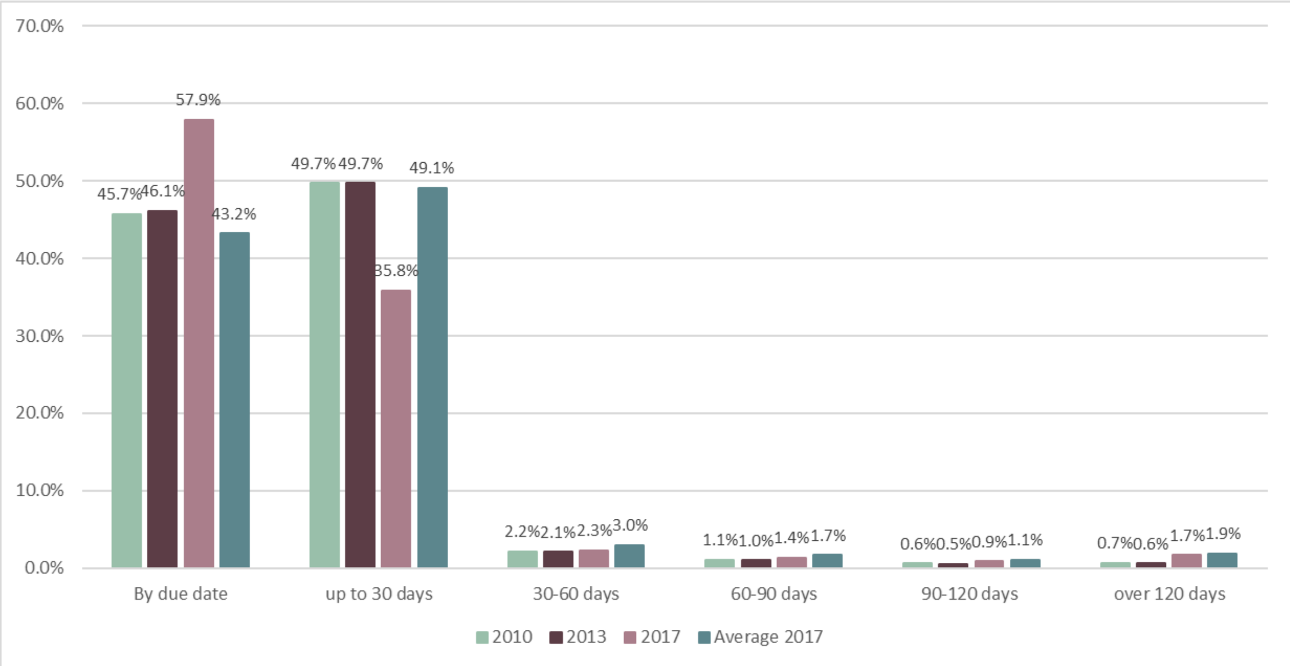
In France in 2018, 43.3% of the companies were paying their invoices on time, close to the EU average of 42.8%[99,100]. France is therefore performing better in comparison with the European payment average in 2018. However, France is performing slightly worse in terms of payment durations in the construction sector, than in other sectors. Indeed, the Days Sales Outstanding (DSO)[101] for the construction sector in France stood at 75 days (in 2017), compared to a country overall average of 74 days (across all industries) and compared

95 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/media/4197/european-payment-industry-white-paper-2018.pdf
96 Ibidem
97 Ibidem
98 European Central Bank, Survey on the access to finance of enterprises, 2019. https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/index.en.html
99 Cribis Dun & Bradstreet, Payment Study, 2019. http://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf
100 The EU average here refer to the average for 23 European countries for which data were available and for which trends have been compared and analysed over the years. Cribis Dun & Bradstreet, Payment Study, 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf
101 Days sales outstanding (DSO) is the average number of days that receivables remain outstanding before they are collected, 2019. Accounting Tools, Days Sales Outstanding Calculation, 2019. https://www.accountingtools.com/articles/days-sales-outstanding-calculation-and-usage.html

to a global average DSO for the construction sector of 85 days[102]. Additionally, while creditors on average allowed less time for their client to pay in PA2B contracts compared to B2B contracts, PAs took a significant longer time to pay than private customers[103].

Figure 5 presents payment delays in the construction sector in 2010, 2013 and 2017 and compares the late payment practices in the construction sector with the country average. Figure 5 thus presents the payment performances before the introduction of Directive 2011/7/EU (2010), right after the transposition of the Directive into the national law (2013) and a few years after the transposition of the Directive (2017), thus also enabling to observe impacts of the Directive on the payment delays in the construction sector in the country. "By due date" payments define the percentage of debtors that respect the payment terms defined in the contract and agreed with their suppliers. The remaining categories ("up to 30 days", "30-60 days", "60-90 days", "90-120 days" and "over 120 days") present by how many days, construction companies delayed their payments to the suppliers. The data for the construction sector is then compared to the country average across all sectors in terms of payment delays for 2017 ("Average 2017").

Figure 5: Late payments in France in the Construction sector in 2010, 2013 and 2017 (B2B transactions), days



Source: Payment Study 2011, Payment Study 2014, Payment Study 2018, CRIBIS D&B.

The number of companies paying their invoices by the due date (i.e. according to the terms agreed in the contracts) in the French construction sector, accounted for almost 60% of the companies in 2017. In fact, the share of companies paying on time increased by more than 10 percentage points over the period between 2010 and 2017. The proportion of businesses paying with a delay between 1 and 30 days after the due date, represented the second largest share, reaching 35.8% of the debtors in 2017.

Nevertheless, the share of companies paying between 30 and 60 days late and between 60 and 90 days late accounted for 3.7% of the companies in the construction sector in 2017. In parallel, the number of businesses paying their invoices between 90 and 120 days late and even over 120 days late after the due date agreed in the contracts, accounted for a total of 2.6% of the total number of companies in the

[102] Euler Hermes Global, Payment Behaviour, 2018. https://www.eulerhermes.com/en_global/economic-research/news/1387.html

[103] Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/media/4197/european-payment-industry-white-paper-2018.pdf

construction sector. In addition, regarding the number of companies paying more than 30 days late, the share of companies increased between 2010 and 2013 and between 2013 and 2017. The largest observable increase in these categories, is for the payment delays exceeding 120 days that went from 0.7% in 2010 to 1.7% in 2017. This increase in payment delays may help explain the above-average DSO in the construction sector in France.

Late payments are still a major concern in the public works sector in France. Late payments deeply affect the available cash flow of companies, especially when combined with growing production costs (+3.5% in 2018 year over year change)[104]. Unfair long payment terms practices ranging from three to six months are regularly reported in the construction sector in France in both public and private contracts. In addition, in France in 2018, PAs still present the longest average customers delays[105]. According to recent studies realised by BTP Bank (Corporate Bank of Public Building and Labour) in the construction sector, PAs unfair long payment terms practices still strongly impact the companies (served by the bank)[106]. Such payments pattern threatens the financial health of SMEs in particular, but also of larger companies.

In France in 2018, 98 decisions of enforcing financial penalties against companies that were not respecting payment terms were published on the DGCCRF's[107] website ("Sanctions/Payment delays" tab[108]). As a result, several construction companies were sanctioned for their payment practices. These payment delays cascade down the supply chain with disastrous consequences to subcontractors and suppliers.

Disputes are one of the causes of late payment in the construction sector (see more information in Chapter 3 Causes of late payment). In the construction sector, the resolution time for blocked invoices is on the rise and was estimated to stand at 54 days in 2019 (compared to 52 days in 2018), from the detection of a possible problem to the receipt of the paid invoice. The rate of disputes, however, remains stable at 13% for the sector (15% on average across sectors). These results also reflect a continuing deterioration of customer/supplier relations[109].

Box 5: Rejection of companies' requests for payment in the case of public procurement contract in France

In France, in the case of public procurement contracts, companies' requests for payment are too often rejected, if there is a difference between the amount requested by the company and the amount accepted by the PAs.

This practice is actually contrary to the provisions defined in the Article R2192- 34 of the French Code of Public Procurement contracts, which stipulates that in the case of a potential disagreement on the amount of a deposit or on the overall balance, the payment shall still be made within the legal time limits on the provisional basis of the sums accepted by the principal.

Each rejection obliges the undertakings to issue a new invoice, which sets a new payment deadline and thus deprives contractors of any payment of default interest and the flat-rate compensation for recovery costs. As a result, the actual payment durations for the companies might be even worse than the figures provided.

Source: French National Federation of Public Work, 2020.

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104 Banque de France, Rapport de l'Observatoire des délais de paiement 2018, 2019. https://publications.banque-france.fr/liste-chronologique/rapport-de-lobservatoire-des-delais-de-paiement

105 BTP Banque, Performance financière des entreprises du BTP en 2018, 2018. https://www.btp-banque.fr/Performance-des-entreprises-du-BTP

106 BTP Banque, Performance des entreprises du BTP, 2019. https://www.btp-banque.fr/Performance-des-entreprises-du-BTP

107 The DGCCRF (General Directorate for Fair Trading, Consumer Affairs and Fraud Prevention), is authorised to monitor compliance with payment times. The DGCCRF is responsible for monitoring compliance with the rules of the Commercial Code relating to payment periods. The DGCCRF financially sanction the companies that do not respect payment times and then publish on its website the list companies that have to pay a financial penalty for not respecting payment durations. In 2017, these agents audited 2,500 organisations and imposed 230 fines, 45 of which were for large companies or their subsidiaries. Dun & Broadstreet, Payment Study, 2018. https://www.bisnode.de/globalassets/germany/pdf-dokumente/studien/payment-study-2018.pdf

108 Le portail de l'Economie, des Finances, de l'Action et des Comptes publics, Sanctions - Délais de paiement. https://www.economie.gouv.fr/dgccrf/sanctions-delais-paiement

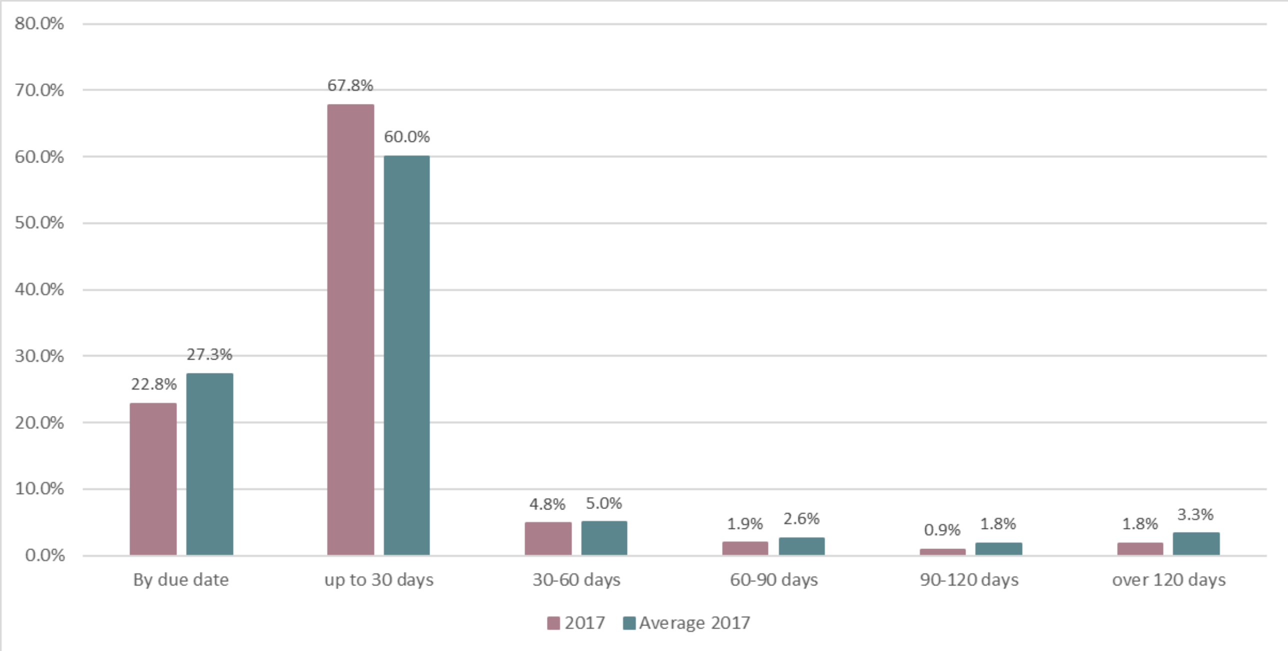
109 Le Monteur, Factures bloquées : que retenir de la dernière étude du Médiateur des entreprises, 2019. https://www.lemoniteur.fr/article/factures-bloquees-que-retenir-de-la-derniere-etude-du-mediateur-des-entreprises.2041850

Ireland

In Ireland, in 2018, 47.8% of the companies were paying their invoices on time compared to the European average of 42.8%[110,111]. Ireland therefore performed better in terms of payment duration across all industries in 2018 than the European average.

Figure 6 presents the average payment delays in the Irish construction sector in 2017[112] and compares the late payment practices in the construction sector with the country average for all sectors in the same year.

Figure 6: Late payments in Ireland in the Construction sector in 2017[113] (B2B transactions), days



Source: Payment Study 2018, CRIBIS D&B.

Overall, the share of companies paying by due date in the Irish construction sector in 2017 is lower than the share of companies paying by due date among the other industries in the country. As illustrated in Figure 6, Ireland has an important proportion of companies paying invoices between 1 and 30 days late in the construction sector. Indeed, the share of debtors paying invoices in a period of up to 30 days late after the agreed due date, represented almost 70% of the companies in the construction sector. The share of companies paying between 30 days and 90 days late and the share of companies paying after 90 days late and over 120 days late are lower in the construction sector in comparison with the country average, representing respectively 6.7% and 2.7% of the debtors in the construction sector in 2017. However, the proportion of companies paying between 30 and 60 days late is one of the highest compared to the other countries of our sample. Importantly, the average percentage of lost revenues due to late payments in Ireland in 2018 reached 5.8% of the total annual revenue in the construction sector (compared to 1.7% at the European level)[114].

110 Cribis Dun & Bradstreet, Payment Study, 2019. http://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

111 The EU average here refer to the average for 23 European countries for which data were available and for which trends have been compared and analysed over the years. Cribis Dun & Bradstreet, Payment Study, 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

112 No data available for the construction sector in Ireland in 2010 and 2013

113 No data available for the construction sector in Ireland in 2010 and 2013

114 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

In addition, studies[115] have shown that Irish SMEs suffer even more from long payment terms, especially in the construction sector. For instance, payment durations to SMEs in the construction industry lay around 64 days. In addition, more than 80% of Irish SMEs do not charge interest on late payments, mainly because of the fear of losing customers as a potential consequence[116]. Irish subcontractors in the construction sector report that 75% of the payments due from their clients in a domestic sub-contract environment are a at least 10 to 20 days late (even after an allotted 30-day credit extension). They also report that the initial release of the first half of retentions (the retention usually represents 2.5% of the contract sum) are generally 60 to 90 days late, while the release of the second half of retentions are generally 180 days late and, in many cases, it can take up to 3 years to get paid[117] (see more information on the retentions in the construction sector, in Chapter 3. Causes of late payment).

Italy

In Italy in 2018, 35.5% of the companies were paying their invoices on time compared to the European average of 42.8%[118,119]. Italy is therefore performing worse than the European average payment duration across all industries in 2018. At the same time, the DSO for the construction sector in Italy reached 80 days (in 2017), which is both better than the global average of the sector of 85 DSO and better than the country's average of 83 days[120]. However, the DSO for the construction sector in Italy is one of the highest among the countries analysed within our sample and way higher than foreseen in Directive 2011/7/EU.

Box 6: Payment practices from the PAs in Italy

In Italy, creditors on average allow to their PAs client a duration of 50 days to pay in the construction sector[121].

While it appears that PAs officially pay within the 30 days limit in the construction sector, these results might be biased by the way these data are currently reported. Indeed, the overall payment duration from the PAs in Italy (in 2015) amounted over 140 days, compared to around 80 for B2B transactions[122].

According to researches carried out by National Association of Building Constructors (*Associazione Nazionale Costruttori Edili*, ANCE), delays in the verification of works are a serious problem in the construction sector in Italy. No less than 62% of Italian construction companies have been asked by the PAs to delay the submission of the invoice or the request to issue the SAL[123] (the SAL is the document which in the construction law in Italy, certifies the end of the verification of the works).

