

WELSH CONSTRUCTION FORUM



A 12 EASY STEP GUIDE
SETTING UP A
**PROJECT
BANK ACCOUNT**
IN WALES

MINISTERIAL FOREWORD

The Welsh Construction Forum was established in June 2020, following the introduction of Covid19 lockdown measures, to allow public and private sectors to discuss and to address joint areas of concern across the construction and infrastructure sectors in Wales.

Industry partners identified priority areas which needed to be addressed to create a more sustainable environment for businesses to thrive and to better deliver the infrastructure, buildings and housing needed in Wales. One of these priority areas was the need for fair, prompt and secure payment for supply chains.

Cashflow is the lifeblood of any business, and it has been the policy of the Welsh Government that Welsh Government departments apply Project Bank Accounts (PBAs) to all government funded projects over a £2million threshold to safeguard payments unless there are “compelling reasons” not to do so. This supports our commitment to increase business confidence, to strengthen our foundation economy and to support the growth of SMEs in Wales.

I am pleased that the collective efforts of the Forum have quickly led to the development of this simple guidebook to support the implementation of PBAs across the sector and to complement existing Welsh Government policies and guidance. This is an important step forward in improving the business environment in which we deliver construction and infrastructure projects across Wales and I would urge both public and private sector partners to apply it on all appropriate projects.

Lee Waters MS, Deputy Minister Climate Change

PURPOSE OF THIS GUIDEBOOK

This Guidebook has been prepared by members of the Welsh Construction Forum to support the implementation of Project Bank Accounts (PBAs) on all appropriate construction and infrastructure projects in Wales.

The aim of the Guidebook is to provide construction clients and members of the supply chain with 12 simple steps to ensure that PBAs can be established as quickly and as easily as possible to safeguard payments during the course of a project.

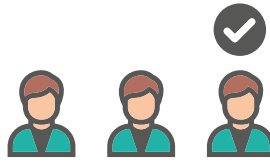
**THIS GUIDEBOOK COMPLEMENTS EXISTING DETAILED GUIDANCE
PRODUCED BY THE WELSH GOVERNMENT WHICH CAN BE ACCESSED HERE**



Whilst the development of the Guidebook has involved a number of Forum members specific acknowledgement is accorded to Michelle Morgan-Loughman and Professor Rudi Klein of Actuate UK (Wales) who drafted the document.



STEP 1
WHY PBAS?



STEP 2
WHO WILL SET UP THE PBA?



STEP 3
THE INVITATION TO TENDER



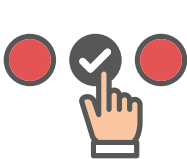
STEP 4
PBA TRUSTEES



STEP 5
PBA BENEFICIARIES



STEP 6
DECIDE WHICH
CONTRACT TO USE



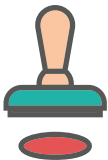
STEP 7
DECIDE HOW TO
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STEP 8
SOLE OR JOINT
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STEP 9
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STEP 10
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STEP 11
ENSURE PBA PROVISIONS IN
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STEP 12
DOUBLE-CHECK STEPS 1-11
HAVE BEEN ADDRESSED

12 EASY STEPS

IN SETTING UP A PROJECT BANK ACCOUNT (PBA)

STEP 1 WHY PBAs?



The reasons for introducing PBAs are three-fold:

- to improve the regularity and velocity of payments to the supply chain;¹
- to reduce the impact on the supply chain of upstream insolvencies;
- to encourage collaborative working.

The benefits include:

- facilitation of compliance with fair payment requirements (e.g. Code of Practice: Ethical employment in the supply chain: “Ensure that our suppliers are paid on time – within 30 days of valid receipt of invoice”, para 5.2)
- reduction in risk of failure of supply chain firms and consequent disruption caused to projects;
- reduction in cost to suppliers of late/non-payment (e.g. cost of borrowing necessitated by late payment);
- reduction in the bureaucracy, cost and disputes associated with having multiple layers of payment systems on projects;
- automatic visibility and auditability for the client of the timing and amounts of all payments made to the supply chain via the electronic banking process.

¹ By using PBAs Highways England have been able to ensure that all sub-contractors (including sub-sub-contractors) are paid with 19 days of the assessment dates under the tier 1 contracts.

