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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL on the implementation of Directive 2011/7/EU of the
European Parliament and of the Council of 16 February 2011 on combating
late payment in commercial transactions

Delegations will find attached document COM(2016) 534 final.

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the implementation of Directive 2011/7/EU of the European Parliament and of the
Council of 16 February 2011 on combating late payment in commercial transactions**

{SWD(2016) 278 final}

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1. PURPOSE OF THE REPORT

In accordance with Article 11 of Directive 2011/7/EU on combating late payment in commercial transactions¹ (hereinafter the "Directive"), the Commission shall submit a report to the European Parliament and the Council on the implementation of the Directive, accompanied by any appropriate proposals, by 16 March 2016. Since the Late Payment Directive is an initiative adopted under the Regulatory Fitness and Performance Programme (REFIT) of the Commission², this evaluation also falls under REFIT to monitor progress on the implementation of the Directive and to ensure that it is on track to deliver its expected benefits.

This report is provided in response to the requirement established in the Directive.

2. ASSESSMENT OF EFFECTIVENESS, EFFICIENCY, COHERENCE, RELEVANCE AND EU ADDED VALUE

The Directive was adopted on 16 February 2011 with a deadline for transposition into the national laws of all Member States of 16 March 2013.

The specific objectives of the Directive are:

- To provide creditors with timely payments and measures that enable them to fully and effectively exercise their rights when paid late
- To confront debtors with strict measures that discourage them from paying late or from establishing excessively long contractual payment terms

The Directive also pursues the following general objectives:

- To facilitate the functioning of the internal market by streamlining payment practices across the EU
- To develop a legal and business environment supportive of timely payments in commercial transactions in order to facilitate access to finance for SMEs

This report assesses whether the Directive is on track to achieve its intended objectives and includes recommendations on how to improve its implementation. There are three key factors that rendered a definitive ex-post evaluation a challenge: the recent entry into force of the Directive; the difficulty to isolate the role of the Directive in changes seen on the ground; external conjuncture such as the financial crisis and the economic situation of certain Member States.

In the context of this evaluation the Commission used:

¹ OJ L 48, 23.2.2011, p. 1–10, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011L0007>

² http://ec.europa.eu/smart-regulation/refit/index_en.htm

- (1) An external study³, carried out in 2015, which included:
 - Desk research of the national laws transposing the Directive and associated soft measures, cross country data on average payment periods collected by private organisations and other publicly available information (e.g. academic literature, national sources).
 - An online representative survey as well as a public consultation with a total of 2950 full responses.
 - 135 interviews with stakeholders from public authorities and businesses across the EU and 31 follow-up interviews.
- (2) Consultation of national experts and EU-level business organisations in the context of the Late Payment expert group⁴ meeting on 24 November 2015.
- (3) Complaints, feedback and queries received from stakeholders.
- (4) Publicly available information: reports, surveys, studies etc.

The evaluation of the Directive was conducted against five criteria: effectiveness, efficiency, coherence, relevance and EU added value. It reveals that:

- (1) The Directive has raised awareness of the problem of late payment and has placed the issue high on the political agenda. Due to its strengthened measures and new requirements for public authorities in particular, the implementation of the Directive has sparked considerable interest at Member State level. In response, governing authorities in a number of Member States are adopting structural and voluntary measures to support the provisions of the Directive in order to bolster the transposing law and to address specific national issues in this context. As a result, companies are becoming increasingly familiar with the rules related to late payment and their rights.
- (2) The EU average payment period is slowly decreasing in both the public and private sectors. However, the external ex-post evaluation revealed that public entities in more than half of all Member States are not yet respecting the 30-day limit imposed by law. In some of these cases, supplementary efforts are being undertaken and the overall trend is already showing signs of improvement. In the private sector, with the exception of a handful of Member States that record poor figures in this area, the periods established in the Directive appear to be broadly respected.
- (3) Approximately half of all creditors do not exercise their rights to claim late payment interest, compensation and recovery costs as provided for by the Directive for fear of damaging their commercial relationships. The external evaluation also revealed that many SMEs continue to accept long payment terms imposed by larger companies for the same reason. This is an inherent aspect of business culture brought about by the different position of

³ <http://bookshop.europa.eu/en/ex-post-evaluation-of-late-payment-directive-pbET0415875/>

⁴ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail&groupDetail&groupID=2710>

companies in the supply chain, their size and degree of dependency on each other, as well as other factors such as the market sector specificities.

(4) There is little evidence to date that the Directive has had a measureable impact on businesses' liquidity and facilitated cross-border trades. Recognising that the Directive has so far not had any major impact on payment behaviour, it is likely to take more time before these general objectives are attained. Furthermore, due to the multi-faceted nature of late payments, it will remain challenging to determine whether observed changes on the ground are due exclusively to the Directive or are also dependent on other factors such as, for example, a general improvement in economic conditions.

(5) On the one hand, several factors have contributed to an effective application of the Directive. These include measures adopted at national level (i.e. prompt payment codes) that have successfully supported the objectives of the Directive. Additionally, forums that enable the exchange of best practices between Member States on how to tackle late payment, such as the Late Payment expert group prove beneficial. Finally, continued awareness raising and expertise-sharing by the Commission and by national experts was found to be useful.