The moment in which the SAL is issued is very important because it is the moment in which, according to the Italian law, the payment terms start (maximum of 30 days). According to the law, this moment must be respected, which conduct the Italian authorities to artificially change the beginning of the payment term.

The European Commission opened in 2017 an infringement procedure against Italy on this issue.

Source: Associazione Nazionale Costruttori Edili, Italy.

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115 Irish SME Association, Increased payment delays for Ireland's SME sector, 2019.https://www.isme.ie/increased-payment-delays-for-irelands-sme-sector/

116 Irish SME Association, Increased payment delays for Ireland's SME sector, 2019. https://www.isme.ie/increased-payment-delays-for-irelands-sme-sector/

117 Data were gathered from an Irish Subcontractors operating in the construction industry in Ireland.

118 Cribis Dun & Bradstreet Payment Study, 2019. http://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

119 The EU average here refer to the average for 23 European countries for which data were available and for which trends have been compared and analysed over the years. Cribis Dun & Bradstreet, Payment Study, 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

120 Euler Hermes Global, Payment Behaviour, 2018. https://www.eulerhermes.com/en_global/economic-research/news/1387.html

121 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

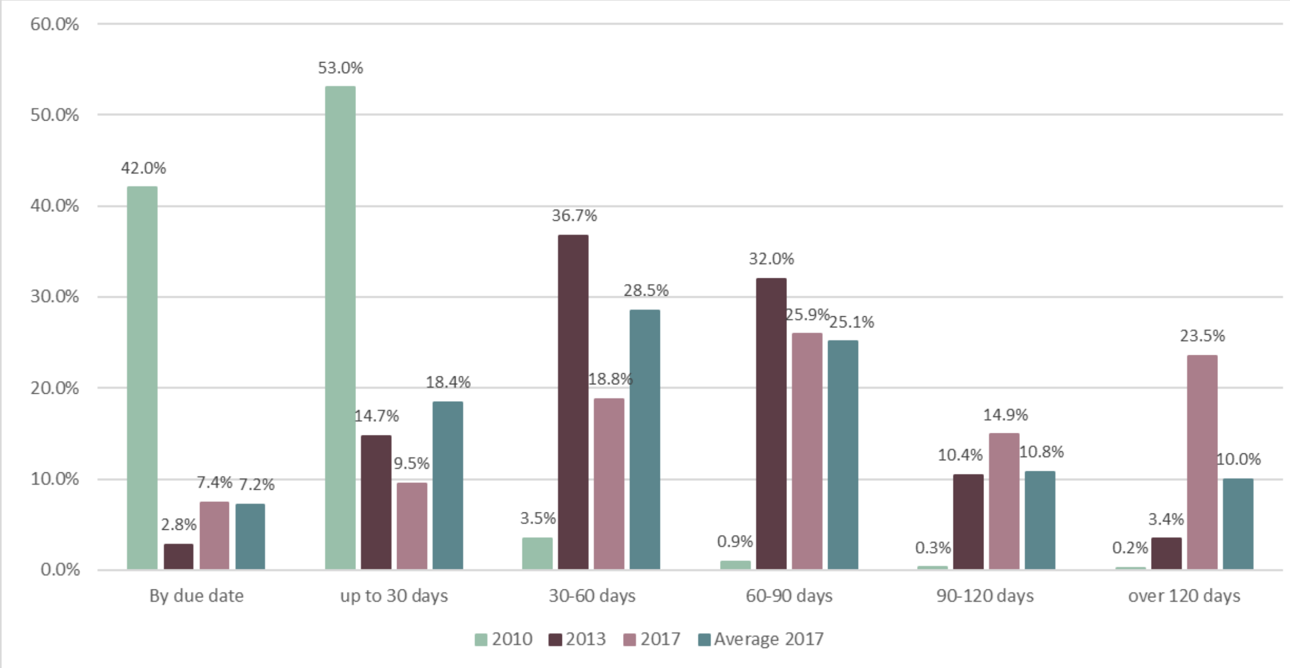
122 European Commission, Ex-post evaluation of Late Payment Directive, 2015. file:///C:/Users/alange020/Downloads/ET0415875ENN.en%20(3).pdf

123 Stato Avanzamento Lavori or SAL. The work progress (commonly abbreviated as SAL) is the document that certifies that a certain amount of work of any kind and any measure has been carried out, in order to be able to calculate the amount that the client of the work must pay to the company commissioned to carry out the task.

It is nevertheless important to mention that payment durations of commercial transactions vary between regions. In fact, companies in Northern Italy apply shorter payment durations, while payments in southern Italy are less punctual and payments tend to be delayed more and more. Indeed, 44.1% of the companies are paying invoices by the due date in the North-Eastern region, compared to 21.9% of the companies in the South and on the Islands[124].

Figure 7 presents the evolution of the payment delays between 2010 and 2017.

Figure 7: Late payments in Italy in the Construction sector in 2010, 2013 and 2017 (B2B transactions), days



Source: Payment Study 2011, Payment Study 2014, Payment Study 2018, CRIBIS D&B.

As shown in Figure 7, payment delays in Italy increased over the years. Indeed, in 2010, most of the companies in the construction sector were paying invoices by the due date or up to 30 days after the agreed due date. However, 2013 saw an important increase in the share of construction companies paying between 30 and 60 days late and between 60 and 90 days late. In 2017, the proportion of construction companies paying invoices between 90 and 120 days late and even over 120 days late significantly increased. Finally, in the three longest categories of payments delays, the proportion of companies is higher for the construction sector compared to the national average over all industries. In 2017, debtors paying between 90-120 days late and over 120 days late represented 38.4% of the total number of companies in the construction sector in Italy. In other terms, in 2017, 38.4% of the companies in the construction sector paid at least 90 days late while solely 7.4% of the construction enterprises paid by the due date.

In Italy, the payment delays from the PAs significantly affect the pattern of late payments. In fact, these continue to represent an important bottleneck for the growth of the construction sector in the country[125]. According to a survey carried out by the ANCE in 2018[126], in Italy in the second semester of 2017, 73% of the construction companies experienced late payment from PAs. The average payment duration from the PAs towards the companies in the construction sector continued to be far beyond the limits set by Directive

124 D&B Payment Study 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

125 Associazione Nazionale Costruttori Edili, Osservatorio Congiunturale sull'Industria delle Costruzioni, 2018. http://www.ance.it/docs/docDownload.aspx?id=42965

126 Ibidem

2011/07/EU on late payments. In addition, ANCE research also highlighted the existence of a "culture" of late payments within PAs in Italy[127].

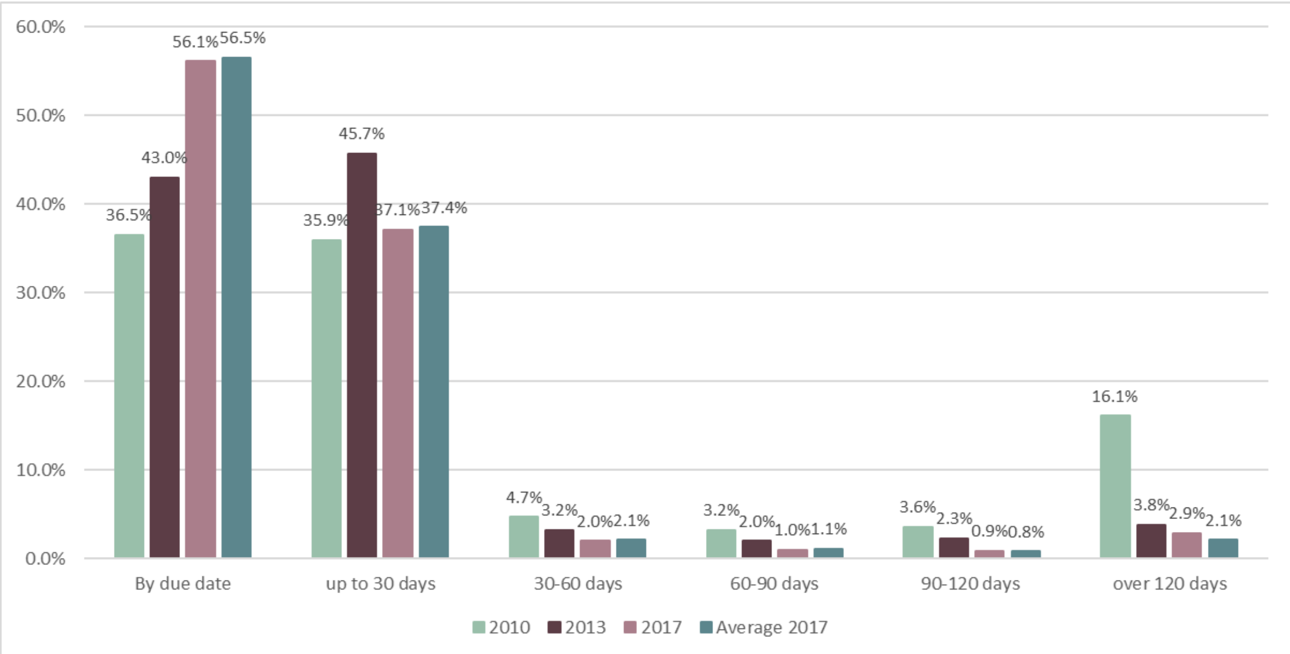
Spain

In Spain in 2018, 47.5% of the companies were paying their invoices on time, performing better than the EU average of 42.8%[128,129]. Spain is, therefore, performing above the EU average payment duration across all industries in 2018. However, according to a recent report, the construction sector in Spain is one of the most affected by late payments in the country[130]. The DSO for the construction sector in Spain stood at 111 days in 2017, compared to a country average of 78 days (across all industries) and a global construction sector average of 85 days[131]. Therefore, the DSO in the construction sector in Spain is significantly higher compared to the average DSO in the country and sector DSO average.

> **On average, companies allowed a 63 days payment term to PAs in the construction sector in Spain in 2018 (56 days in B2B), while PAs took an average 73 days to pay their suppliers (56 days taken in B2B). While those numbers are higher than what Directive 2011/7/EU on late payments suggests, the payments terms in the construction sectors are aligned with the payment terms enforced in Spain for other sectors[132].**

Similarly to the other countries, Figure 8 presents the average payment delays in the construction sector from 2010 to 2017 and compares late payments in the construction sector to the country payment delays average (see Figure below).

Figure 8: Late payments in Spain in the Construction sector in 2010, 2013 and 2017 (B2B transactions), days



Source: Payment Study 2011, Payment Study 2014, Payment Study 2018, CRIBIS D&B.

127 Ibidem
128 Cribis Dun & Bradstreet, Payment Study, 2019. http://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf
129 The EU average here refer to the average for 23 European countries for which data were available and for which trends have been compared and analysed over the years. Cribis Dun & Bradstreet, Payment Study, 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf
130 CEPYME; Boletín de Morosidad y Financiación Empresarial, 2019. https://www.cepyme.es/wp-content/uploads/2020/01/Boler%C3%ADn-Morosidad-y-Financiaci%C3%B3n-Empresarial-CEPYME-IITRI19.pdf
131 Euler Hermes Global, Payment Behaviour, 2018.https://www.eulerhermes.com/en_global/economic-research/news/1387.html
132 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

Spain displays a considerable increase in the companies in the construction sector paying by the due date between 2010 and 2017 (from 36.5% in 2010 to 56.1% in 2017), while this is still slightly below the country average across all sectors (56.5% in 2017).

The share of businesses paying up to 30 days late (after the due date stated in the contract, therefore late payments of up to 30 days) slightly increased between 2010 and 2017. In contrast, when analysing in more details the evolution of the number of companies paying 30 days after the due date, it can be observed that the number of debtors in this category heavily decreased between 2013 and 2017. This strong decrease may be correlated to the strong increase in the number of companies paying by the due date over the same period. Spain features important decreases in the share of companies paying between 30 - 60 days late, 60 – 90 days late, 90 – 120 days late, and even more considerably for the share of debtors paying more than 120 days late (from 16.1% in 2010 to 2.9% in 2017). However, the number of companies paying more than 120 days late is still higher in the construction sector compared to the country average.

In Spain and compared to the other sectors in the country, the construction sector has the second highest number of late payments, reaching almost EUR 24 million in 2019[133]. Besides, the construction sector in Spain is the sector with the longest average payment terms, reaching 94.7 days in 2019[134].

It is also important to highlight that while 62% of the companies are familiar with Directive 2011/7/EU (compared to a European average of 32% in the construction sector), only 6% of the companies identified positive impacts as results of the implementation of Directive 2011/7/EU Directive on payment delays[135].

United Kingdom

In the UK in 2018, 34.7% of the companies were paying their invoices on time compared to the European average of 42.8%[136,137]. The UK is therefore performing poorly in comparison with the European average payment duration across all industries in 2018. Importantly, when looking at the average payment terms, it is also important to mention that UK PAs tend to pay on average slightly later than the allowed payment terms they were granted by their creditors[138].

As for the other countries of the sample, Figure 9 presents the late payment in the construction sector in 2010, 2013 and 2017 and compares the payment delays in the construction sector with the country average payment delay durations.

133 Expansion, La morosidad de las grandes empresas con sus proveedores suma 80.000 millones, 2019. https://www.expansion.com/economia/2019/09/27/5d8d1e29468aeb6f7d8b45dc.html

134 Bolerín-Morosidad-y-Financiación-Empresarial, NÚMERO 17 SEGUNDO TRIMESTRE 2019, 2019. https://www.cepyme.es/wp-content/uploads/2020/01/Boler%C3%ADn-Morosidad-y-Financiaci%C3%B3n-Empresarial-CEPYME-IITRI19.pdf

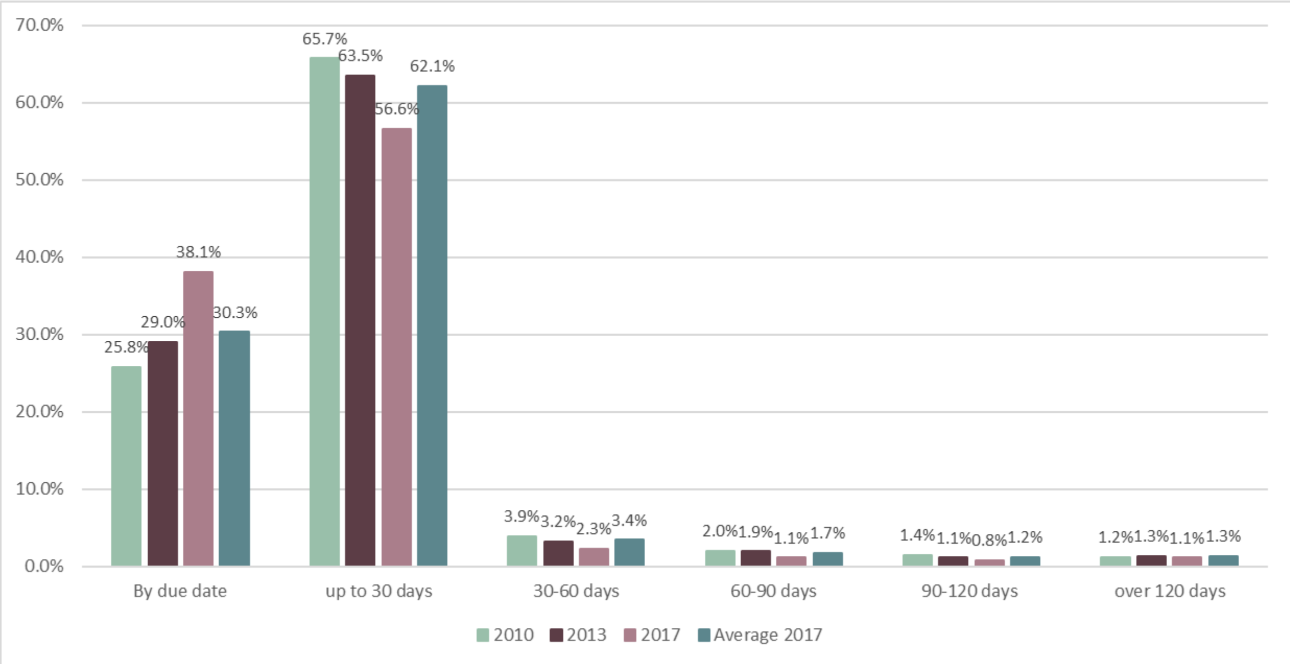
135 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

136 Cribis Dun & Bradstreet, Payment Study, 2019. http://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

137 The EU average here refer to the average for 23 European countries for which data were available and for which trends have been compared and analysed over the years. Cribis Dun & Bradstreet, Payment Study, 2019. https://www.dbisrael.co.il/pdf/D&B_Payment_Study_2019.pdf

138 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

Figure 9: Late payments in the UK in the Construction sector in 2010, 2013 and 2017 (B2B transactions), days



Source: Payment Study 2011, Payment Study 2014, Payment Study 2018, CRIBIS D&B.