STEP 2 WHO WILL SET UP THE PBA?



A decision will have to be made on who sets up the PBA – client or tier 1 contractor. If the client has a longstanding banking agreement it is likely to be easier and quicker to stipulate that the client's bank will provide the PBA facility. Also, if a client has an on-going programme of work utilising PBAs it is easier for them if they select the PBA bank as it will enable them to standardise the set-up and operation process. Given the time involved in setting up PBAs (which could be a number of weeks) the sooner this is done the better. Go to Step 8 for advice on whether the account should be in the joint names of the client and tier 1 contractor or in the sole name of the later.

The PBA option in NEC 4 [option Y(UK)1] requires that the tier 1 contractor sets up the PBA but the banking arrangements must be approved by the client. Those banks offering PBA facilities should be researched in advance.

STEP 3 THE INVITATION TO TENDER



Make clear the following in the Invitation To Tender (ITT)

- all payments certified or authorised by the client will be deposited in a PBA;
- the PBA assets (i.e. the sums deposited by the client) will be held in trust for the benefit of the project participants (beneficiaries) listed in the ITT²;
- payments out of the PBA will be made to the beneficiaries listed in the ITT; (if beneficiaries are not known they can be identified by other means - see Step 5)
- if the successful tenderer is to set up the PBA, this should be done within a maximum period of 4 weeks from contract award.³

² The reason for attaching trust status to the PBA monies is that they are protected (i.e. ring-fenced) in the event of the insolvency of the tier 1 contractor.

³ If a bidding tier 1 contractor is required to set up a PBA it will need to gather together all the necessary banking documentation in readiness for the possibility of being awarded the contract.

STEP 4 PBA TRUSTEES



The ITT should state that the client will be a trustee of the PBA alongside the tier 1 contractor.⁴

It is recommended that clients adopt one form of trust deed for all their projects and include a copy in the ITT. The trust deed must be signed by the client and tier 1 contractor alongside the contract. This deed simply confirms the names of the trustees and beneficiaries (if known when the deed is signed), and that the PBA monies are held by the trustees in trust for the beneficiaries (see step 6). A sample trust deed can be found at Annex 6 of the Guidelines for deploying Welsh Government Project Bank Account Policy (WPPN 04/21).

WELSH GOVERNMENT PROJECT BANK ACCOUNT POLICY



⁴ As trustees of the PBA monies the client and tier 1 contractor must ensure that the beneficiaries (i.e. the tier 1 contractor and sub-contractors) are paid their due payments from the PBA.

STEP 5 PBA BENEFICIARIES



The ITT should list the PBA beneficiaries

These will include the tier 1 contractor and sub-contractors. Since the names of the supply chain firms are unlikely to be known the ITT could simply list the beneficiaries by reference to their trades (e.g. cladding, steel, mechanical, electrical and plumbing, plastering/drylining, ductwork etc). Alternatively, the ITT could simply state that the beneficiaries will be those sub-contractors delivering at least 1% of the value of the tier 1 contract at award stage. Supply chain firms selected after the trust deed has been signed by

the tier 1 contractor, can be added as beneficiaries to the trust deed by virtue of a joining deed. The joining deed confirms that the sub-contractor is a beneficiary of the PBA monies which are held in trust by the named trustees. A sample joining deed can be found at the Guidelines referred to under Step 4 (where it is also referred to as a deed of adherence).

STEP 6 DECIDE WHICH CONTRACT TO USE



The two main standard form contracts have a PBA option or supplement. The NEC PBA option has a trust deed but the JCT supplement doesn't; however, the supplement makes clear that the parties have agreed that the PBA assets will be held in trust.

A client does not need to use the trust deed offered by any standard form. It is recommended that their legal advisor develops a form of deed that best suits their requirements; this is particularly relevant where clients have an on-going programme of work as it again helps to standardise the PBA process.

STEP 7 DECIDE HOW TO OPERATE THE PBA



The key document is the bank mandate (the agreement with the bank) which will identify the account holder(s) and which party(s) has authority to trigger payments out. If the tier 1 contractor is the sole account holder the client should approve the banking arrangements and have visibility of the account to monitor payments

Clients with an on-going programme of work should consider appointing an internal administrator and naming this person on the bank mandate.⁵ This will make the set-up of any future PBA much simpler as the administrator will already have been cleared by the bank.

