

Position Paper

UEAPME'S position paper¹ on the Commission's proposal on the late payments directive (recast) COM (2009)126

Executive summary

1. UEAPME appreciates the Commission's efforts to shorten payment periods for public authorities, but this is insufficient as there is no maximum time limit set for those exceeding 30 days.
2. The introduction of compensation rights for recovery costs and the proposal to allow creditors to charge interests for late payments has to be welcomed, but it has to be turned into an obligation.
3. UEAPME is on favour of the introduction of a maximum payment period in B2B relations of maximum 60 days.
4. Unacceptable is the Commission's decision to exclude business-to-consumer transactions from the scope of the proposal. This will leave small businesses undefended against late or missing payments from private customers.

Introduction

The proposal to amend directive 2000/35 on late payments, adopted by the European Commission on 8th April 2009, is according to UEAPME, to be welcomed but will not fully protect small businesses. The proposal can certainly not be considered as the application of the "Think small first approach".

The question of late payments has been a concern of UEAPME for a decade. Although the precise nature of the problem varies from member state to member state, there has been a wide support from all the member organisations for measures that would encourage prompt payments. It has to be underlined that late payments do not only undermine the EU objectives of growth, competitiveness and employment, but also act as a significant obstacle to the single market for SMEs. This is because of the costs and uncertainties that late payments create.

UEAPME has welcomed the European Commission's approach on this and, at the time of the approval of the directive 2000/35, UEAPME strongly welcomed it and expressed the wish that the Commission would continue to monitor the European late payments situation through extensive studies and other means.

Since many years² UEAPME has also advocated for a review of the directive in order to respond to clear shortcomings, such as the exclusion of B2C contracts. It is also regrettable that the Commission proposal comes 5 years after the in the directive foreseen review date³.

¹ This position represents the views of UEAPME with the exception of its member Företagarna, which only agrees with the chapter on the Public Sector.

As the reasons and the causes for late payments are quite diverse, there is no one size fits all solution. Legislation alone cannot solve the problem, but legal solutions have to be explored and improved as much as possible.

The SMEs themselves and the owner managers have an important role to play. Indeed many SMEs still lack an efficient credit and financing management. They could e.g. start already by issuing invoices promptly. Much more use should be made of the available financial information on clients⁴. A lot can still be done by public authorities and the business organisations to raise awareness about the existing legislation and many SMEs have not adapted their general clauses to the existing legislation.

Late payment is also in contradiction with Corporate Social Responsibility. Indeed, in order to maintain an enterprise's reputation, it's important to consistently 'do the right thing' in all of the working relationships. In practice, a good reputation can be achieved by satisfying customers, settling invoices on time and remaining committed to ethical business practices. This reputation is crucial to ensure success in the marketplace⁵.

SMEs suffer more than larger firms from late payments. Large businesses owe more money to SMEs than SMEs owe to them. SMEs have in fact a weaker negotiating position compared to larger organisations. Additionally, smaller businesses usually do not have the expertise and resources to commit to debt collection that larger organisation have at their disposal. Another major reason why smaller businesses tend to be owed more than they owe, is that there is much less scope for them to obtain generous credit terms - larger firms, on the other hand, can use their negotiating strength to obtain much more favourable payment terms. The impact of late payments on SMEs performances is also likely to be more damaging.

UEAPME has always insisted on a holistic approach of the problem of late payment by the Commission that between other should take also competition into account. Indeed, the Directive has not achieved to prohibit abuse of freedom of contract of the creditor. More and more, and this has even worsened with the economic crisis, we see that SMEs are in fact pre-financing the big enterprises. Today one cannot say that there is contractual freedom: big enterprises have such a power that SMEs do not have any possibility of negotiation anymore. Therefore UEAPME is in favor of the introduction of a maximum payment period in B2B relations.

The often used argument that this will have consequences for the other points of negotiation between enterprises, such as the price, eventual discounts etc, is not valid, as already today big enterprise are abusing there power and position to obtain discounts and lower prices from their SME-providers.

The period in which enterprises pay other enterprises should be limited to maximum 60 days.

² See the UEAPME position paper on late payments, 2006.

³ Article 6.5 of Directive 2000/35 states indeed: "The Commission shall **undertake two years after 8 August 2002 a review** of, inter alia, the statutory rate, contractual payment periods and late payments, to assess the impact on commercial transactions and the operation of the legislation in practice. The results of this review and of other reviews will be made known to the European Parliament and the Council, accompanied where appropriate by proposals for improvement of this Directive."

⁴ These are also the recommendations made in the "Review of the effectiveness of European Community legislation in combating late payments" DG Enterprise, October 2006, Contract 30-CE0039936/00-92, p.253

⁵ See: Corporate Social Responsibility for SMEs: Documentation Centre, p.8
http://ec.europa.eu/enterprise/csr/campaign/documentation/download/questionnaire_en.pdf

Late payment: also a huge problem in B2C relations

As UEAPME has always highlighted, the problem of late payment is not limited to Business-to-business relations, but occurs also in business-to-public authorities (State, cities...) and business-to-consumers relations. Late payments are a real plague in commercial relations affecting the overwhelming majority of enterprises. The scope of the directive should be extended to all kind of transactions between enterprises and their clients, irrespectively of the status of the debtor. Indeed there is no objective reason at all to treat the same situation (payment of an invoice) in a different way if a consumer is involved. A common practice among consumers is not to pay the whole amount and to speculate on the inertia of the enterprises as the outstanding debt is not worth to go to court.