(6) On the other hand, certain obstacles have been noted that may hinder an effective application of the Directive:

- With respect to public authorities, Member States under adjustment programmes where prompt payment of current invoices has to be balanced against accumulated debt repayment, appear to have difficulties in respecting the Directive.
- With respect to businesses – because the Directive maintains a certain amount of flexibility in business to business transactions, this is being exploited in a number of cases by larger companies that take advantage of their stronger market position by dictating often unfair contractual terms to smaller suppliers. Furthermore, as explained above, in the event of late payment smaller companies do not exercise their rights for fear of damaging the commercial relationship. This inherent market imbalance cannot be fully remedied by legislative actions alone and a more systematic use of soft measures and out-of-court settlement procedures such as mediation and alternative dispute mechanisms would appear useful.
- The evaluation indicated that stakeholders need clarity on how to interpret several key concepts of the Directive such as "grossly unfair", "expressly", and "objectively justified in the light of the particular nature or features of the contract." The starting point in the calculation of payment periods was also considered unclear.
- The lack of a compulsory and common monitoring system makes it very challenging to verify progress made as a result of the application of the Directive.

- (7) The Directive is proving to be an efficient tool to the extent that there are limited regulatory costs resulting directly from its usage for both businesses and public authorities. Regulatory costs include, for example, reporting and administrative burden, transposition and implementation and voluntary measures that support the Directive. However, costs related to application of the Directive may be more significant particularly for businesses if a reduction in payment periods is required to respect the limits of the Directive. This would entail an initial large financial transfer, which is expected to have an impact on a company's liquidity. Overall however, the costs are deemed to be ultimately offset by the expected benefits. The external evaluation found that, for each day of reduction in payment delays, an estimated EUR 158 million is saved by European companies in finance costs⁵.
- (8) The Directive is coherent with other EU policies that aim to create a level playing field and facilitate competitiveness for businesses. The legislation is complemented by a number of EU regulations related to debt recovery. Initiatives such as the Small Claims Procedure⁶, the European Payment Order⁷ and the European Enforcement Order⁸ provide creditors with simplified procedures for debt collection that are fully coherent with the provisions of the Directive.
- (9) Late payment remains a highly pertinent and relevant issue for companies across the EU. The external evaluation found that four out of five businesses continue to experience late payments since the Directive was first transposed into Member State legal systems. Whilst the Directive has its place in the fight against late payment, 'softer' remedies that could address matters related to business culture, such as market imbalances, including those resulting from the varying size of businesses, are also needed.
- (10) There is a general consensus that the Directive generates significant EU added value. Payment practices have been streamlined across Europe, removing uncertainty, which should gradually lead to increased cross-border trading. Such objectives could not have been achieved by Member States acting differently.

3. CONCLUSIONS/RECOMMENDATIONS

The Directive is at an early stage of its lifecycle. The improvements in average payment periods remain modest to date. Although companies are highly aware of their rights stemming from the Directive, usage of them is not yet widespread. Several factors appear to prevent an effective application of the Directive such as the lack of a common monitoring system, lack of clarity on some key concepts of the Directive and the market

⁵ <http://bookshop.europa.eu/en/ex-post-evaluation-of-late-payment-directive-pbET0415875/> p.59

⁶ Regulation (EC) N°861/2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A116028>

⁷ REGULATION (EC) N°1896/2006, https://e-justice.europa.eu/content_order_for_payment_procedures-41-en.do

⁸ Regulation (EC) N°805/2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133190>

imbalance between bigger and smaller companies. However, the Directive is found to be coherent with other EU legislations and policies, is still relevant and has achieved EU added value.

On this basis, it is recommended that the Directive is maintained in its current form and that more time is needed to allow all its effects to bear fruit. In order to accelerate the hitherto positive impact of the Directive, the following actions are being suggested to Member States and will be taken by the Commission :

For Member States:

- Set up a system/procedure to monitor progress, report and publish information on average payment periods in both the public and private sectors. The Commission will provide guidance for the establishment of a common methodology for calculating payment periods and will facilitate the exchange of best practices on reporting methods in the context of the bi-annual expert group meetings.
- Maintain the issue of late payment high on the political agenda by continuing to raise awareness of the topic at national level.
- Encourage the development and implementation of supporting initiatives such as prompt payment codes, mediation, incentives for timely payment (positive naming and shaming), etc.

For the Commission:

- Run targeted studies in Member States to identify best practices in different sectors that contribute to a more effective implementation of the Directive, take stock of the results and disseminate the information via various channels.
- Continue to provide guidance to stakeholders and exchange good practices in different forms (expert group meetings, interpretative notes).
- Explore the possibility to collect comparable information on how national justice systems function when implementing the expedited recovery procedure for unchallenged claims and present the results in the EU Justice Scoreboard.
- Assess at a regular basis the Directive's impact and its success in reaching its objectives, bearing in mind that some effects are likely to take a longer time to materialise fully.