



**UNICE**

Union of Industrial and Employers' Confederations of Europe  
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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**PROPOSAL FOR A DIRECTIVE  
COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS**

*[COM (98) 126 FINAL]*

**UNICE POSITION PAPER**

**I. INTRODUCTION**

UNICE has noted the Commission Proposal for a Directive combating late payment in commercial transactions. Following consultation with its industry and employer federation members from 25 European countries UNICE welcomes the thrust and aim of the above proposal. There are, however, a number of areas on which UNICE wishes to comment in more detail as outlined below.

**II. GENERAL REMARKS**

The phenomenon of late payments is a barrier to the competitiveness of European industry in general; it adversely affects the competitive position and sometimes the survival rates of companies, SMEs in particular, and is an obstacle to the achievement of the Single Market by deterring enterprises from taking advantage of opportunities beyond their national borders. It is also bad business practice.

Business relations should be based on contracts freely entered into by both parties, with both parties agreeing to comply with the conditions as stated in the contract. UNICE therefore welcomes the fact that the proposed Directive aims to ensure freedom of contract between the parties involved. If implemented satisfactorily, the proposal should also strengthen the hand of private firms vis-à-vis the public sector, which is also to be welcomed. Despite these positive aspects, however, UNICE is still somewhat sceptical as to the use that will be made of a number of the provisions contained therein.

From experience it can be seen that companies - and in particular those with little margin for negotiation for economic reasons - are often unwilling to initiate legal proceedings against their business clients for fear of losing future business, and UNICE questions whether the introduction of the above Directive will change this situation dramatically. Different business cultures and practices in member states will also hinder the uptake of the provisions of this proposed Directive in practice.

However, should the proposed Directive be adopted, all effort should be made to ensure that the best use is made of its provisions European Union-wide and that these provisions reflect as much as possible the reality of business practices on the ground. In all cases the Directive should not lead to extra administrative burdens or costs for business.

With these concerns in mind, UNICE puts forward the following comments on the detailed articles of the proposal.

### III. DETAILED COMMENTS

#### ***-Article 2 - Definitions***

'Late payment' in *art.2.2* is defined solely in terms of failure to observe the contractual or statutory terms of payment; however, in contract law, the principle of liability and accountability must be retained so that any claim for compensation arising out of a contractual relationship is tied to the precondition of fault. The definition should be changed to reflect this.

The definitions of 'public authorities' (*Art. 2.4*) and 'public procurement contracts' (*Art. 2.5*) need to be further clarified. Furthermore the reference in *Art. 2.5* to "contracts...concluded in writing" could create a superfluous obstacle given the increasing use of electronic procurement. In many national legislative orders, 'contracts concluded in writing' require handwritten signatures which will obviously become less relevant with the development of electronic procurement. UNICE therefore suggests the deletion of this reference, or a more flexible wording which makes allowance for technological developments, drawing inspiration inter alia from the Commission's current discussions (e.g. on the proposal for a directive concerning a common framework for electronic signatures, COM (98) 297 final of 13 May 1998).

#### ***-Article 3 - Due date, interest and compensation for the damage incurred***

##### ***Art. 3.1(a)***

UNICE welcomes the fact that the freedom of contract is respected so that the reference to a payment period of 21 days is only valid if there is no written contract or where the contract is not explicit on the due date. However UNICE is of the opinion that the proposed statutory period of 21 days is too short.

##### ***Art. 3.1(b)***

UNICE is pleased to note that the proposed Directive takes into account the possibility that absence of an invoice, difficulty in determining the date of the invoice or late delivery of the goods could be used in practice to artificially shorten the payment time, once again putting pressure on SMEs. Thus the facility of calculating the due date from date of delivery is a positive step.

##### ***Art. 3.1(d)***

The proposal makes provision for late interest to be payable automatically without the need for the creditor to send a reminder. Some of UNICE's member federations deplore this uncompromising stance, which runs counter to flexibility and contractual freedom in commercial relations.

##### ***Art. 3.1(e)***

While recognising the dissuasive effect of late interest, UNICE has serious concerns regarding the suggested 'statutory rate' of interest which would be applied for late payment. Ideally this is an area which should be agreed between the interested parties to take account of the specific features of contracts, parties involved and standard commercial interest rates in each country.

The capacity for negotiations between commercial partners must remain bilateral if debtors are not to be required to pay a higher statutory interest rate than their creditors, and to accept more flexible conditions when they are creditors.

***Art. 3.2***, which authorises the Commission to change the 'statutory rate', should be deleted as it fails to take account of legislative procedures. See also our comments regarding art. 9 (below).