Late payment in B2C relations is especially a problem in the services sector and more especially in the construction sector, a sector that is suffering a lot of the financial crisis and that is confronted with late payment from all kind of clients (B2B, public authorities, and consumers).

In this time of economic crisis, SMEs are doing everything to avoid dismissing their staff. Therefore it is important that they have the necessary cash to pay them in time. Extending the scope of the directive has nothing to do with consumer protection. Consumers have, rightly fundamental rights, but also fundamental obligations.

A question raised in the debate is if the European Union has the right to act in this field (B2C). In our opinion there cannot be any doubt about it.

Indeed, different practices in agreeing payment periods and dealing with contract infringements relating to payments across Member States can increase uncertainty for retailers and service providers active within the EU when it comes to negotiating contracts; it can also increase the costs of trade in terms of the time spent negotiating and enforcing contracts. With multiple legal procedures and administrative processes to understand and respond to, retailers and service providers can incur significant costs in recovering late payments. As a barrier to trade, late payments therefore represent an obstacle to the functioning of the internal market.

Article 14 of the EC Treaty states that the EC shall guarantee the free movement of goods and services. As far as late payments constitute a barrier to the free movement of goods and service, Article 95 of the EC Treaty provides the legal justification for the Commission to apply necessary regulations, laws or administrative actions in Member States, provided its objective is the "establishment and functioning of the internal market ... [and/or] the harmonisation" of such actions.

The official reason why the Commission did not want to include B2C contracts in the scope of the directive is "that the need is not fully demonstrated."⁶ UEAPME has to contradict this argument. All our member organisations have reported⁷ that late payment is also a problem in B2C contracts in some sectors. In addition, the Commission deliberately missed the chance to collect evidence as it refused, although requested by UEAPME, to include this question in the consultation questionnaire used during the consultation last summer. Lastly, if it is not a problem in all member states, quid non, then it should also not harm to include B2C.

⁶ Letter of Vice president Verheugen, dd. 23 April 2009, to UEAPME

⁷ See 2006 Position paper.

The answer from the Commission is even more lamentable if we know that their own report “Review of the effectiveness of European Community legislation in combating late payments” states⁸ that: “It is virtually impossible today to obtain for the EU precise statistical information on the administration of claims resulting to undisputed debts.”

UEAPME request the Council and the EP to extend the scope of the directive to business to consumer relations.

Public sector

UEAPME is of the opinion that the text of the proposed article 5 will not fulfil the expectations and the laudable objectives of the Commission. Indeed, the proposed text still does not forbid member states to pay later than 30 days. It is still an option for them, although then they have to pay compensation according to art 5.4. This will not solve the problem as some Member States will apply this possibility to pay compensation. UEAPME is in favour of a clear prohibition.

In addition, article 5 could be significantly improved. Indeed, we think that especially in times of crisis, when SMEs are struggling to keep their employment level stable, it is unacceptable that public authorities pay SMEs late. We also understand that sometimes flexibility is needed as mentioned in article 5 and the principle of contractual freedom must apply. But the period in which public authorities pay enterprises should be limited as SMEs don't have a real negotiation power towards public authorities and thus the contractual freedom is in practice a fiction. Therefore UEAPME insists to introduce in article 5.3a a maximum period of [60] days.

Article 5.3a of the proposal could be formulated as follows:

“3a. Member States shall ensure that no period for payment longer than the time limits provided for in paragraph 2.b) is fixed in the contract unless it is specifically agreed between the debtor and the creditor and is duly justified in the light of particular circumstances such as an objective need to schedule payment over a longer period, that should not exceed [60] days.”

We also fear that the exemption “duly justified in the light of particular circumstances such as an objective need to schedule payment over a longer period” is too general and will be misused by public authorities. There are indeed no criteria to evaluate the justification, or what can be accepted as a justification. In addition, the public authorities will be judge and party at the same time.

The period in which public authorities pay enterprises should in principle be limited to maximum 30 days. Exemptions on this principle are only allowed in some limited duly justified cases and can never exceed 60 days.

⁸ Review of the effectiveness of European Community legislation in combating late payments. DG Enterprise, Contract 30-CE0039936/00-92, October 2006.

Charging of interests

The main problems SMEs have to face concern the length and costs of the claims and the problem to add interest rates. Very often, in fact, SMEs have the weaker position in the contract. The other party is their major client and they do not dare to ask for interests. In some cases, even judges do not award interests automatically. Therefore we suggest that interest rates would be applicable automatically in case of late payments. In this case enterprises would not have the necessity to apply them as they are legally imposed.

The right to charge Interest rates should be turned into an obligation.

Monitoring

The Commission should monitor the European late payments situation through extensive studies and annual reports by the Member States. An evaluation of the improvements and a proposal for amending the directive should be made two years after the entering into force of the directive.

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