The companies in the construction sector in 2017 generally score better than the country's cross-sectoral averages in terms of payment delays (except for those between 1- and 30-days late payments). The strong decrease in the number of companies paying between 1 and 30 days late over the 2010 – 2017 period, is likely correlated with the increase in the number of companies paying by the due date over the same period. Indeed, the DSO for the construction sector in the UK reached 42 days (in 2017), compared to a country overall average of 53 days (across all industries) and a global sector average of 85 days in the construction industry[139].

It can also be outlined in Figure 9Figure 14, that the number of companies paying by the due date in 2017 in the construction sector was higher than the national average. While the number of companies paying by the due date largely increased between 2010 and 2017, the number of companies paying more than 30 days late, decreased from 2010 to 2017 in all the categories of payment delays.

In the construction sector the number of companies paying up to 30 days late, represented the largest share. Nevertheless, the number of companies paying between 30 and 60 days late and between 60 and 90 days late, still accounted for 3.4% of the total number of companies in the construction sector in 2017, while the number of companies paying between 90 and 120 days late, and over 120 days late accounted for 1.9% of the businesses in the construction sector.

The issue of late payments has severe impacts on the UK construction sector. Indeed, studies showed that in 2016 in the UK, as consequences of late payments, 37% of small firms declared cash-flow problems, 30% fall back on overdraft and 20% mentioned a slowdown in profits[140]. In 2017, almost 50% of the SMEs in the country identified late payment as a major obstacle to business success (compared to over 40% in 2016)[141].

[139] Euler Hermes Global, Payment Behaviour, 2018. https://www.eulerhermes.com/en_global/economic-research/news/1387.html

[140] Federation of Small Businesses, Pay it Forward - Lessons and recommendations for Europe from the UK payment landscape, 2018. https://amaiz.com/documents/pay_it_forward.pdf

[141] UK Department for Business, Energy & Industrial Strategy, creating a responsible payment culture - a call for evidence in tackling late payment, 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745639/creating-a-responsible-payment-culture-call-for-evidence.pdf

Moreover, researches reveal that around 66% of the subcontractors in the construction sector do not always receive the full amount they billed. Diverse reasons could explain this fact, including disagreements over the contract, queries relating to work quality or general disagreements. Finally, in 2019 almost half of the subcontractors in the construction sector were reporting on average EUR 13,000 of bad debt or unpaid invoices[142].

Recognising the issue, the UK implements initiatives to sanction companies not respecting legal payments terms, including the Prompt Payment Code (PPC). By signing the PPC, companies were committing to pay at least 95% of their suppliers in the 60 days following the issue of the invoice and to publicly report data that would enable the government to identify if the companies were paying their suppliers on time. In case of non-compliance, companies must present an action plan to explain how they plan to achieve compliance with the code within an agreed period[143]. Some construction companies, not paying their suppliers in line with the UK government's Prompt Payment Code (PPC), have been suspended from the PPC. This initiative relies hence on a "name and shame" type of approach, which can affect the reputation and brand of late payers (For more information on the PPC in the UK, please refer to Chapter 4. Policy initiatives).

Takeaways

For most of the countries in the sample, late payment is an unresolved issue as it is still a widely spread businesses practice imposed by customers – either private businesses or public authorities - on suppliers. PAs in the construction sector tend to have higher than average B2B payment terms and practices and this is particularly true in some countries of the sample. According to recent surveys[144], companies in Germany continue to rate the payment behaviour of the PAs worse than the one of their private sector clients. Payment delays from the PAs are often due to heavy administration procedures. However, it is important to mention that based on the countries studied in the report, most of the late payments are completed on average within 30 days after the agreed terms in the contract. Nevertheless, some countries, such as Italy in the sample, still experience a high number of private and public debtors paying more than 30 days late, especially since 2013. This Chapter focused on payment delay durations, meaning that the analysis did not consider the total payment duration. The later can be significantly longer than it appears at first sight from the data, depending on the agreed payment terms (Please refer to Chapter 1. Setting the scene for explanations on the difference between long and late payment).

Impact on the construction sector

Unfair long payment terms and late payments practices have a wide range of negative economic impacts on companies, such as cash flow shortages, hindered growth, lower profitability or increased costs for companies. Both large companies and SMEs are heavily affected by late payments. These impacts may be enhanced by a series of existing or potential factors such as the low profit margins of construction companies in the EU; or the expected slow-down of the EU construction sector. SMEs generally have lower flexibility in terms of available cash flow and thus are more sensitive to unfair long payment terms and late payments.

142 Bibby Financial Services, Subcontracting growth Report - Key findings from our survey of subcontractors, 2019. https://www.bibbyfinancialservices.com/about-us/news-and-insights/reports/2019/subcontracting-growth-report-2019

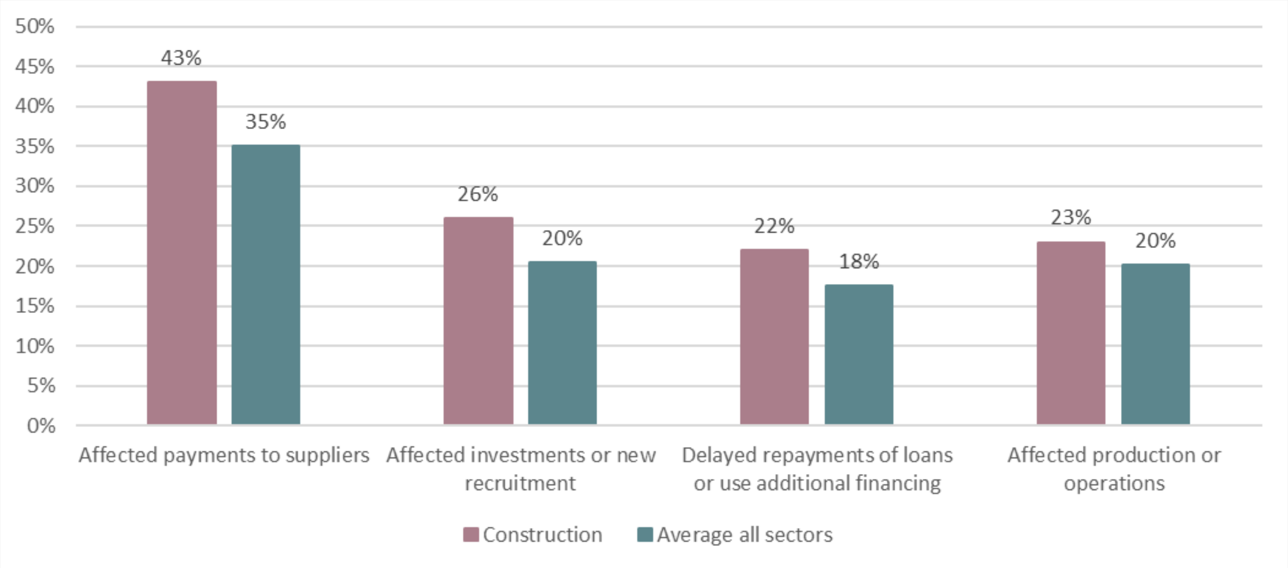
143 The Construction Index, Late-paying construction companies suspended from Prompt Payment Code, 2019. https://www.theconstructionindex.co.uk/news/view/late-paying-construction-companies-suspended-from-prompt-payment-code

144 Survey realised by ZDB, The German Construction Industry. https://www.zdb.de/zdb-cms.nsf/id/home-de

Major consequences of late payments

According to the Safe survey on the access to finance of enterprises[145], the consequences presented in Figure 10 of late payments were reported by SMEs in the construction sector. SMEs in the construction sectors are more impacted by late payments practices compared to the EU-28 average for all other industries. In addition, 43% of the SMEs in the construction sector highlight that late payments impact their payments to suppliers. Late payment is hence passed on throughout the construction supply chains, intensifying through the snow ball and spill over effects thus affecting the smallest enterprises, which are usually at the end of the value chain, the most (see Chapter 3 Cause of Late Payment).

Figure 10: Consequences of the late payments in the Construction sector in 2018



Source: Survey on the access to finance of enterprises (SAFE), Analytical Report 2019

The major consequence of late payment is the cash flow shortage that it generates for construction companies. Indeed, late payment represents a strong break into access to finance for companies. To alleviate the issue, companies tend to fall back on loans or guarantees leading to additional costs for them that should have been avoided. According to a recent survey carried out in the UK, around 1 in 10 employers are forced to pay their staff late due to late payment from clients[146]. Delay in payment of the salaries in turn negatively impacts the employees, who are forced to delay their own payments such as mortgage or rent.

Linked to the cash flow issue is the reduction of business performance. Construction companies depend on positive cash flows for their daily functioning and to embark on new projects as companies need to have sufficient financing to support labour costs, rent, cost of materials and loan payments. Late payment practices lower business growth, delay investments, endanger the realisation of projects and could lead to staff dismissals. In this way, late payments and unfair long payment terms negatively impact productivity growth and economic performance and could result in missed business and growth opportunities. Poor payment practices may also increase risk aversion among businesses, leading to higher rates of precautionary saving and lower rates of investment, which has an impact on a macro level. For instance, a recent study has shown that in the UK, the situation with zero payment delays would lead to a 22% reduction in the number of business deaths, equal to more than 50,000 companies staying in business for a

145 European Central Bank, Survey on the access to finance of enterprises, 2019. https://www.ecb.europa.eu/stats/ecb_surveys/safe/html/index.en.html

146 Federation of Small Businesses, Pay it Forward - Lessons and recommendations for Europe from the UK payment landscape, 2018. https://amaiz.com/documents/pay_it_forward.pdf

year[147]. In addition, one in five companies surveyed mentioned that faster payments from debtors would enable them to hire more employees[148].

Late payment can lead to business failure and create knock-on effects of deferred payments all along the supply chain. For example, according to a survey carried out by ANCE in Italy, 58% of the construction companies admit deferring the payments of their suppliers and subcontractors to deal with delays that were imposed on them by public contracting authorities[149]. This can lead to an increase in the number of business failures which has a substantial impact on countries' GDP. Indeed, research reveals that, in the construction sector, 26% of the companies declared that faster payments from their debtors would enable them to hire more employees[150].

Lastly, late payments also represent a significant administrative burden. Companies need to invest time in chasing late payers and possibly sue debtors when the late payments case does not resolve over time. For instance, according to a recent survey in the UK, SMEs declared that they spent 1.2 days per months on average during the last years, in chasing late payments[151]. This represents an important amount of time that is only spent on administrative procedures caused by late payments.

Takeaways

Late payment practices strongly and negatively impact businesses and the European economies in general. While the direct impacts of unfair long payment terms and late payment practices could be easily identified, the major issues raised by late payments and unfair long payment terms are happening behind the headlines. The major concerns associated with late payment and unfair long payment terms are all the knock-on effects that they have on the construction supply chain and on the whole economy at a national level but also at the European level. Indeed, companies strongly suffer from late payment practices and often tend to pass down payment delays to their suppliers and clients. Thus, unfair long payment terms and late payment along the supply chain cascade down (domino effect) in the whole economy and create a vicious circle that is hard to stop, unless tackled at its origins.

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147 These data were computed for 2014. Federation of Small Businesses, Time to Act - The economic impact of poor payment practice, 2016. https://www.fsb.org.uk/static/517120db-2555-473f-a6ceb5c661d569fb/Time-to-Act.pdf

148 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

149 Associazione Nazionale Costruttori Edili, Osservatorio Congiunturale sull'Industria delle Costruzioni, 2018. http://www.ance.it/docs/docDownload.aspx?id=42965

150 Intrum, European Payment Industry White Paper, 2018. https://www.intrum.com/publications/european-payment-industry-white-paper/

151 Federation of Small Businesses, Time to Act - the economic impact of poor payment practice, 2016. https://www.fsb.org.uk/static/517120db-2555-473f-a6ceb5c661d569fb/Time-to-Act.pdf

3.
Causes of late payment

Chapter 3 provides an analysis of the main factors that shape and influence late payments in the construction sector. In a first part, it delves into the construction sector characteristics and, more specifically, the disputes and payment process, and how these contribute to enhancing the issue of late payment. In a second part, Chapter 3 focuses on the construction supply chain characteristics, highlighting how its fragmentation and imbalance of power in relationships influences late payment. In doing so, Chapter 3 underlines a set of insights, that should be considered for policies to reach their desired effects in practice.

Construction sector characteristics

Disputes

The construction process entails a high level of risk, which mainly relates to the complexity of construction work and its underlying uncertainty[152]. Construction work is a dynamic and iterative process, involving a wide range of players with different expertise, knowledge and interests. They often last over a long-time period, being subject to several risks, including changes in material and labour costs, bad weather conditions slowing down works, etc.[153]. These risks sometimes lead to differences in terms of what was initially planned or achieved and can hence translate in disputes.

Box 7: Causes of disputes in the construction sector

The most common causes for disputes over the quality of the goods and services in the construction sector relate to inter alia:

- Failure to properly administer the contract;
- Poorly drafted or incomplete and unsubstantiated claims;
- Errors and/or omissions in the contract documents;
- Incomplete design information or client requirements (for design and build);
- Client/contractor/subcontractor failing to understand and/or comply with its contractual obligations;
- Unforeseen or differing ground conditions and utility infrastructure relocation issues;
- Actions/inactions of third parties/practice of agencies.

Source: Morrissey 2017.

Construction companies are prone to frequent disputes over the quality of the goods and services. Europe experienced a continuous increase between 2011 and 2018 in the average value and duration of disputes' resolution in the construction sector. These amounted to EUR 37 million and 20 months in 2018 respectively, in comparison to EUR 31.7 million and 11.7 months in 2011. This makes Europe the region with the longest dispute duration, with the main causes of disputes being: differing site conditions; third-party or force majeure events and failure to properly administer the contract[154]. Importantly, these disputes often take

152 Designing Buildings Wiki, Construction disputes, 2019. https://www.designingbuildings.co.uk/wiki/Construction_disputes
153 Morrissey, Why dispute avoidance is vital in the high-risk construction sector, 2017. http://www.engineersjournal.ie/2017/04/11/dispute-avoidance-vital-in-high-risk-construction-sector/
154 Arcadis, Global Construction Disputes Report, 2019. https://www.arcadis.com/media/5/D/1/%7B5D16141D-B883-4398-BB35-218023E1F4F6%7DRP_GCDR_AL20190620_Final.pdf

place between the main contractor and subcontractors, and between PAs (the client) and the main contractor (see Box below).

The disputes over the quality of the goods and services contribute to postponing the signing-off processes and the final delivery (and payment) of construction projects.

Box 8: Verification and late payment

Directive 2011/7/EU allows the procedure of acceptance or verification of goods and services to take a maximum of 30 calendar days from the date of the receipt of the goods or services, unless otherwise stated in the contract and provided it is not grossly unfair – as defined by the Directive (see Section on Terminology). The verification period is additional to the payment term. In fact, according to the Late Payment Directive, the payment terms start as soon as the verification period is (successfully) concluded.

However, both enterprises and PAs appear to increasingly use the verification period as a tool to purposefully delay their payment obligations. This results in businesses having to wait an extremely long period for the payment of their goods or services without the possibility to take legal action.

Source: EBC, 2019[155].

Payment delays, based on substantiated shortcomings in the quality of service, are usually covered in the contract. However, some construction companies are subject to unfounded quality disputes, initiated with the intention of delaying the payment process[156,157]. Such a situation often leads to late payment, hindering the sustainable development of the construction sector.