The key documentation likely to be required by the banks comprises:

- the trust deed;
- account opening form;
- mandate forms (a sample can be found at Annexe 6 in the Guidelines referred to under Step 4);

These documents will require input from both the client and tier 1 contractor. Other forms may be required such as an Entity Classification Form to confirm tax residency. It would be helpful if public sector clients were to open a dialogue with banks to ensure that bank documentation fits in with public sector needs.

⁵ This will also apply to tier 1 contractors setting up a PBA.

STEP 8 SOLE OR JOINT ACCOUNT HOLDERS



Ideally your ITT should state that the PBA account holders will be the client and tier 1 contractor

On this matter the standard contract PBA options are different. The NEC option Y(UK)1 places the responsibility on the tier 1 contractor to open the account as the sole signatory. If the client wishes to be a joint account holder it may be necessary to amend this using a Z clause. The JCT option provides for the client and tier 1 contractor to be joint account holders.

If the client and tier 1 contractor are joint account holders it should be emphasised that the contractor continues to be responsible for managing supply chain payments.

The Guidelines mentioned under Step 4 indicate that both options offer the same level of security but there are advantages and disadvantages for the client in using either. For example, the sole account option means that there will be a reliance on the contractor to expedite the opening of the account. On the other hand, there may be internal restrictions which prohibit having joint accounts with suppliers.

STEP 9 ENSURE PAYMENT VISIBILITY FOR THE CLIENT

Where the tier 1 contractor is the sole account holder the contract should give the client visibility over the instructions to the bank regarding the payments proposed to be made.



NEC4 Contracts require that the tier 1 contractor sets up the PBA within 3 weeks of the contract date. The project manager must approve the banking arrangements and the instructions (authorisation) to the bank to make the required beneficiary payments. This is a tight timescale and, again, the tier 1 contractor is strongly advised to have a conversation with its bank to resolve outstanding matters in order to meet this deadline. The risk is that a tier 1 contractor could go into insolvency at the outset of a project owing a significant amount of monies to its supply chain which could be lost because the PBA isn't in place.

It would be helpful if the client was given "step-in" rights in the bank mandate. Such rights enable the client to step in where, for whatever reason, the tier 1 contractor fails to issue any necessary instruction to the bank.

STEP 10 ENSURE UNQUALIFIED ASSENT

Once tenders have been returned there should be a check on the payments proposed to be made to ensure there has been unqualified assent to the PBA requirements.

This is to forestall, following award, any attempt at whittling down the requirements.



STEP 11 ENSURE PBA PROVISIONS IN SUB-CONTRACTS

Clients should ensure that the tier 1 contractors insert the following PBA provisions into all beneficiary sub-contracts.



- they name the PBA bank;
- they name the trustees;
- they confirm that the sub-contractor is a beneficiary under the PBA trust;
- they require the sub-contractor to sign the joining deed;
- they require that the sub-contractor is notified of the amounts to be paid into the PBA in respect of its works and/or services, and
- they align their payment cycles with those in the tier 1 contract.⁶

⁶. Some beneficiaries may have a contractual right to be paid early (e.g. on delivery or within a 7 day period following delivery/ completion of work). The tier 1 contractor may need to make the appropriate arrangements with the client to ensure that the necessary monies are paid into the PBA to facilitate any early payments.

STEP 12 DOUBLE-CHECK STEPS 1-11 HAVE BEEN ADDRESSED

Before contracts are signed double-check to ensure that all the matters set out in steps 2 to 11 have been addressed in the contractual package and have been implemented.



NEED MORE HELP?

WHAT ARE THE MINIMUM REQUIREMENTS FOR A PBA?



HOW DOES THE PAYMENT PROCESS WORK?



