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NOTE

From:	Permanent Representatives Committee (Part 1)
To:	Council
Subject:	Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions - Policy debate

Delegations will find attached a Presidency background note on the proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions, with a view to the policy debate at the Competitiveness Council on 7 March 2024.

Presidency background note

Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions

Policy debate

1. Commission proposal

Late payment of invoices affects companies from all sectors across all EU Member States. It has a particularly negative impact on small and medium-sized enterprises (SMEs), as they rely on regular and predictable streams of cash, and have more limited access to liquidity than large businesses.

SMEs that are paid late must cover the resulting shortfall in liquidity through short-term loans, thus driving up their financing costs. Reducing late payments is a key element to provide SMEs with the much-needed liquidity to invest in innovation or to pass cost reductions on to consumers.

Therefore, the Late Payment Directive[1] was adopted to protect European businesses, particularly SMEs, and to enhance their competitiveness. Nonetheless, late payments account for 25% of bankruptcies in the EU nowadays. This led to the Commission publishing, on 12 September 2023, a proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions. The objectives are to address the shortcomings of the Directive, aiming to improve the payment discipline of all concerned actors and to protect companies from the negative effects of payment delays in commercial transactions. It is part of a wider “SME relief package” which also included a Directive on tax simplification for SMEs and the Commission’s announcement of a set of measures to simplify processes for SMEs, improve their access to finance and to a skilled workforce, and support SMEs throughout their business life cycle.

[1] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ L 48, 23.2.2011, p. 1–10.

The Commission's proposed revision of the late payment rules replaces the existing Directive with a Regulation with binding maximum payment terms of 30 days for all commercial transactions between undertakings or between undertakings and public authorities. It would make the payment of compensatory fees and interest automatic in case of late payment and flank these new measures with a robust enforcement framework. It would also make it easier for companies to assert their rights by reducing the burden of, and facilitating access to, effective redress via mediation.

According to the Commission's impact assessment, the new rules aim to reduce late payments by 35%. Furthermore, the amount of time companies spends on chasing their debtors would be significantly reduced, saving European businesses 340 million person-hours, equal to EUR 8.7 billion. Beyond the direct monetary benefits, this should redistribute liquidity more fairly in the economy and decrease the dependency of SMEs on external financing. The goal is to protect SMEs, which often lack bargaining power and are forced to accept unfair payment terms and conditions.

The instrument proposed by the Commission for the review is a Regulation. Indeed, according to the Commission it has numerous advantages, including tackling the cross-border aspect of late payment. With a Regulation, key aspects, such as the maximum term for payments and verification procedures, the rate of interest for late payments and the amount of flat fee compensation, would be the same throughout the EU and directly applicable. In this way, a level playing field across Member States on these aspects is ensured.

At the same time, Member States would be allowed to adopt more stringent provisions on certain aspects. They would retain the option to enforce a shorter payment period through national legislation. A procedure for acceptance or verification may be exceptionally provided for in national law, but only when deemed strictly necessary due to the specific nature of the goods or services. This procedure must be explicitly described in the contract and is also limited to a maximum of 30 days. Additionally, the Regulation would lay down obligations regarding enforcement bodies, mediation systems, credit management, financial literacy training and unfair contractual practices and provisions, but it would be for the Member States to complement them according to their national legislation.

The proposed Regulation would apply to payments made in “commercial transactions”, to be understood as transactions between undertakings or between undertakings and public authorities, where the public authority is the debtor, which lead to the delivery of goods or the provision of services for remuneration. This definition includes the design and execution of public works, construction and civil engineering works.

The Regulation would not apply to payments for transactions with consumers, payments made as compensation for damages, and payments in relation to debts that are subject to insolvency proceedings, including proceedings that are subject to debt restructuring.

The new Regulation would oblige Member States to designate national authorities responsible for enforcing the Regulation, which are to cooperate with the Commission and with other relevant national enforcement authorities, and would list the powers these enforcement authorities must have.

2. <u>Position of Member States</u>

Member States generally support taking into account the interests of SMEs and are closely aligned with the Commission's arguments. Many Member States consider that the establishment of predictable payment terms would improve the payment culture in Europe, better frame the freedom of contract, create a safer business environment, increase cash flows, boost investments, and thus strengthen the competitiveness of EU companies, in particular SMEs.

However, a large number of Member States and stakeholders are concerned about the Commission’s proposal as regards the Regulation’s interference with the freedom of contract, the lack of a time break for inspection of delivered goods or services, and possible conflicts with national laws. They pointed out that individual payment conditions are an important part of business contracts, and many functioning business models are based on long payment terms. From their point of view, restricting the freedom of contract would encourage companies to move contractual relationships to non-EU countries.

A large majority of Member States therefore oppose the proposed maximum payment period of 30 days which they generally consider as a disproportionate intervention of the legislator. While considering the fact that the current Directive already had an impact on the freedom of contract and that this limitation of freedom of contract is justified by the pursuit of a general interest, namely the economic health of companies and therefore the economic health of the EU, they call for more flexible rules and the possibility for business partners to negotiate their own payment terms, notably between enterprises of the same size. Longer payment periods could be mutually agreed and would not necessarily indicate unequal bargaining power. Introducing a strict cap on payment periods would entail applying the same rules to varying business situations.

Closely linked are also Member States' concerns regarding the choice of the legal instrument, in particular the fully harmonizing effect of the Regulation, which would treat a wide range of different business situations in the same manner and would leave very limited manoeuvring margin for Member States to adapt the rules to their national context.

Concerns were also raised on the administrative burden that the proposed Regulation would impose on companies and public authorities, in particular the obligation for main contractors in public works contracts to provide evidence that subcontractors have been paid.

Moreover, the establishment of national authorities to ensure compliance with the Regulation is an issue of concern for several Member States. In addition to concerns about the administrative burden and costs associated with setting up and operating these public authorities, there are also concerns about the scope of the powers conferred on them in the proposed Regulation, in particular regarding the overlap of these authorities with the competencies of courts and tribunals, which could lead to the creation of two types of parallel procedures.

3. Questions for debate

Ministers are invited to guide discussions on two aspects in particular.

- Bearing in mind the objectives of the revision of the Late Payment Directive, which aim to protect European businesses, especially SMEs, against late payments and to shift to a culture of prompt payment, Ministers are invited to express their opinions on the choice of the legal instrument.

- Considering the imperative of safeguarding the economic health of companies, particularly SMEs, and recognizing the importance of public authorities setting a precedent for prompt payment, Ministers are invited to share their views on the proposal for binding 30 calendar day payment periods. Should flexibility mechanisms be introduced to address the various situations in which businesses operate? These insights will inform discussions during future Working Party meetings.

- Bearing in mind the objectives of the revision of the Late Payment Directive and the underlying reasons, notably the lack of suitable deterrents and insufficient enforcement mechanisms, Ministers are invited to share their views on the proposed enforcement authorities. While respecting the competencies of courts and tribunals regarding civil disputes, should control and enforcement mechanisms be implemented to reduce late payments in commercial transactions ?