Unfounded disputes over the quality of the goods and services are hence recognised, especially among the industry, as one of the main causes behind late payment. Not only construction companies are prone to disputes, but the dispute process itself tends to last months, before it is solved. However, this does not mean that dispute mechanisms are irrelevant or harming the construction industry. Instead, it shows that dispute mechanisms can be further improved in a way that allows tackling unfounded disputes efficiently (in terms of time and resources) and effectively (in terms of the number of disputes). In doing so, they would discourage unfounded disputes over the quality of goods and services.

Payment process

In parallel to the issue of disputes, the payment process also affects the issue of late payment in the construction sector. Reflecting the often-long duration of construction work, the payment process is split in several parts including the advance payment (in some cases), the interim payments and final payment. For each of these stages, the payment process in the construction sector is relatively slow, involving a comparatively high level of documentation (see Figure below). On the one hand, clients and contractors need to ensure that requirements are fulfilled and that "all the boxes are checked". On the other hand, contractors and subcontractors must often provide extensive information when sending out an application for payment and wait for all the waivers to be collected. This, in turn, contributes to extending the time needed to complete a payment. However, the uptake of digital payment in construction (e.g. electronic invoicing systems), even though low, may gradually help mitigating the issue of slow payment.

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155 European Builders Confederation, Position Paper - EBC position on the Late Payment Directive, 2019. http://www.ebc-construction.eu/wp-content/uploads/191025-Position-Paper-Late-Payment_EN.pdf

156 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

157 European Builders Confederation, Position Paper - EBC position on the Late Payment Directive, 2019. http://www.ebc-construction.eu/wp-content/uploads/191025-Position-Paper-Late-Payment_EN.pdf

Figure 11: Example of a payment procedure in the construction sector

While the causes for late payment from PAs differ compared to those of the private sector (See Box below), some of them relate as well to the payment process. The latter is hindered by administrative and bureaucratic procedures, including the lack of coordination between PAs (whereby payments are affected by the non-transfer of funds by other administrations). In other instances, the non-payment may be linked to administrative inefficiencies, and to some extent to a culture of unfair long payment terms or late payments in the administrations[158].

Box 9: Late payment causes of the Italian PAs

In Italy, the financial difficulties of public bodies represent the main cause of delay in payments by PAs. The other difficulties mainly relate to the non-transfer of funds by other authorities (58% of the companies that register delays indicate this among the various causes of delay) but also to situations of financial instability of the contracting entity (20%). The administrative inefficiency in managing the payment procedures appears in second place among the causes of delay. The weight of this inefficiency also increased compared to previous surveys.

Indeed, there is a sharp increase in companies reporting difficulties related to the issuing of the payment mandate (63%) by the public authority. The phase of issuing the payment certificate also represents a critical moment in the payment cycle (54% of companies report critical issues). In addition, difficulties related to "bureaucratic stickiness" within the contracting station (32%) are reported. These data testify to a lack of attention towards payment timing and the persistence of a "culture" of late payments in administrations.

Source: ANCE, 2018.

It is also common for clients to include a "retention" fee, particularly for the final payment. The retention is a percentage (often about 5%) of the amount certified as due to the contractor on an interim certificate, that is deducted from the amount due and retained by the client.

The objective of a retention fee is to make sure that the contractor completed the activities as specified and required by the contract. Generally, half of the amount retained is released on certification of practical completion, while the other half is released upon certification of making good defects[159] (usually paid between 12 and 24 months after the project completion).

Instances where clients and/or contractors delay retention payments are not rare in the construction sector, contributing to the issue of late payment, thus reducing subcontractors' cashflow[160]. Research focusing on this issue was conducted in the UK. It highlights that the average delays at each tier of the supply chain are several months. The extent of this average delay is significantly longer for tier 2 and 3 sub-sub-

[158] Associazione Nazionale Costruttori Edili, Osservatorio Congiunturale sull'Industria delle Costruzioni, 2018. http://www.ance.it/docs/docDownload.aspx?id=42965

[159] The certificate of making good defects is a certificate given in relation to the completion of defects, imperfections, and any other fault raised during the rectification period.

[160] UK Department for Business, Energy & Industrial Strategy, Retention payments in the construction industry, 2017. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654258/2017.10.23_Retentions_Payments_Consultation_FINAL.pdf

contractors compared to tier 1 subcontractors[161]. Subcontractors (especially in tier 2 and 3) often lack visibility on when retentions will be paid. Based upon these points, 60% of contractors identify retention withholding to be an issue[162]. To address this issue, a Construction (Retention Deposit Schemes) Bill 2017-19 – the "Aldous Bill" was introduced in the UK (but has not yet been voted and hence adopted at the time of writing of this report).

In addition to the issue of retention, some clauses such as the "pay-when-paid" and/or "pay-if-paid" contribute to increasing the risk of late payment for construction subcontractors. These clauses, further detailed in the Box below, represent a way for contractors to shift the financial risks to their subcontractors, as these only get paid if or when the contractors themselves get paid by the client. These clauses are hence said to be damaging to subcontractors, as larger contractors then rely on them to withhold payment[163]. This helps explain why recent regulations and policies, such as the Construction Contract Act (2013) in Ireland prohibited the "pay-when-paid" clause.

Box 10: "Pay-if-paid" & "pay-when-paid" clauses in construction contracts

"Pay-if-paid" and "pay-when-paid" clauses can alter the normal (i.e. common law) payment obligations running from the contractor to its subcontractor (or subcontractor to its supplier).

A "pay-if-paid" clause alters the common law payment obligation by requiring payment from the customer as a condition precedent to the contractor's duty to pay a subcontractor or supplier. A condition precedent is "an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." In other words, a "pay-if-paid" clause means the contractor is only obligated to pay the subcontractor if it receives payment for the subcontractor's work from the owner.

A "pay-when-paid" clause, on the other hand, is a payment condition that establishes a reasonable time for the contractor to comply with its duty to make payment to a subcontractor or supplier upon the contractor's receipt of payment from the owner. A "pay-when-paid" clause governs the timing of a contractor's payment obligation to the subcontractor, usually by indicating that the subcontractor will be paid within some fixed time period after the contractor itself is paid by the property owner.

Source: Rowles & Cahalan, 2020 [164]

The payment process in the construction sector can contribute in several ways to worsening the issue of unfair long payment terms and/or late payment. However, both private and public sector actors have been active, developing initiatives trying to either facilitate and/or accelerate payment in the construction sector (See Chapter 4 on Policy initiatives).

Takeaways

The nature and inherent construction sector's characteristics contribute to the worsening of the issue of late payment in the sector. More fundamentally, the causes of late payment highlighted in this section are structural, and in some cases linked to the behaviour of construction enterprises (and in some cases PAs). This means that shifting those behaviours will ultimately require time, proof of concept and incentives so that all construction companies and PAs perceive late (and long) payment as an issue that goes against their own interests.

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161 UK Department for Business, Energy & Industrial Strategy, Retentions in the construction industry - BEIS Research Paper 17, 2017.https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654399/Retention_Payments_Pye_Tait_report.pdf

162 Levelset, National Construction Payments Report, 2019. https://www.levelset.com/blog/2019-national-construction-payments-report/

163 PhilipLee, The Construction Contracts Act, 2013. https://www.philiplee.ie/the-construction-contracts-act-2013/

164 Rowles & Cahalan, Construction Contract Clauses: An Intro to Pay-if-Paid vs. Pay-when-Paid, 2020. https://www.sgrlaw.com/construction-contract-clauses-an-intro-to-pay-if-paid-vs-pay-when-paid/

Supply chain characteristics

A long and complex construction supply chain

A typical construction supply chain is composed of several stages and involves a variety and high number of entities. It helps explain why late payments are widespread in the sector. The construction sector is composed of two main types of players: few large-scale construction companies, engaged in heavy construction (e.g. civil and industrial construction work), and a myriad of SMEs (99.9% microenterprises) specialised in trades such as electrical and plumbing work. These often act as subcontractors or work on smaller projects[165]. For instance, in the UK, the average construction project has 70 subcontract packages and 40% to 60% of the capital expenditure cost sits within the supply chain[166]. A construction project hence often involves one large-scale construction company – often the general contractor, and several subcontractors (tier 1), sub-sub-contractors (tier 2) and suppliers (tier 3) (Figure below).

Complex supply chains of construction projects make the payment process rather long and risky. Indeed, a late (or long) payment from the public or private client can have a trickle-down effect, in which late payments and unfair long payment terms can accumulate quickly[167]affecting many other businesses down the supply chain, with SMEs being affected the most[168].

A last supply chain aspect explaining the prevalence of late payments relates to the nature of (B2B) transactions in the construction sector. In fact, sectors with a large proportion of individual consumers (Business to Consumer - B2C), who generally pay as soon as they obtain the service or good paid for, are in a more favourable situation than those whose products or services are used as inputs in the production or service process of other companies (B2B). In the case of B2B transactions, client companies often ask for a trade credit, which has a duration generally corresponding to the time needed to incorporate the goods or services supplied into the own production. These deadlines, for verification or installation are themselves of variable length, also depending of the degree of complexity of the final products and services[169]. This element, though characterising the construction sector transactions, can be found in other industries such as manufacturing.

165 McKinsey Global Institute, In brief reinventing construction, 2017. https://www.mckinsey.com/~/media/McKinsey/Industries/Capital%20Projects%20and%20Infrastructure/Our%20Insights/Reinventing%20construction%20through%20a%20productivity%20revolution/MGI-Reinventing-Construction-In-Brief.ashx

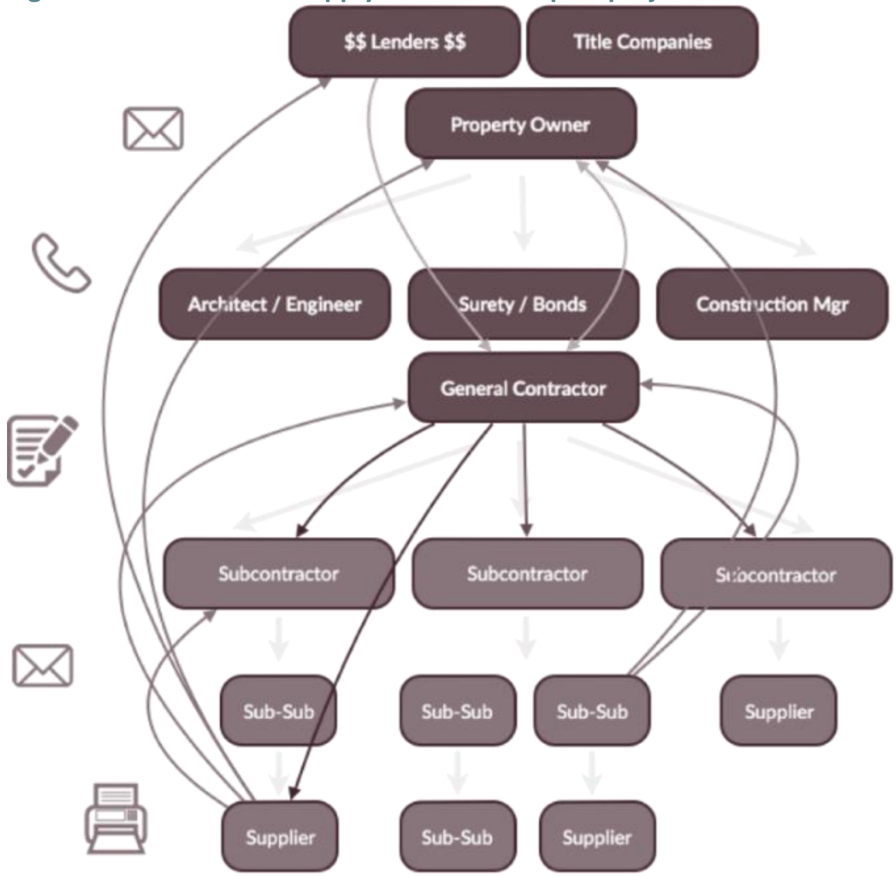
166 CN Focus, Late payment: The state of the construction industry, 2016. https://www.constructionnews.co.uk/guides/late-payment-state-construction-industry/

167 European Builders Confederation, EBC position on the Late Payment Directive, 2019. http://www.ebc-construction.eu/wp-content/uploads/191025-Position-Paper-Late-Payment_EN.pdf

168 Levelset, Why does it take so long to get paid in construction? And what can I do about it? 2019. https://www.levelset.com/blog/why-does-it-take-so-long-to-get-paid-in-construction-and-what-can-i-do-about-it/

169 Banque de France, Rapport de Observatoire des délais de paiement 2018, 2019. https://publications.banque-france.fr/liste-chronologique/rapport-de-lobservatoire-des-delais-de-paiement

Figure 12: Construction supply chain for complex projects



Source: Rauch, Viator, Benarroche & Goldman (2020)[170].

The supply chain is hence fragmented, as well as the construction work itself (from the design to the production and maintenance stages), and the payment. Because of payment interdependencies, late payment (or unfair long payment terms) from public or private clients often trickle down to contractors and suppliers, who are usually SMEs. The industry and policy-makers have hence started elaborating processes allowing for faster payment – through the use of digital technologies or Project Bank Account (PBA) for example (see Chapter 4 on Policy Initiatives). These, however, have not yet become a common practice in the construction sector.

Imbalance of power in relationships

The relatively widespread imbalance of power in relationships in the construction supply chain is a key factor in late payments and explains why late payments occur. Imbalances exist among businesses but also between PAs and businesses.

> **Business relationship between large construction firms and SMEs are characterised by power imbalance: SMEs are small in terms of size and have hence fewer human and financial capacities than large(r) construction companies. They also tend to rely on few contracts with large companies, while the latter can often collaborate with other SMEs to exploit and develop market opportunities[171].**

170 Levelset, Why does it take so long to get paid in construction? And what can I do about it? 2019. https://www.levelset.com/blog/why-does-it-take-so-long-to-get-paid-in-construction-and-what-can-i-do-about-it/

171 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

Not least, construction SMEs often have limited knowledge and capacities when it comes to effective credit management processes (especially in comparison to large construction companies). This limits their ability to detect and hence address in a preventive manner the risks of late payments and unfair long payment terms. Without such awareness and knowledge about effective credit management, risks of default, limited cashflow and longer collection periods are issues likely to appear.

Some larger firms tend to use their dominant position in the supply chain to intentionally delay payments, to their own financial advantage. In such a case, unfair long payment terms and/or late payments are used as a form of (free) trade credit or deferring payment practice[172,173]. In fact, close to 50% of all construction companies in Germany and Poland report that outstanding invoices are intentionally used as a form of free credit[174]. In the UK, subcontractors finance a significant part of the project (between 40 to 60%[175]), at their own higher level of cost[176]. Because of their weaker position, SMEs often find themselves accepting longer payment terms than they are comfortable with. This issue affects equally the challenge of late payment as the one of unfair long payment terms. The Federation for Small Business (FSB) highlighted some of the ways large companies leverage on their dominant position vis-à-vis smaller businesses (see Box below). This was based on a survey conducted by FSB, involving all its members (SMEs across sectors, including the construction industry).

Box 11: Payment practices most resented by UK SMEs

The FSB established a classification of the five payment practices most resented by UK small firms, based on the survey responses they received:

1. **Flat fees – "pay to stay''**: also known as "supplier assessment charges'' or "supplier investment payments''. These are flat charges which companies levy on suppliers, either as a requirement to be on a supplier list, or packaged as an investment into hypothetical future business opportunities. It is often indicated that non-payment will result in de-listing.
2. **Excessively unfair long payment terms – "pay you later''**: many companies insist on payment terms of 90, or even 120 days. In effect, this becomes an interest free loan from firms in the supply chain to large companies with excessive payment terms.
3. **Exceeding payment agreements – "late payment''**: as well as insisting on unfair long payment terms, many companies are routinely exceeding agreed terms, or changing terms retrospectively to allow them to miss agreed payment dates. Also thought to be common is the practice of extending payment dates if money is owed on, or close to, the end of a financial reporting date in order to smooth a big company's balance sheet.
4. **Discounts for prompt payment**: prompt payment discounts are arbitrary discounts big firms give themselves for paying early, or even just on time. For example, a firm that has agreed to pay 120 days following receipt of an invoice may also apply an automatic discount of three per cent, if they pay on or before the 120th day.
5. **Retrospective discounting**: some firms seek to apply retrospective discounts to outstanding money

172 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

173 Charles Russel Speechlys, Late payment and the Prompt Payment Code: Where to from here, 2019. https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/constuction-engineering-and-projects/2019/late-payment-and-the-prompt-payment-code-where-to-from-here/

174 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

175 Constructing Excellence, The Payment Minefield, 2016. http://constructingexcellence.org.uk/wp-content/uploads/2016/07/Payments-Minefield-%E2%80%93-A-review-of-payment-practices-within-the-UK-Construction-industry.pdf

176 Access to finance for MSMEs is often more expensive than for large companies, as the risk perception of banks is higher because of e.g. lack of collateral, or the lack of relevant credit information.

owed to a supplier. This involves the company effectively changing the terms of the contract signed with the supplier after a contract has been agreed. Methods used to extract these vary, but include threats of de-listing, withholding payment, and previously unagreed discounts applied to specific volumes of business.