PBA ACTIONS DURING PROCUREMENT AND CONTRACT MANAGEMENT



CASE STUDY - IMPLEMENTING A PBA AT A LOCAL AUTHORITY



WELSH GOVERNMENT E-LEARNING



WPPN 04 21 GUIDELINES FOR DEPLOYING WELSH GOVERNMENT PROJECT BANK ACCOUNT POLICY

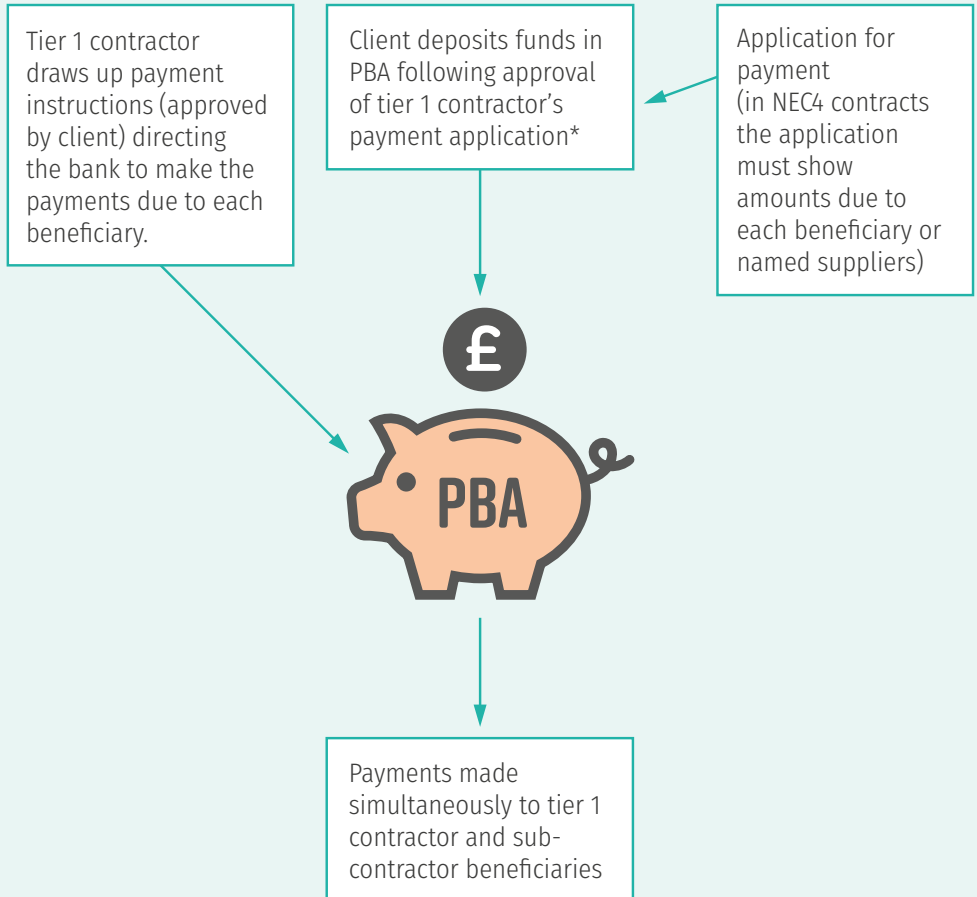


WHAT ARE THE MINIMUM REQUIREMENTS FOR A PBA?*

1. The account needs to be linked to a trust deed so that the money is ring-fenced and can only operate with the parties' joint agreement.
2. The banking service should not materially alter the operation of the trust deed or PBA.
3. Beneficiaries must be joined to the trust deed by a joining deed.
4. Dual agreement required before payments are made.
5. The bank must be informed and acknowledge that a trust deed exists and that the operation of the payment process will be covered by the deed.
6. Clients must be able to view transactions from the bank report not more than 1 day after payment.
7. All beneficiaries should be paid at the same time.
8. Payments from the PBA should only be able to be made to the contractor and other named supplier beneficiaries.
9. There are no cheque facilities.
10. There are no overdraft facilities.
11. The PBA bank must confirm that the monies are held in trust and cannot be used to offset any other contractor/supply chain liabilities.
12. The tier 1 contractor must inform the client and relevant supply chain firms and trustees of any changes to the PBA with respect to alterations to any terms and payment authorisations.

*This is a summary of the minimum requirements listed in A Guide to the Implementation of Project Bank Accounts (PBAs) in construction for government clients published by the Cabinet Office, 3 July 2012 and reproduced at Annex 1 in the Guidelines for Deploying Welsh Government Project Bank Account Policy, Version 2.2 or the Guidelines was published in February 2021 as WPPN 04/21

HOW DOES THE PBA PAYMENT PROCESS WORK?