***-Article 4 - Retention of title***

UNICE fully welcomes the Commission's proposal to provide a uniform retention of title clause applicable in all Member States – such a provision will facilitate and encourage enterprises to take advantage of the Single Market, and will also encourage payment in due time. However, the provisions of *Art. 4.1* could be strengthened by the following amendments:

- Use of the term 'in writing' may suggest a requirement for a written signature, which is in no way necessary and may be incompatible with developments in electronic commerce. Nevertheless, for reasons of proof, reservation of ownership should not be notified by mere verbal agreement. A written document must be able to prove the wish of the creditor to apply a reservation of ownership clause as and when necessary. Thus, if the validity of the reservation clause depends on the purchaser receiving notification 'in writing', the term 'in writing' must be based on a more flexible wording which make allowance for technological developments (in this regard, see our comments on *Art. 2.5* above).
- Under the proposal, risk would be transferred automatically on possession of the good passing to the purchaser, with no possibility of the contract making other provisions. Thus, this proposal would have the likely effect of systematically transferring to the purchaser the financial burden of insurance in this context, inter alia to cover the risk of deterioration or destruction of the goods sold. This proposal does not correspond either to positive law in many Member States or to practice in international transactions (i.e. the incoterms chosen by the parties which define how responsibilities and risks are to be shared).
- UNICE would also like to see clarification of procedures should the buyer go into liquidation or receivership.

***Art.4.2***

UNICE fails to understand the Commission's reasons for applying the qualification clause only to debts payable in a single payment. The parties should be able to provide for transfer of ownership of goods sold to be subject to complete payment of the price, regardless of how payments are scheduled. Therefore, this provision should be deleted.

The statement on article 4 in the annex to the proposal should be worded as follows: "Goods remain the property of the vendor until full payment has been made" (clearly, this amendment is applicable to all the different language versions of the annex).

***-Articles 5 and 6 - Accelerated recovery procedures for undisputed debts and Simplified legal procedures for small debts***

While UNICE is sympathetic to the objective of this provision, it wonders whether the Commission is going beyond its current powers insofar as this proposal would tend to harmonise the rules governing judicial procedures between Member States. As UNICE underlined in its position paper on the Commission communication "Towards greater efficiency in obtaining and enforcing judgements in the EU", there are enormous differences between Member States' court procedures and administration systems which could lead to discrimination. UNICE therefore believes that these gaps must be further narrowed before specific proposals are tabled to harmonise procedures for payment injunctions or other similar measures which would flow on from accelerated and simplified recovery procedures.

Lastly, UNICE does not share the Commission's optimism about the efficiency and rapidity of such procedures. Although on the whole they are beneficial, it must be pointed out that most of these procedures relate to settlement of non-commercial debts. Companies hesitate to initiate court proceedings because they harm commercial relations and generally bring them to an end. That is why commercial firms prefer to turn to conciliation and arbitration mechanisms which are already widely present in Europe.

**-Article 7 - Transparency in public procurement contracts**

UNICE supports establishment of legislative measures applicable to the public sector such as definition of maximum payment periods and an automatic right to late interest.

**-Article 8 - Prompt payment, due date and automatic interest**

While UNICE agrees with the thrust of the article, given the differing payment traditions by public enterprises in the member states to date, UNICE believes that the reference period of 60 days maximum should only be applied to those countries where present payment periods are longer than this. Member states, such as Ireland and Germany, where the statutory obligation for payment by public authorities is less than 60 days, should be allowed to keep their present systems so as to prevent a worsening of payment conditions.

A majority of UNICE's member federations wonder whether it is judicious to set a maximum payment period of 60 days for the public sector against 21 days for the private sector. The reasons for such discrimination are difficult to understand, knowing that the public sector is subject in most Member States to the rules of common law where the conditions for its commercial relations with private firms are concerned. Moreover, as the Commission rightly points out, in many countries the public sector is one of the worst payers. Such late payment by the public authorities, which have a considerable impact on the economic situation because of the volume of their purchases, sets a bad example for economic players as a whole. Lastly, companies are not really in a position to negotiate on an equal footing with the public sector. There is an imbalance between the parties since very many firms depend on public procurement and are fearful of losing their only or main customer.

Paradoxically, the proposal for a directive fails to regulate the question of payments by the European institutions, which must also set an example in prompt payment.

**-Article 9 - Committee**

UNICE is opposed to the establishment of a committee to review the functioning of the Directive. In UNICE's opinion, DG XXIII could perform such a task. Also, as noted above, UNICE questions the Commission's legal right to revise the 'statutory rate' as proposed in *Art. 3.2* and as this is one of the main functions foreseen by the Commission for the committee, such a committee would be superfluous.

**IV. CONCLUDING REMARKS**

Late payment is a major problem for companies. While UNICE is fully supportive of the aims of the proposed Directive, it is still somewhat sceptical as to the use that will be made of some of the provisions therein given differing cultural, economic and legal traditions in member states.

Nevertheless, the proposal can be welcomed once it can be guaranteed that:

- no extra administrative or cost burdens will be imposed on enterprises;
- member states fully understand that 'freedom of contract' must be respected at all times;
- special attention must be given to the level of the 'statutory rate' of interest;
- in no way should the proposal lead to a deterioration in payment periods in member states, especially with regard to public enterprises.

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