Source: FSB, 2017.

Because of their weaker positions, SMEs not only tend to accept longer payment terms, but also avoid using dispute mechanisms in cases of late payments. First, SMEs want to maintain good relationships with contractors[177,178]. Second, SMEs may not be aware of the legislation governing late payment in their country – reflecting the relatively low awareness of SMEs about the EU Directive on Late Payment. Third, SMEs often lack the resources (time, knowledge, labour or capital) that would allow them to deal with a dispute. In fact, a survey conducted in the UK, finds that: "*30% of small businesses said that a failure to challenge contract terms was at least in part due to the asymmetry in market power between parties. A further 34% would have liked to have challenged the other party, but did not have the knowledge or resources to do so*"[179].

The fundamental freedom of contract in business-to-business relations continues to result in bigger companies taking advantage of their stronger position on the market, and a major number of creditors claim to not exercise their rights regarding interest and compensation for fear of damaging commercial relationships.

Source: EPRS, 2018[180].

Importantly, power imbalance can also exist between the main contractor and PAs. Though the latter should lead by example, there has been several cases where PAs have been found paying their contractors late. In fact, some studies have shown that across all sectors, PAs are often even less punctual payers than businesses[181]. In these cases, contractors tend to avoid entering into litigation by fear of being treated unfavourably afterwards[182]. Therefore, leveraging dominant positions to push for unfair long payment terms or late payment occurs at several stages in the construction supply chain. For instance, in Italy, 92% of the construction companies report to have suffered from at least one serious unfair practice by PAs such as requests to delay the issue of the invoice, or to abandon the default interest in the case of late payments, or unjustified and excessively long payment terms[183]. This is an area where Directive 2011/7/EU has proven to be relatively ineffective – because it does not define and address grossly unfair practice.

Power imbalance reinforces the long and late payment practices in the construction sector. SMEs are particularly affected, as they are further exposed to (lack of) liquidity or issues relating to their cashflow, which in turn may lead to lower capacities to expand and invest in their productivity, or in the worst case may cause their insolvency and bankruptcy.

177 Gough, Construction subcontractors forced to accept contracts or lose business, 2016. https://smallbusiness.co.uk/small-businesses-urged-get-ready-winter-2535493/

178 Bibby Financial Services, Subcontracting growth, 2018. https://www.the-channel-partnership.co.uk/uploads/SubcontractingGrowth2018-WEB_Io8c0YYd.pdf

179 Federation of Small businesses, Time to Act - the economic impact of poor payment practice, 2016. https://www.fsb.org.uk/static/517120db-2555-473f-a6ceb5c661d569fb/Time-to-Act.pdf

180 European Parliament, Directive 2011/7/EU on late payments in commercial transactions - European Implementation Assessment, 2018. http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/621842/EPRS_IDA(2018)621842_EN.pdf

181 Intrum, European Payment Report, 2019. https://www.intrum.com/media/5755/intrum-epr-2019.pdf

182 Interview with construction sector stakeholder.

183 Associazione Nazionale Costruttori Edili, Osservatorio Congiunturale sull'Industria delle Costruzioni, 2018. http://www.ance.it/docs/docDownload.aspx?id=42965

Takeaways

The nature and structure of the construction supply chain influences the extent and impact of (unfair long payment terms and) late payments in the sector. Beyond its fragmentation, the power imbalance in the supply chain partially conditions the improvement regarding (or deterioration of) late payments. Hence, unfair long payment terms and late payments are not merely a legal and formal issue, but also a result of informal practices and relationships.

To tackle the long payment terms/late payment issue effectively in the construction sector requires considering each actor's power in the supply chain relationship. However, doing so is not a straightforward process, and may raise further questions: what type of public interventions could effectively shift the power balance in the supply chain? At which level should such a public intervention take place – EU or EU MS (or both)?

4.
Policy initiatives

Late payment is a complex and multifaceted issue, with no single straightforward solution[184]. Chapter 4 hence provides an overview of the main policy initiatives tackling late payment in the construction sector, with a view to highlight, whenever possible, their challenges, opportunities and lessons learnt.

This Chapter starts by looking at preventive measures, i.e. policies and instruments that address unfair long payment terms and/or late payments before they take place. These include different tools ranging from stricter payment terms; transparency of payment practices; invoice management measures; awareness-raising campaigns; codes of good practices; and mediation measures. The Chapter then looks at corrective measures, i.e. those aiming to correct and remedy late payments after the latter happened. They mostly concentrate around three types of instruments: dispute resolution mechanism, sanctions and mediation measures. A distinction is made in the Chapter between “hard” (binding) and “soft” (non-binding) regulations.

In doing so, this Chapter also highlights that combining both preventive and corrective measures and hard and soft regulations is in fact not exceptional in the European countries analysed, and that the policy response to tackling late payment in the construction sector may very well lie in a smart type of policy mix.

Background

This Analytical Report specifically looks at those policies that focus on late payment in the construction sector in the selected set of countries. Whenever possible and relevant, examples from other EU MS were included. As presented in the Table below, policy-makers use a wide range of hard and soft policies and instruments to tackle late payments.

Table 1: Policies and instruments tackling late payments in the construction sector in the EU

Countries	Hard regulations				Soft regulations	
	Stricter regulations	Transparency of payment practice	Invoice management practice	Dispute resolution system & sanctions	Awareness raising activities	Codes of good practices
Spain					√	
France		√	√	√	√	
Ireland	√			√		
Italy						√
United Kingdom	√	√	√	√	√	√

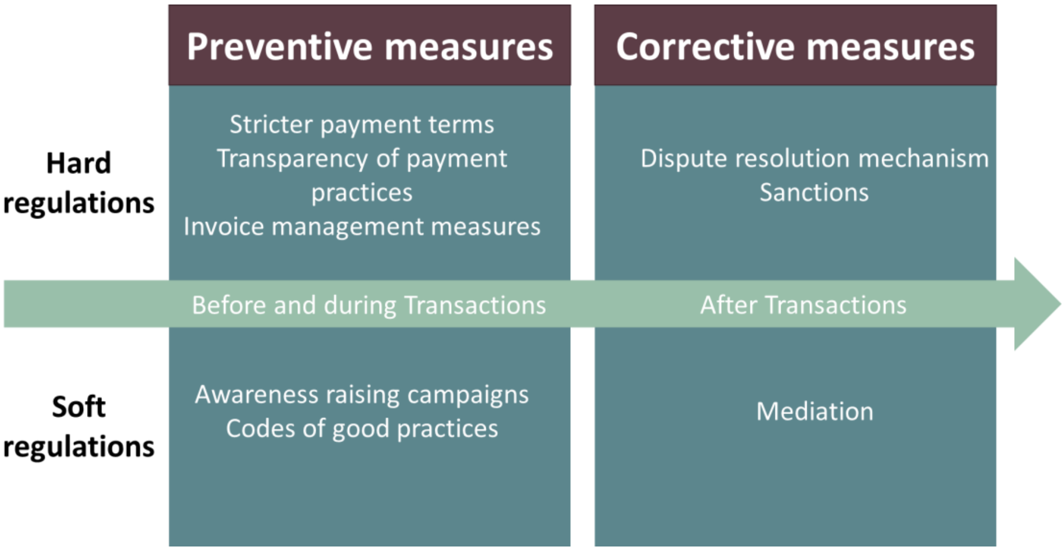
Source: Based on European Commission, 2018[185].

[184] European Commission, Minutes: 8th meeting of the late payment expert group - Directive 2011/7/EU, 2018. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=26766

[185] European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

Policy-makers often use hard and soft regulations[186] that tackle late payment in the construction sector upfront, i.e. the so-called "preventive measures"; and downstream, i.e. namely the "corrective measures". On the one hand, preventive measures often aim to raise awareness and inform construction companies about late payment; and facilitate the payment process by addressing some of the causes relating late payment (e.g. the time-consuming payment process). On the other hand, corrective measures provide for dispute settlement mechanisms and sanctions, allowing to remedy late payments after they took place (See Figure below).

Figure 13: Policies and instruments tackling late payments in the construction sector



Source: Adapted from European Commission, 2018[187].

This already indicates that policy-makers:

1. Find it relevant to develop complementary (to the EU regulatory framework) national and sectoral regulations;
2. Tend to adapt their approach to the late payment issue by implementing preventive and corrective policy measures; and
3. Do not only regulate but also tailor to the extent possible public policies and instruments to incentivise construction private and public debtors to adapt/change their payment behaviour.

The sub-sections below delve in each type of policies and instruments mentioned above, with a view to better understand their design and implementation, and their benefits and drawbacks.

Preventive measures

Hard regulations

Binding preventive measures in the construction sector include stricter payment terms, invoice management measures and more recently transparency of payment practices.

[186] Please refer to the terminology section for the definitions of hard and soft regulations.

[187] European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

Stricter payment terms

Stricter payment terms refer to hard regulations providing for stricter and/or shorter maximum payment terms than those of Directive 2011/7/EU. They are often used to protect the cashflow during construction work, ensuring a certain level of liquidity in the supply chain, and promote shorter payment periods. While several European countries have put in place stricter or shorter maximum payment terms for their national economy than those of Directive 2011/7/EU, Ireland is the only country in the sample to have designed and implemented them specifically for the construction sector[188]. The UK also implemented shorter payment terms, though only applicable in cases where companies don't provide payment terms in their contract.

Box 12: Stricter payment terms in the UK and Irish construction sectors

The UK Construction Act[189] stipulates that, in case the parties fail to provide a final date for payment in relation to a construction contract, the maximum payment terms will amount to 24 days. While it has the merit to push construction companies to pay faster, its scope is limited. It does not apply to contracts where payment terms are agreed and clearly stated, thus limiting its potential use and impact.

Based on the UK experience[190], Ireland developed its own Construction Contract Act, which was adopted in 2013. Ireland follows a different approach: the main contractor/subcontractor and subcontractor/sub-subcontractor contracts are governed by the Schedule to the Construction Contracts Act. The latter requires that payment should be made every 30 days after the relevant payment claim date (unless shorter terms are agreed in the contract). This approach is explained by the initial rational of the Irish government to combat poor payment practices in the construction sector generally and in particular for tier 2 subcontractors and lower tier subcontracts[191].

While stricter payment terms in the construction sector are "a step in the right direction"[192], as even in the case of late payment they have the potential of shortening the whole payment duration, their objectives, i.e. to promote faster payment and reduce power imbalance along the supply chains, remain to be analysed. In fact, a major issue relates to the power imbalances that discourage contractors to claim their rights if the payment terms are not respected. A possible addition to stricter payment terms that could help enhance their implementation would be to have a governmental (or non-governmental organisation such as construction associations) play the role of monitoring body, to check whether the provisions relating to stricter payment terms are enforced. Last, the automatic application of fixed interest rates in case of late payment could also be a way to change positively payment behaviour in the sector.

In addition, setting up stricter payment terms is not a straightforward process. In some countries, the proposal to set specific maximum payment terms per sector encountered strong opposition. For instance, in the Netherlands, where such a proposal was opposed by the National Competition Authority, as it was not in line with e.g. standard contracts for some occupations e.g. electricians or plumbers[193]. In the case of Hungary, an SME representative noted that there is a greater support for voluntary measures than legislative

188 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

189 UK Housing Grants, Construction and Regeneration Act 1996. Part II. http://www.legislation.gov.uk/ukpga/1996/53/data.pdf

190 William Fry, Construction Contracts Act 2013, 2014. https://www.williamfry.com/docs/default-source/2015-pdf/construction-contracts-act-2013.pdf?sfvrsn=0

191 Cunningham, The Construction Contracts Act 2013 - An Overview, 2017. https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1069&context=beschreoth

192 Cunningham, The Construction Contracts Act 2013 -An Overview, 2017. https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1069&context=beschreoth

193 European Commission, Minutes: 8th meeting of the late payment expert group – Directive 2011/7/EU, 2018.https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=26766

intervention, because of fear that stricter payment terms could lead to insolvencies in the sector[194]. This may also explain why construction specific stricter payment terms are not widespread in EU MS.

Both Construction Acts in the UK and Ireland forbid the "pay-when-paid" clause in construction contracts[195], which was considered as a key change.

In doing so, these EU MS bring an end to the process whereby late payment by an employer (client) is passed onto subcontractors[196]. However, as in the case of stricter payment terms, the theory and practice differ. The "pay-when-paid" clauses are still quite common among the sector whether in Ireland[197], or in the UK[198], especially as sub-subcontractors and subcontractors favour maintaining good relationships with their clients.

Imposing stricter or shorter payment terms through binding regulations seem to encounter mixed results according to the Irish and UK experience. Two issues tend to come up. The first one is that companies generally rarely support the introduction of stricter or shorter payment terms. Secondly, and directly related to the first issue, even in cases when policy-makers go ahead in implementing such initiatives, companies still seem to apply longer and/or more flexible payment terms, depending on their power position in the supply chain (the other party accepting it against their will). Both seem to be related to the fact that there is no monitoring and enforcement mechanism, checking whether the construction sector generally applies the Construction Act provision in their contracts and that there are rarely consequences for public authorities and enterprises who ignore the respective provisions/bans.

Invoice management measures

Another way to address the late payment issue is to facilitate the payment process, notably through the introduction of Project Bank Accounts (PBAs) and electronic invoice systems, with a view to improve cashflow among other objectives.

Put simply, PBAs are ring-fenced accounts from which payments are made directly and simultaneously by the client to certain parties of the supply chain[199]. As a result, first tier subcontractors do not have to wait for contractors to be paid, to get paid (and the underlying objective is that the same goes on as we go downstream in the supply chain). PBAs are hence a (financial) vehicle, but they do not affect the procedures for valuing and certifying payments.

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194 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

195 There may be exceptions. For instance, in the Irish Construction Contract Act, exception arises in the event of a liquidation of an employer within the contractual chain

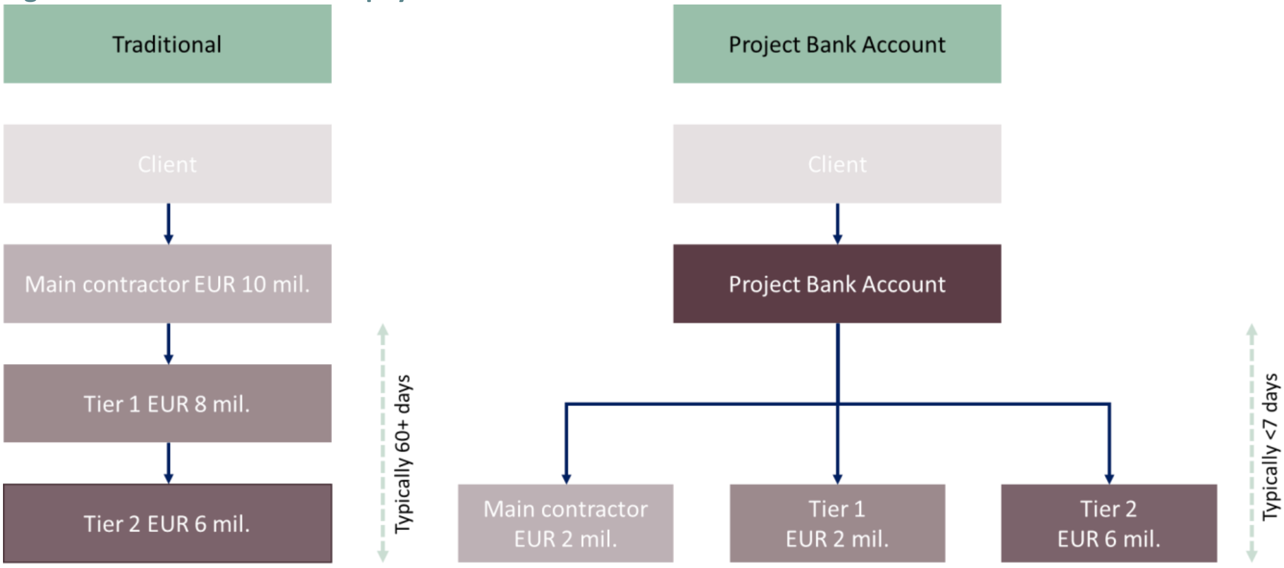
196 Cunningham, The Construction Contracts Act 2013 – An Overview, 2017. https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1069&context=beschreoth

197 Cunningham, The Construction Contracts Act 2013 - An Overview, 2017. https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1069&context=beschreoth

198 Beale&Company, Construction Law Update: Late Payment - Is the Construction fit for Purpose?, 2018. https://beale-law.com/uploads/files/Webinar_Late_Payment_Is_the_Construction_Act_fit_for_purpose.pdf

199 Designing Buildings Wiki, Project bank account, 2019. https://www.designingbuildings.co.uk/wiki/Project_bank_account

Figure 14: PBAs vs traditional payment channel



Source: Construction Future Wales, 2017[200].