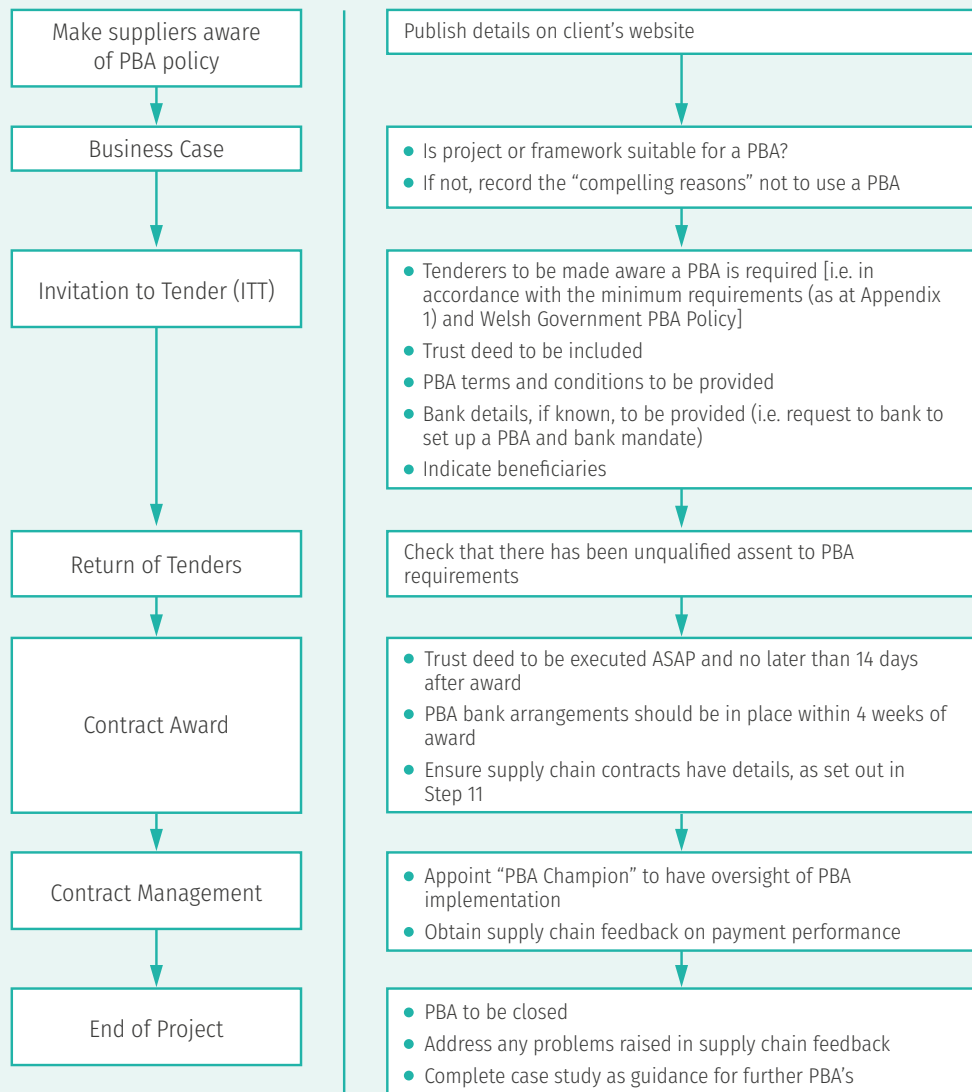
*The client and tier 1 contractor will need to decide on entitlement to interest earned while the funds are in the account. Clause Y1.3 in NEC4 Option Y (UK) 1 states: "Unless otherwise stated in the Contract Data, the Contractor pays any charges made and is paid any interest paid by the project bank. The charges and interest by the project bank are not included in Defined Cost"

PBA ACTIONS DURING PROCUREMENT AND CONTRACT MANAGEMENT

STAGE

ACTION

[see <http://prp.gov.wales/toolkit/>]



21ST CENTURY SCHOOLS PROGRAMME PROJECT BANK ACCOUNT TRIAL – WHITMORE HIGH SCHOOL

BACKGROUND

The 21st Century Schools Programme is a long term strategic investment in educational estate throughout Wales. It is a unique collaboration between Welsh Government, the Welsh Local Government Association (WLGA), local authorities, colleges and diocesan authorities. The Vale of Glamorgan Council has an ambitious 21st Century Schools Programme which will see more than £135m invested in school buildings across the Vale between April 2019 and March 2024. More information on the Council's 21st Century Schools Programme can be found on the Council's website.