PBAs provide several benefits (see Box below).

Box 13: Benefits of implementing PBAs

PBAs help ensure:

1. Certainty of payment;
2. Security of payment (in the event of insolvency administrations cannot touch the money and banks cannot use the right to offset)[201];
3. Speed of payment for tier 1 subcontractors and further downstream the supply chain, thus improving cashflow and contributing making SMEs solvent and viable[202];
4. Transparency and predictability;
5. Visibility of the supply chain;
6. Reduction in the need for borrowing or financing credit and hence of cashflow issues;
7. Reduction in the need to chase payments, including those relating to retention; and
8. Reduction in the number of disputes.

Some parts of the UK were pioneering the use of PBAs. Northern Ireland was the first to introduce the requirement to use PBAs in January 2013 for all construction projects above GBP 2 million (EUR 2.4 million). Their experience is reported to have generated positive results (such as improved cashflow)[203], especially for construction SMEs. In 2016, Scotland announced that PBAs would be used on all building projects with a value of more than GBP 4 million (EUR 4.8 million) from October 2016. In 2019, the Scottish government reduced its threshold to GBP 2 million (EUR 2.4 million) for building contracts; and introduced a PBA requirement for civil engineering projects worth GBP 5 million (EUR 6 million) and above. Wales also followed these examples, by requiring PBAs for all building projects above GBP 2 million (EUR 2.4 million) as

200 Construction Futures Wales, Project Bank Accounts, 2017. https://www.slideshare.net/RaeSDavies/construction-futures-wales-project-bank-accounts

201 Ing, Explainer: How do project bank accounts work? 2019. https://www.building.co.uk/focus/explainer-how-do-project-bank-accounts-work/5099705.article

202 Pirie, Project Bank Accounts in construction contracts: to implement or not? 2019. https://www.harpermacleod.co.uk/hm-insights/2019/april/project-bank-accounts-in-construction-contracts-to-implement-or-not/

203 The Construction Index, Project bank accounts please Northern Ireland's supply chain, 2019. https://www.theconstructionindex.co.uk/news/view/project-bank-accounts-please-northern-irelands-supply chain

of January 2018. Discussions are ongoing in the UK about setting up requirements to use PBA in public procurement[204]. In the EU-28, Czechia has also implemented PBAs for specific set of projects[205].

However, recent discussions also highlight some challenges relating to PBAs. First, they can be expensive to set up and run, requiring also a certain time to negotiate the terms of the PBA between the parties and relatively extensive documentation requirements (which may discourage PAs to demand PBAs)[206]. Second, PBAs are to some extent project specific, meaning that if parties change for a different project, a new PBA needs to be set up. Third, the construction sector still lacks understanding and sometimes awareness around PBAs, their modalities and benefits[207]. Last, PBAs scope is also limited: i) they are only applied in contracts with Public Authorities and thus not in projects where the client is a private actor; ii) they do not include subcontractors below the first-tier level. This may in turn explain why they are not common practice yet in the construction sector. Next to PBAs, electronic invoicing system may also help fasten the payment process along the construction supply chains (see Box below). Most electronic invoicing systems initiatives originate from public procurement requirements/initiatives and are thus rarely construction sector specific (but rather applicable cross-sectoral).

Box 14: Implementation of an electronic invoicing platform in France

The French government implemented Chorus Pro as an electronic invoicing platform in January 2017, in line with the EU Directive on Public Procurement and the Economic Modernisation Act (LME) of 4th August 2018. Electronic billing became mandatory for large public-sector company suppliers in 2017, for midcaps in January 2018, and for SMEs in 2019. Rollout is planned to be fully finalised with micro-enterprises adapting Chorus Pro by 2020.

As a result, "*local and departmental* authorities (payment practices) *are already averaging under 22 days – so under the 30-day legal limit, whereas regional councils are still over the 36-day mark*"[208]. This shows that in some countries, PAs are also pushed to modernise their payment systems, with a view to accelerate payments to contractors.

However, the implementation of Chorus Pro displays major challenges, including e.g. technical and operational difficulties related to compatibility issue with accounting software. The lack of integration of project managers in the validation of payment claims is also problematic[209]. Finally, there is not enough data at this stage to evaluate the real effectiveness of the measure.

In 2019, the UK government, through the Department for Business, Energy & Industrial Strategy (BEIS), announced new measures relating to e-invoicing systems. These include the creation of a new fund to encourage businesses to use technology to simplify invoicing, payment and credit management. The latter measure will provide incentives for construction companies along the supply chains to switch to paperless invoice means, eventually reducing the time (and cost) needed to send invoice to their clients[210].

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204 Designing Buildings Wiki, Project bank account, 2019. https://www.designingbuildings.co.uk/wiki/Project_bank_account

205 The Construction Index, Project bank accounts please Northern Ireland's supply chain, 2019. https://www.theconstructionindex.co.uk/news/view/project-bank-accounts-please-northern-irelands-supply chain

206 Ashurst, Project Bank Accounts: A means to make the cash flow? 2019. https://www.ashurst.com/en/news-and-insights/legal-updates/project-bank-accounts---a-means-to-make-the-cash-flow/

207 Ing, Explainer: How do project bank accounts work? 2019. https://www.building.co.uk/focus/explainer-how-do-project-bank-accounts-work/5099705.article

208 Dun & Bradstreet, Payment Study, 2018. https://www.bisnode.de/globalassets/germany/pdf-dokumente/studien/payment-study-2018.pdf

209 Economie.gouv.fr, Rapport à l'observatoire économique de la commande publique sur l'accès de TPE/PME à la commande publique et sur les délais de paiement dans la commande publique, 2018. https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/oecp/concertation/RapportOECP-accesTPE-PME-delais-paiement-2018.pdf

210 UK Parliament, Statement on new measures to protect small businesses from late payments, 2019. https://www.parliament.uk/business/news/2019/june/statement-on-new-measures-to-protect-small-businesses-from-late-payments/

While the electronic invoicing system does not have the same impact along the construction supply chain, its merit lies in the fact that it may shorten payment practices (in the French case from public bodies). This benefits directly the main contractors and may lead to the latter provide faster payment to its subcontractors, generating a positive trickle-down effect throughout the supply chain.

Another initiative in Slovakia[211], Hungary[212] and Poland[213] accelerating payment along the construction value chains includes the reverse taxation for construction goods and services. In this context, the tax is paid to the state by the purchaser of the product or by the recipient of the service. This means that the invoice will be issued by the contractor without Value-Added Tax (VAT) calculation and the tax will be paid by the buyer to the state. This helps maintaining a certain level of liquidity in the sector, thus avoiding cashflow issues, especially for SMEs. While most of these regulations apply to all sectors equally, the Slovak example (presented in the Box below) shows a construction specific reverse taxation regulation.

Box 15: National law on VAT in the Slovak construction sector

Enforced on the 1st of January 2016, one of the main provisions of the national law on VAT is the transfer of the VAT payment from the supplier directly to the client in the construction sector. This means that the construction supplier will first issue an invoice without VAT to the client. The client will, in his turn declare the VAT directly to the state and claim, if eligible the tax deduction.

As an example, construction supplier A has performed construction work for client B. The value of the work, as agreed in the contract, is of EUR 10,000 without VAT. Supplier A will issue the invoice to supplier B of EUR 10,000. Customer B will then apply the VAT tax to the price of the delivered construction work and will enter the tax in the tax return for the fiscal period and pay the tax to the state directly.

The introduction of national self-taxation of construction work is intended to remedy the unfavourable economic situation regarding the insolvency of construction customers while eliminating tax evasion in the construction sector.

Electronic invoicing system, PBAs and reverse taxation seem to be promising tools that can have both a direct and indirect impact on payment practices along the construction supply chains. As highlighted in these examples, their use is often initiated through public procurement policies, showing that late payment can be tackled not only through direct policies. Using public procurement is also a way for the public sector to use a “stick and carrot” type of approach, where they provide a market opportunity, and impose the use of such tools. The impacts appear to be positive, which may generate more interests and initiatives from public (and perhaps later from private) sector actors. However, more specific analysis needs to be done to observe the impact of these policy measures on late payment.

Transparency of payment practices

Transparency of payment practices relates to mandatory rules to disclose payment behaviour, applicable mainly to large companies[214]. This in turn can help construction companies check payment practices and the solvency of their potential clients and business partners. While there were no specific regulations on transparency of payment practice for the construction sector across EU MS, the general ones, i.e. applicable

211 TMF Group, Reverse charge extended to foreign entities in Slovakia, 2015. https://www.tmf-group.com/en/news-insights/articles/2015/december/slovakia-reverse-charge/

212 Naturasoft, Fordított áfa 2018 tudnivalók a fordított adózásról, 2018. https://www.naturasoft.hu/forditott_afa_adozas.php

213 European Builders Confederation, Position Paper - EBC position on the Late Payment Directive, 2019. http://www.ebc-construction.eu/wp-content/uploads/191025-Position-Paper-Late-Payment_EN.pdf

214 Indeed, this type of measure often target large companies as these often operate upstream in the supply chain, and can influence greatly the payment of subcontractors and sub-subcontractors. Imposing the reporting of payment practices on all companies (including SMEs) may create additional administrative burden on companies that cannot afford such costs.

to all economic sectors, have proved to generate notable development in the construction sector, as illustrated in the examples below. Importantly, while it has been demonstrated in this report that PAs also have a strong impact on late payments, the following measures only apply for companies[215,216].

In January 2017, the UK government adopted and published the UK Payment Practices and Performance Regulations, with a view to promote transparency regarding large companies' payment behaviour. The latter obliges businesses with a turnover superior to GBP 36 million (EUR 42.6 million), or a total balance sheet above GBP 18 million (EUR 21.3 million), or more than 250 employees to report on their payment practices, performance and policies on a half-yearly basis. While this measure encourages a "race to the top" where businesses improve their business practice – responding to public and peer pressure – it has also "teeth": failure to publish a report or publishing false or misleading information is a criminal offence. This may lead to sanctions in the form of a fine, distributed by the Department for Business, Energy and Industrial Strategy (BEIS).

SMEs can hence access[217] this data free of charge before engaging into a business relationship with a large construction company – even though this does not (fully) mitigate the issue of power imbalance in the supply chain. Likewise, construction associations can use the data to assess the significance of the late payment issue in the sector. While it is too early to assess the implementation of this regulation, it is interesting to note that construction newspapers and magazines are already using the data on payment practice reported[218,219].

The FSB also believes that such an approach can generate positive results and impacts in supply chains including in the construction sector. In this regard, possible ways forward could include linking payment performance to public procurement. The data provided by the UK Payment Practices and Performance Regulations could be used as one of the criteria to be considered by public procurement authorities when evaluating tenders. This way, performant behaviour could open up potential market opportunities, thus rewarding good practices, rather than (only) sanctioning bad practices. However, more analysis on the scope, implementation modalities and implication should to be conducted to assess its relevance and effectiveness.

France follows a different approach than the UK when it comes to transparency of payment practice. To increase transparency about adherence to payment times, companies whose annual financial statements are certified by an Auditor, are now required to report on their payment times in their Management Report[220].

215 PwC, Payment practices and performance reporting, 2017. https://www.pwc.co.uk/services/risk-assurance/insights/payment-practices-and-performance.html

216 economie.gouv.fr, Délais de paiement : les règles à connaître, 2019. https://www.economie.gouv.fr/dgccrf/Publications/Vie-pratique/fiches-pratiques/Delais-de-paiement

217 This will be the case, especially if the data is provided for free. Any fees demanded may disincentivise SMEs to access and make use of such data.

218 The Construction Index, Build UK exposes poor payment record of main contractors, 2018. https://www.theconstructionindex.co.uk/news/view/build-uk-exposes-poor-payment-record-of-main-contractors

219 David, CN Payment 100 - the best and worst players revealed, 2019. https://www.constructionnews.co.uk/archive/cn-payment-100-the-best-and-worst-payers-revealed-25-03-2019/

220 Dun & Bradstreet, Payment Study, 2018. https://www.bisnode.de/globalassets/germany/pdf-dokumente/studien/payment-study-2018.pdf

Box 16: Payment reporting obligations in France

The French government, through the LME, introduced the obligation for companies[221] whose annual financial statement are certified by an auditor, to publish in their management report a breakdown of the balance of debts to suppliers by due date at the end of the last two financial years.

In doing so, companies must communicate information on their payment delay from both suppliers and clients. This allows generating data on the state of play and the impacts of late payment in the general economy and in specific sectors[222]. In addition, in the case of irregularities linked to late payment, the French authorities can check the data provided by companies and if needed sanction the latter. As a result, payment behaviours are said to have shifted in a positive manner[223].

While the cases of France and the UK differ, they both made payment performance reporting a binding requirement (though not applicable to all companies) as a way to tackle the late payment issue. They also include "teeth", which take the shape of a sanction in the case of poor payment practice. Perhaps as importantly, the fact that these initiatives generate payment practice (or other data) data available in the public domain is also an incentive for large companies to demonstrate their good payment behaviour in order to attract qualified subcontractors. Likewise, SMEs can use the data, which in turn may influence who they engage in a business relationship with, and thus slightly increase their position in terms of power balance in relationships in the construction supply chains.

Soft regulations

Non-binding preventive measures mostly focus on three types of approaches: awareness-raising campaigns, codes of good practices, and mediation measures.

Awareness-raising campaigns

Awareness-raising campaigns refer to events and information campaigns aiming to increase knowledge about issues, rights and remedies related to unfair long payment terms or late payment practices from both public and private sector actors. They may be indirect (relevant across sectors) or direct (specific to the construction sector). Awareness-raising campaigns are often led by construction associations, sometimes in collaboration and/or with the support of their national government (see examples in the Box below).

Box 17: Awareness-campaign on late payment in France conducted by the French Federation of Building

The French Federation of Building ("*Fédération française du bâtiment*–" – FFB) promoted in 2017 the use of visuals that can be inserted in invoices and payment notices to both private and public sector clients[224].

This was a practical way for SMEs to remind their stakeholders about the current policies and regulations in place on late payment, thus avoiding payment delay linked to the lack of knowledge of the late payment regulatory framework. Still in France, the national union of construction economists ("*Union nationale des économistes de la construction*–" – UNTEC) developed campaigns combatting late payments in 2019[225].

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221 This applies to companies with a turnover over EUR 8 million; and/or a balance sheet over EUR 4 million; and/or a number of employees above 50,

222 Banque de France, Rapport annuel Observatoire des délais de paiement 2017, 2018. https://publications.banque-france.fr/sites/default/files/medias/documents/odp2018_book_web2603.pdf

223 Dun & Bradstreet, Payment Study, 2018. https://www.bisnode.de/globalassets/germany/pdf-dokumente/studien/payment-study-2018.pdf

224 Fédération Française du Bâtiment, réduire les délais de paiement, 2017https://www.ffbatiment.fr/federation-francaise-du-batiment/laffb/actualites/reduire-les-delais-de-paiement.html

225 Patrigeon, Délais de paiement : les économistes de la construction veulent une clarification, 2019. https://www.batiactu.com/edito/delais-paiement-economistes-construction-veulent-clarification-55212.php

Figure 15: FFB stickers to be inserted in invoices and payment notice

Source: FFB, 2017.

The Italian association ANCE also developed an awareness campaign, especially about the EU Directive on Late Payment, for its members. In addition, the association provided on its website support information dedicated to the issue of late payments, allowing construction companies to inform themselves about what the regulations are, and what they can do in cases where they are confronted with such an issue. Furthermore, ANCE regularly monitors the payment behaviour of PAs and publishes dedicated reports.

The FSB in the UK also developed few indirect awareness-raising campaigns on late payment, including "Fair Pay, Fair Play" in 2019. The campaign aimed to provide a better understanding about the late payment issue in the UK, informing about the UK government's latest policies, and highlighting some measures the association advocates for. The campaign generated some impact on social media and led to meetings between government representatives and private sector actors to exchange about unfair long payment terms and/or late payment issues and potential ways forward. The campaign was rewarded with the Trade Body Campaign of the Year award in December 2019.

In addition, the Spanish PAs came up with a 'sustainable' way to raise awareness on late payments among all sectors in Spain, including in construction. This initiative, the *Platforma Multisectoral contra la Morosidad* (PMcM) is a multi-stakeholder platform dedicated to combatting late payment, through the implementation of campaigns, actions – including name and shame (see more details in the Box below).

Box 18: Soft measures supporting the implementation of the late payment regulations in Spain

The Spanish authorities went beyond the transposition of the regulations to limit payment durations in the country and implemented soft measures to tackle the unfair long payment terms and late payment problems.

The PMcM[226] is a cross sectorial platform implemented with the aim to combat late payments and unfair long payment terms in Spain and to promote an ethical payment culture and the compliance with Directive 2011/7/EU. The PMcM platform for instance helped identify six major construction companies in Spain that are late in paying their suppliers, thus not respecting the deadlines set by the Spanish law[227].

The president of the PMcM also takes strong positions towards the government to support the introduction of new laws and regulations to combat late payment and unfair long payment terms in the country. This was for instance the case in 2018, when Antoni Cañete (president of PMcM), publicly supported the approval of

[226] Platforma Multisectoral contra la Morosidad. http://www.pmcm.es/

[227] Infocif, Plazos de Pago en el sector de la construcción, 2015. https://noticias.infocif.es/noticia/plazos-de-pago-en-el-sector-de-la-construccion

the proposed law *Ley de Refuerzo de Lucha contra la Morosidad* (combating late payments), that was going through the parliament[228].

The platform is also supporting Spanish companies to get paid according to the terms defined in the contract and thus helps the fight against late payment practices in the country. While the initiative did not eliminate the problem, it helped mitigating it[229].

Source: PMcM Platform.

In a fragmented sector, awareness-raising campaigns have the merit to provide a common set of information and understanding about regulations and good practices regarding late payments in the construction sector. This way, long payments terms and/or late payments cannot be explained by a lack of awareness ("I did not know") or understanding. They further allow re-emphasising the need to find solutions to tackle this issue, attracting the attention of policy-makers especially in the construction sector whose share of added value to the GDP is high. At the same time, their impact is fairly limited as they rely on the public and private sector actors' good will and intentions.

Codes of good practices

Codes of good practices are non-binding measures, often led by construction associations or national governments, to incentivise construction companies to shift their payment behaviour. These often encourage – through e.g. exchange of information and practices or rewards (that benefits companies' reputation and brand or finance), companies to lead by examples and engage in a virtuous circle.

The construction supply chain payment charter (hereafter the Charter), was introduced in the UK under the lead of the government in 2014, building on the Construction Act, the Late Payment of Commercial Debt Regulations of 2013, the Fair Payment charter and the Prompt Payment Code. The Charter is based on 11 fair payment commitments[230], and targets clients, contractors and sub-contractors in the public and private sector. Members of the Charter agree to apply fair payment commitments in their activities. While the objective was to have members report their performance against a set of Key Performance Indicators (KPIs), no details were published on the KPIs and the method for monitoring compliance[231]. The Charter was revised in 2016 and 2018, but did not appear to have a strong impact on the sector. In fact, there were about 35 members in 2018 (including three main contractors and two private clients). With no monitoring and enforcement mechanisms, the Charter's impact did not reach the expected results[232].

Examples of codes of good practices specific to late payment in the construction sector also exist in another EU MS. These include for instance the Estonian Good Conduct of the members of the Association of Construction Entrepreneurs; the Latvian General conditions of the Construction Employment Contract and the Hungarian Code of Ethics for Construction Entrepreneurs (see the Box below).

[228] Platforma Multisectoral contra la Morosidad. La PMcM denuncia otro nuevo truco, una insólita modalidad de "confirming con anticipo obligatorio" que elude las obligaciones de pago a proveedores, 2018. http://www.pmcm.es/blog/post/pmcm-denuncia-nueva-modalidad-de-confirming-anticipo-obligatorio-que-elude-las-obligaciones-de-pago-a-proveedores

[229] Anales sectriales interempresas, La PMcM denuncia los palnes de pago a proveedores, 2013. https://www.interempresas.net/Ferreteria/Articulos/117595-La-PMcM-denuncia-los-planes-de-pago-a-proveedores.html

[230] Build UK, Implementing the construction supply chain payment charter, 2017. http://www.cicm.com/wp-content/uploads/2017/02/Implementing-the-Construction-Supply chain-Payment-Charter-Guidance-Note.pdf

[231] Designing Buildings Wiki, Construction supply chain payment charter, 2018. https://www.designingbuildings.co.uk/wiki/Construction_supply_chain_payment_charter

[232] The Credit Protection Association, Construction Payment Charter is 'Dismal Failure', 2018. https://cpa.co.uk/construction-payment-charter-dismal-failure/

Box 19: Code of good practices in the Hungarian construction sector

The Hungarian government introduced in its Decree 1593/2012 (XII.17.) on the Acts Preventing the Emergence of Debt Chains a standardised Hungarian construction contract template. This led the Hungarian Chamber of Commerce and Industry (MKIK) together with the Hungarian National Construction Association (EVOSZ) to prepare a Code of Ethics for Construction Entrepreneurs, approved in 2013. The objective was to provide construction entrepreneurs with ethical rules about how they should treat their stakeholders including their employees and subcontractors[233]. For instance, the Code forbids the misuse of a dominant position in the construction sector, which leads to unfair market practice (such as longer than reasonable payment terms). In case of a breach, construction companies are issued a warning (that can be public depending on the scope of the breach). This can lead to the initiation of adjudication procedures in front of the competent competition authority.

This non-binding approach was deemed most relevant by stakeholders, who noted that "*there is a greater support for voluntary measures than legislative intervention. Stricter payment terms, according to the interviewee, could lead to too many insolvencies in the construction sector, affecting the whole supply chain*".

Source: European Commission, 2018[234].

Code of good practices seems to generate some interest among the construction sector, being one of the most common initiatives across the EU. However, their modalities – if we compare the UK Charter to the Hungarian Code of Ethics for Construction Entrepreneurs, and their impact differ. Among the major differences is the monitoring and reporting mechanism, as well as the potential enforcement process (that could lead to a sanction in the case of disrespect of the Code). Monitoring and rewarding (or sanctioning) payment practices act as incentives for companies to change their payment behaviour. Without such components, code of conducts does not seem to generate the expected results.

Takeaways

A few EU MS have implemented construction specific preventive policies and instruments, showing that unfair long payment terms and late payment in the sector are a concern to policy-makers; and that sectoral policies, tailored to the sector's issues, are perceived as relevant tools to combat late payments in the same way as indirect measures.

Only very few initiatives aiming to reduce late payments practices also target PAs, while almost no initiative target PAs practices specifically, although PAs often use equally excessive payments terms as well as late payment.

Policy-makers seem to opt for a dual approach, using both soft and hard regulations, demonstrating that these are not mutually exclusive but rather complementary. Soft regulations – awareness-raising campaigns and codes of good practices, are relatively common and easier to set up than hard regulations. In fact, they can either support or provide some foundations for the implementation of hard regulations. This section also showed that policy implementation is a gradual and iterative process, including notable failures and successes, from which policy-makers can learn and adapt or update future late payment policies and instruments.

While hard regulations are developed solely by governments (sometimes under the pressure of the sector), soft regulations can be led by construction associations. It is therefore valuable to ensure a certain level of coordination and coherence while implementing such a dual approach.

233 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

234 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

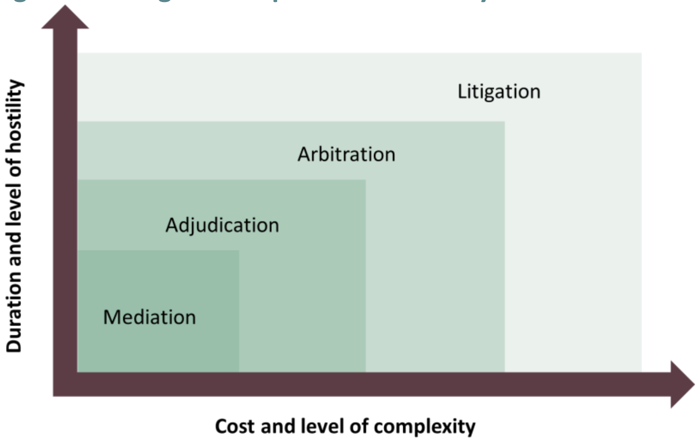
Policies and instruments combining the "stick and carrot" seem to generate traction among the construction sector. Enforcing regulations worked best when policy-makers incentivise companies to play the game, by e.g. providing them market opportunities (through public procurement); or helping them build their brands. At the same time, adding teeth to soft regulations (especially to codes of good practices) seems most needed to ensure companies' commitment.

Corrective measures

Hard regulations

The main binding corrective measures in the construction sector relate to dispute resolutions systems and sanctions. The dispute resolution systems are often composed of (sometimes) a mediation process; an adjudication process, an arbitration process, and a litigation process. In this part, we focus on the adjudication process. Each of these processes has its own characteristics in terms of costs, procedures duration, level of complexity and hostility (see Figure below).

Figure 16: Stages of dispute resolution system



Source: Adapted from Beldenlex, 2007[235].

In Ireland, the UK as well as in Hungary (see Box below), the payment dispute resolution mechanism took the shape of adjudication processes. The latter are relatively fast (20 days maximum in the case of Ireland and the UK, and 30 days in Hungary), and less expensive and demanding in terms of administrative requirements and documentations than arbitration processes.

Box 20: At the origin of the Adjudication process in Hungary

In 2013, the Hungarian government, through Act XXXIV of 2013 on the Expert Body for Performance Certification, set up the Expert Body for Performance Certification (EBPC) to respond to the increasing number of disputes in the construction sector. These disputes mainly concerned the main contractor and the client (rather than subcontractors) and tended to last for years. The EBPC must deliver its expert opinion within 30 days.

The EBPC jurisdiction applies to those cases a) where no performance certificate is issued; b) where the issuance of a performance certificate is disputed; c) where payment is not made despite being due; and d) when the ancillary obligations to guarantee the contract and their enforcement are disputed by the parties.

Source: Klee, 2014 [236]

[235] Beldenlex, Brief Comparison between Mediation, Adjudication, Arbitration and Litigation, 2007. http://beldenlex.com/training/publications/Brief%20Comparison%20Between%20Meditation,%20Adjudication,%20Arbitration%20and%20Litigation%20-%20ADR.pdf

In 2018 in Ireland, there have been 39 requests, including 32 cases which resulted in the appointment of an adjudicator. The disputes mostly concern subcontractor with the main contractor (21), followed by the main contractor and the employer (6) and the main contractor with a government agency type of employer (2)[237] on issues relating to interim and final payment (15 and 13 respectively). In 26 cases, a decision was issued by the adjudicator, which resulted for 19 cases in monetary rewards. These results may indicate that adjudication is perceived as a way to bring parties to the table, and does not lead systematically to litigation[238]. In 16 cases, the duration of the adjudication decision was less than 42 days, and 5 were less than 28 days.

Importantly, some of these numbers show that the adjudication process is not a straightforward process. It often takes more time than the initial 28 days stated in the Irish Construction Contract Act. Second, while most cases led to the adjudication, few were rejected for lack of information, showing that the construction sector still needs to "domesticate" such a process.

The limited number of cases in 2018 can be explained by several factors including:

1. The lack of awareness and knowledge of the legislation;
2. The reluctance of subcontractors to engage in a dispute in a sector where "everybody knows everybody";
3. The remaining tolerance towards the long-established payment procedures towards subcontractors;
4. The fear of potential escalating costs if a hearing is required or ordered, especially if the duration of an adjudication case is extended; and
5. A recent move in Ireland to follow the international experience towards methods of dispute avoidance, which now also exists in the latest version of the Conditions of Contract for Public works[239,240].

To address the reluctance of subcontractors to engage in a dispute, the UK government created a new type of intermediary modelled on the Australian success with a Small Business Commissioner (SBC) to assist SMEs with a large number of problems. In the late payment situation, the SBC can offer a communication channel or Alternative Dispute Resolution service, but it can also use its powers to investigate a company and inspect whether it is systematically breaking the law on late payment, and takes steps to require compliance, without identifying the individual company that made the SBC start its investigations. The anonymity of suppliers can therefore be better protected, whilst the outcome of debts being paid on time, and observance of the rules of a fair market place, are enhanced[241].

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236 Klee, International Construction Contract Law, 2014. https://books.google.lu/books?id=jVRVBQAAQBAJ&pg=PA256&lpg=PA256&dq=dispute+construction+adjudication+hungary&source=bl&ots=BPS2US-uSn&sig=ACfU3U3V-NmqmPjFYWDlDeSUlZXfnxWdSQ&hl=en&sa=X&ved=2ahUKEwjxuK_30KvnAhVHT8AKHYvCC8oQ6AEwAXoECAoQAQ#v=onepage&q=dispute%20construction%20adjudication%20hungary&f=false

237 Annual Report of the Chairperson of the Ministerial Panel of Adjudicators, Dr. Nael Bunni, on the 3rd Anniversary of the Commencement of the Construction Contracts Act, 2013. https://dbei.gov.ie/en/Publications/Publication-files/Third-Annual-Report-of-the-implementation-of-the-Construction-Contracts-Act-2013.pdf

238 Walker, Hodges & Blackburn, Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market, 2018. https://www.ukfinance.org.uk/system/files/Review-into-the-complaints-and-alternative-dispute-resolution-ADR-landscape-for-the-UK%E2%80%99s-SME-market-301018.pdf

239 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

240 According to Cox (2019), "In late 2017, the Royal Institute of the Architects of Ireland ("RIAI") published updated construction contracts. It is arguable that the RIAI contracts are not fully in accordance with the terms of the Act. While the Act provides that parties to a construction contract can refer payment disputes to adjudication "at any time", the RIAI contracts stipulate that all disputes must first go to conciliation before the parties can have recourse to statutory adjudication or arbitration." Cox, Ireland: Adjudication Article Series: How the Construction Act 2013 can impact contracts, 2019. https://www.mondaq.com/ireland/Real-Estate-and-Construction/854708/Adjudication-Article-Series-How-The-Construction-Contracts-Act-2013-Can-Impact-Contracts

241 Walker, Hodges & Blackburn, Review into the complaints and alternative dispute resolution (ADR) landscape for the UK's SME market, 2018. https://www.ukfinance.org.uk/system/files/Review-into-the-complaints-and-alternative-dispute-resolution-ADR-landscape-for-the-UK%E2%80%99s-SME-market-301018.pdf

In some cases, disputes can eventually lead to sanctions. However, the latter are rarely tailored to late payment in the construction sector, but rather apply cross-sector (see Box below).

Box 21: Administrative sanctions on late payments

> Where sanctions are concerned, the French commercial code imposes fines of up to EUR 2 million for companies that default on payment times. In terms of process, the DGCCRF, is authorised to monitor compliance with payment times.
>
> In 2018, it processed 543,000 checks, controlled 111,600 entities overall, and imposed for EUR 1.5 million fees (where the biggest fee stood at EUR 350,000) in the construction sector[242,243]. Not only does the DGCRF impose fees, but it also publishes the names of companies with a poor payment behaviour – thus using a "name and shame" approach. As a result, subcontractors can freely inform themselves about which construction company best to collaborate with. It may also incentivise large contractors to adapt (i.e. fasten) their payment behaviour[244].