Welsh Government confirmed that the use of project bank accounts (PBAs) would be a condition of funding for projects over £2million. The Council decided to trial a project bank account as part of the 21st Century Schools Programme to establish a process for future schemes. A £30.5m scheme to deliver a new build school for Whitmore High School in Barry was identified to trial PBAs. Morgan Sindall were appointed to deliver the scheme.

PROJECT BANK ACCOUNTS

PBAs are ring-fenced bank accounts with trust status that act solely as a receptacle for transferring funds from the client to the lead contractor and supply-chain. A PBA is simple and cost effective to set up and operate for all parties and provides insolvency protection for the money been paid into the PBA.

The main benefits associated with PBAs are:

- Payments are accelerated through the supply chain;
- Supply chain spend and payment flows are transparent and provide a mechanism to measure payment timescales down the supply chain;
- Payment terms through the supply chain are determined by the client rather than contractors further up the supply chain;
- Risks & costs linked to payment delays are mitigated through faster payment;
- Risk of supply chain failure is reduced as a result of improved cash flow;
- Supply chain achieve cost benefits resulting from early and certain payments;
- Provide a mechanism to measure payment timescales down the supply chain; and
- All monies paid into the account are secure.

APPROACH

The Council used this opportunity to fully review the existing payment processes for construction schemes in order to maximise the benefits associated with PBAs. A whole-council approach was adopted, bringing together colleagues from accountancy, procurement, accounts payable, ICT and legal. A project was launched to establish a new process for PBA payments and to ensure the Council was ready to establish the first PBA.

This included:

- Mapping out the full payment process, including setting monthly dates for valuations, submission of invoices, payment of invoices and payments from the PBA;
- Establishing the minimum requirements for the PBA;
- Reporting to the Council's Audit Committee;
- Drafting the relevant documentation, including the trust deed and deeds of adherence; and
- Establishing key performance indicators (KPIs) and monitoring arrangements.

OUTCOME

The first PBA was successfully established for the Whitmore High School scheme. All contractor invoices have been paid into the PBA since the start of the project. The Council has streamlined the payment process with invoices being paid into the PBA within 5 days of submission to the Council. This has significantly improved the timescales for payments through the supply chain and has encouraged positive relationships between the Council, the contractor and suppliers. Auditing arrangements have also been streamlined as the Council is able to track payments throughout the supply chain through the PBA. Within the first 12 months of the PBA, more than £6million was paid directly to suppliers through the PBA.

LESSONS LEARNT

Following the establishment of the PBA, the Council undertook a lessons learnt review for future projects. The key points are outlined below.

- Ensure early engagement with the contractor to agree documentation prior to the setting up of the PBA.
- Establish a process for the execution of deeds of adherence to ensure these can be turned around quickly. Also ensure the relevant delegated authority is obtained in advance.
- The Council's preference is the 'Sole Account' model, whereby the PBA is in the name of the contractor only. This removes the need for the Council to trigger the PBA payment each month which would increase administration.
- Ensure early engagement with the supply chain to ensure they are aware of the benefits of PBAs and understand how they work.

FUTURE WORK

Since the establishment of the PBA for the Whitmore High School scheme, the Council has established 3 further PBAs with different contractors. All of these PBAs have used the Council's agreed documentation and payment process. Establishing PBAs is a simple process with very little additional workload required.

The main contractors and suppliers have been fully supportive of PBAs and have echoed the many benefits. The Council is now looking to take PBAs a step further to maximise the benefits throughout the supply chain. This includes looking at retentions and increasing the number of suppliers within the PBA.

Welsh Government guidance notes that PBAs must be used for projects over £2million. However, now that the Council has an established process, PBA would be utilised for projects below this threshold in the future, dependent on the length of the scheme and the composition of the supply chain.