While the introduction of "new" practices such as the adjudication process proved to satisfy some of the expectations from construction stakeholders (notably in terms of duration and costs), they need to be further adapted to fully fit the construction sector actors' interests and constraints. More can be done to incentivise subcontractors or contractors to use dispute resolution mechanism vis-à-vis the main contractors and (private and public) clients respectively. Specifically, sanction mechanisms seem to have an impact on companies' payment behaviour, when monitored.

Soft regulations

Mediation measures

Mediation is a dispute resolution method where a neutral third party, the mediator, assists parties resolve their dispute amicably[245]. This process, non-binding, allows providing a better understanding of the needs and interests of the actors involved, so that they can find an agreement to solve their dispute. In doing so, actors can preserve their business relationships, and avoid a legal process that can be time, financially and emotionally consuming. This is an important aspect to consider in a sector where SMEs partly depend on their relationships with the main contractors to keep and expand potential business opportunities. In addition, consensual dispute approaches are preferred over adjudication, arbitration and litigation, which are considered as last resort type of solutions[246].

While most mediation measures are applied across sectors, the Danish government set up the Danish Building and Construction Arbitration Board in 1973. The latter offers dispute resolution in the field of building and construction following the General Conditions for the Provision of Works and Supplies within Building and Engineering of 10 December 1992 (AB 92)[247].

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242 Direction Générale de la concurrence, de la consommation et de la répression des fraudes, Résultats 2018 de La DGCCRF, 2018. https://www.google.com/search?rlz=1C1GCEU_en&ei=hbExXoKfB5GM8gKztqCABg&q=dgccrf+combien+audit+2018&oq=dgccrf+combien+audit+2018&gs_l=psy-ab.3...20643.21674..21866...0.0..0.84.569.8......0....1..gws-wiz.70YzNMMxeZg&ved=0ahUKEwjC9fWXnKnnAhURhlwKHTMbCGAQ4dUDCAs&uact=5

243 Banque de France, Rapport de l'Observatoire des délais de paiements 2018, 2019. https://publications.banque-france.fr/liste-chronologique/rapport-de-lobservatoire-des-delais-de-paiement

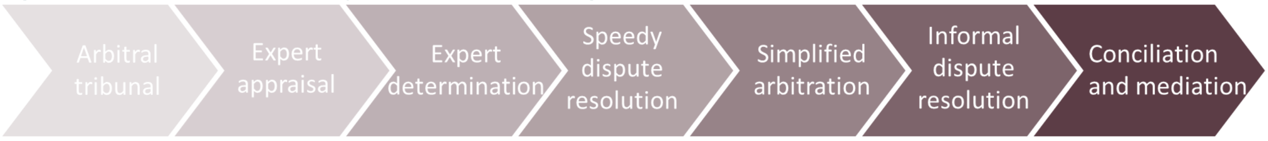
244 Batiactu, Retards de paiement : Bercy dresse le bilan 2018, 2019. https://www.batiactu.com/edito/retards-paiement-bercy-dresse-bilan-2018-55573.php

245 CIC, Built environment professions together, Mediation. http://cic.org.uk/services/mediation/

246 European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour, 2018. https://op.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1

247 Voldgiftsnævnet Byggeri Og Anlæg, The Danish Building and Construction Arbitration Board. https://voldgift.dk/the-danish-arbitration-board/?lang=en

Figure 17: Services offered by the Danish Building and Construction Arbitration Board



Source: Danish Building and Construction Arbitration Board, 2020[248].

However, the work of the Danish Building and Construction Arbitration Board mostly focuses on expert appraisal and determination, as well as arbitral cases. Mediation and conciliation are hence not part of the most common cases. In 2017, approximately 40% of all arbitral cases ended with a settlement, while about 50% of cases ended with an award or some other ruling. The remaining 10% of cases were withdrawn or otherwise discontinued[249]. In France, while there are no specific mediation measures as in the case of Denmark, some construction associations such as the FNTP have inserted a mediation clause[250].

While disputes in the construction sector are relatively common, few countries have dedicated specific or tailored mediation mechanism for the construction sector. Even when they do so, as in the case of Denmark, the mediation component of the Danish Building and Construction Arbitration Board was not extensively used. This may indicate that this type of instrument may not address the fear of damaging business relationships and/or getting a bad reputation construction SMEs have, or that knowledge about the mechanism is too low. More generally, mediation and conciliation – though increasingly used, are sometimes conducted outside a formal environment. This may also explain the limited use of “formal” mediation bodies.

Takeaways

Dispute resolution mechanisms – from meditation to adjudication and arbitration are complex (and last resort type of) processes. Businesses, sometimes encouraged by regulations, tend to increasingly favour mediation over adjudication, and adjudication over arbitration and litigation. Generally, informal process including mediation and conciliation are less time and resource consuming than the more formal process and tend to help preserve business relationships. In this context, arbitration and litigation are mostly used when the disputes amount to an important sum of money.

The soft and hard corrective measures complete each other. However, more needs to be done to provide tailor-made dispute resolution mechanisms to the construction sector. This is evident, looking at the limited use of dispute resolution mechanisms, which is explained by the fear of harming business relationships with more powerful actors, whether these are main contractors or public and private employers. The lack of awareness of construction companies of these measures and their modalities and implications may also explain their limited use.

[248] Voldgiftsnævnet Byggeri Og Anlæg, Case types and rules. https://voldgift.dk/sagstyper/?lang=en

[249] Voldgiftsnævnet Byggeri Og Anlæg, Statistics. https://voldgift.dk/statistik/?lang=en

[250] FNTP, Contrat de sous traitance du BTP, Conditions générales, 2018. https://www.fntp.fr/sites/default/files/content/conditions_generales_du_contrat_de_sous-traitance_-_edition_2018.pdf

5. Lessons learnt

Despite the adoption and implementation of Directive EU 2011/7/EU late payments remain a major issue for the construction sector, hindering its sustainable development. Notably, late payment is not only a problem in B2B relations. Often the payment discipline of PAs is even worse than that of private companies. Late payment may even become more prominent with the EU construction growth predicted to slow down in the next few years[251]. As explained in Chapter 3, unfair long payment terms and late payments are the results of both formal (contracts, payment process, etc.) and informal (power imbalance in relationships) practices, which are based on structural aspects of the construction sector and its supply chains. This makes late payments a complex and multifaceted issue to tackle.

Policies and instruments tackling late payments in the construction sector at the national level are relatively recent. They take the shape of hard and soft regulations, which aim to address late payments upstream (before they take place) or downstream (after they take place). In addition, unfair long payment terms are addressed by different legislative initiatives. Based on the analysis conducted in the previous chapters of this report, Chapter 5 provides a set of insights and lessons learnt on the issue of unfair long payment terms and late payments in the construction sector. It first starts with general observations, before presenting in-depth lessons that were learnt from the EU and EU MS experiences in tackling unfair long payment terms and late payments.

Observations

> **There are two principle observations made from the analysis in this report: the need for an increase in (regular and consistent) data, and for more coordination among direct and indirect policies, and between public and private sector actors.**

More needs to be done regarding data collection, analysis and harmonisation (across EU MS) on unfair long payment terms and late payments in the construction sector, both at the national and EU levels. While the collection and analysis can be done by national authorities (and/or construction sector associations), the definition and type of indicators measuring unfair long payment terms and late payments should be harmonised and coordinated at EU level. This would help to better inform the design and implementation of late payment policies and instruments. So far, data on late payments in the construction sector is relatively scarce (especially on the impacts of late payments) and scattered (collected by different public and private organisations, sometimes following a different methodology). Data collection should not only focus on B2B relations, but PA2B as well. PAs should regularly report on their payment behaviour in a transparent way. In general, late payment policies and instruments in the construction sector are too rarely accompanied by thorough monitoring and evaluation systems that could generate useful quantitative and qualitative data on unfair long payment terms and late payments (their state of play, cause and impacts).

More effort is required to ensure coherence and synergies between public procurement and late payment policies. Public procurement can act as an incentive for companies to improve their payment practices and behaviours, by rewarding good payers. Policy-makers, hence, need to think about late payment from a

[251] GWMI, Euroconstruct: Growth in the European construction sector forecast to decrease in the next two years, 2019. https://www.globalwoodmarketsinfo.com/euroconstruct-growth-european-construction-sector-forecast-decrease-next-two-years/

holistic perspective, and ensure that they exploit possible synergies with other sectoral/thematic policies without disproportionally increasing administrative burdens for micro and small enterprises

Ensuring coordination between policy-makers and construction sector initiatives is an important aspect that will help maximise impact on unfair long payment terms and late payments. For instance, synergies between initiatives focusing on data collection and analysis can be built to provide stakeholders with a robust overview of the state of play of late payment in the construction sector. In other cases, codes of good practices can be used as a step towards regulations. For instance, in Hungary, the code of good practices, if not respected (and depending on the type of violation of the code) can lead to administrative sanctions.

Policy insights

The EC developed several initiatives that contribute to tackling late payments across sectors, including Directive EU 2011/7/EU. The latter developed a comprehensive regulatory framework, set up by Directive 2000/35/EC, further at the EU and EU MS levels, emphasising the value of an EU approach to late payment. In addition, it helped level the playing field, by setting up the same payment terms across EU MS. However, as recently highlighted by the European Parliament[252], the Directive "should be better enforced, promptly and effectively". Three main aspects – linked to power imbalance in relationships—hinder its implementation in the construction sector:

1. The possibility to derogate the payment deadlines of 30 days and 60 days in PA2B and B2B transactions respectively. This "loophole" is exploited by dominant players (e.g. main contractors and PAs) to impose unfair long payment terms and thus to pay late without legal consequences.
2. The possibility to extend the verification process beyond 30 days, which is sometimes used to extent payment periods artificially.
3. The voluntary waiver to the remedy measures provided by the Directive – claiming interests, compensations or initiating court proceedings. These are measures used by construction actors to avoid harming their relationships with their business partners ("fear factor").

In addition, the EC also uses indirect policies, such as the EU Directive on Public Procurement to tackle the issue of late payments. While its impact on late payment has not been studied, public procurement regulations are worth taking note of because they provide incentives (market opportunities) to influence the payment behaviour of construction companies. In addition, Directive 2014/24/EU gives subcontractors the opportunity to claim payment from the contracting authority directly. However, this provision is not (yet) commonly used by PAs. As the latter (PAs) bear a special responsibility in the combat against late payment, they could make increasing use of this provision. Lastly, PAs more generally should pay their suppliers on time, as stipulated by the EU Directive on late payment.

This dual approach (direct and indirect direct policies and instruments) is mirrored in several European countries such as France, and some parts of the UK. One example is the required use of the PBAs for all construction projects above GBP 2 million (EUR 2.4 million) in Northern Ireland, since 2013. This public procurement regulation tackles late payments, ensuring that the construction supply chain (from contractors to tier 1 subcontractors) is paid in due time. In France, the implementation of "Choruspro", an e-invoicing system mandatory in public procurement, also aims to accelerate the payment process with maximum transparency.

[252] European Parliament, Resolution of 17 January 2019 on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions, 2019. http://www.europarl.europa.eu/doceo/document/TA-8-2019-0042_EN.html

Some EU MS went beyond implementing cross-sectoral late payment policies and instruments and put in place specific tools to tackle late payment in the construction sector specifically. They adapted their approach to the construction sector and its supply chain characteristics. Keeping in mind the complex and multifaceted nature of late payments, policy-makers often combine hard and soft regulations to address late payment upstream (preventive measures) or downstream (corrective measures).

Most of the policies and instruments focus on preventive measures, and combine both hard and soft regulations, proving that these are not mutually exclusive, but rather complementary. Common soft regulations include awareness-raising campaigns and codes of good practices and can be led by both policy-makers and construction associations. Their merits mainly lie in the fact that they i) help inform and raise awareness of companies; ii) incentivise companies to shift their payment behaviour instead of forcing them to; and iii) can often be used as a basis for hard regulations. However, more can be done to maximise the impact of these soft regulations. Firstly, beyond simply informing SMEs, it is important to improve the knowledge and capacities of SMEs on credit and invoice management, through e.g. training, in order to help entrepreneurs taking well-informed decisions that affect their cashflow and solvency. Policymakers and/or construction associations could integrate such a training into their programmes focusing on raising awareness and informing companies on unfair long payment terms and late payment. Secondly, the impact of codes of good practices highly varies depending on whether it is accompanied by a monitoring mechanism (sometimes reporting on company's performance). To generate a change in companies' behaviour, monitoring and rewarding (or sanctioning) payment practices seems to act as an incentive for companies to act on the issue of late payment. Without such components, a good practice code of conduct does not seem to generate the expected results.

Preventive hard regulations include stricter or shorter payment terms; electronic invoicing system and PBAs; and payment performance reporting. As highlighted in this report, stricter or shorter payment terms regulations have not yet had much impact largely because, similarly to the codes of good practices, they were also lacking a proper monitoring and enforcement mechanism (sanctions), which did not incentive PAs and companies to change behaviour. Electronic invoicing system, PBAs and payment performance reporting seem to be promising avenues to improve construction companies' and PAs payment behaviour, but more specific analysis needs to be conducted to analyse and confirm this. Payment performance reporting helps generate payment practice data, available in the public domain, and can help inform SMEs about whether or not to engage in a business relationship with a large construction firm. Last, though not yet implemented, the introduction of a retention deposit system could help address the issue of abuse of retentions in the construction sector. Such a system would keep retentions in a third-party trust scheme. This would reduce the amount held in retentions when buyers see that they can no longer use suppliers' cash to support their own business model[253].

Corrective measures developed by policy-makers consist of mediation (soft regulation), dispute resolution mechanisms and sanctions (hard regulation). This Analytical Report concluded that, even when tailored to the construction sector, mediation mechanisms (soft regulation) are not [yet] extensively used. More generally, mediation and conciliation tend to be conducted outside of a formal environment. This may also explain the limited use of "formal" mediation bodies.

Dispute and resolution mechanisms (hard regulation) seem to have more traction among the construction sector. This is especially true of the adjudication process, which takes less time and resources than the arbitration and litigation processes and tends to preserve business relationships. Arbitration and litigation are mostly used when the disputes amount to a significant sum of money. However, while the introduction

[253] Designbuildings (2019). Construction (Retention Deposit Schemes) Bill 2017-19. https://www.designingbuildings.co.uk/wiki/Construction_(Retention_Deposit_Schemes)_Bill_2017-19

of novel practices, such as the adjudication process, proved to satisfy some of the expectations from construction stakeholders (notably in terms of duration and costs), the practices need to be further adapted to fully fit the construction sector actors' interests and constraints. Construction players in a weak position in the supply chain (i.e. subcontractors vis-à-vis contractors, or contractors vis-à-vis public and private clients) are still reluctant to use dispute resolution mechanisms. Therefore, an effective enforcement framework should be put in place to help businesses defend their rights when they are paid late; and allow them to access adequate compensation. This may include the possibility for SMEs to remain anonymous, letting the PAs independently investigate the large construction companies.

Closer monitoring and reporting of payment behaviour in the construction sector, accompanied by possible sanctions, also seem to be effective mechanisms to tackle late payments. For instance, the French authorities formally assessed several companies, investigating their payment practices, and where relevant, fined companies for their bad payment behaviour. Next, they published the names of the companies, the rationale for the fees, and the fees themselves on their website, thus "shaming" the companies. It may seem threatening to the construction sector to impose proportionate administrative sanctions when there is a violation, however its effect on late payments had a positive influence on the French economy. Therefore, it could be argued that this practice will have positive effects on the construction sector in the long run.

Lastly, as the construction sector is particularly affected by late payments, it may be valuable to set up a platform where information and good practices can be exchanged at the EU level. Such a platform could be a sub-group of the existing European Late Payment Expert Group and could include public authorities and construction associations. This link could be beneficial as it would provide information about other sectoral practices relevant to the "Late Payment in Construction Expert Sub-group". This group could put on the agenda the discussion on possible preventive and corrective measures for late payments, and the directions to implement them through soft or hard regulations.