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BusinessEurope views on the revision of the Late Payment Directive

Introduction

1. Companies that are recipient and supplier of services from and for SMEs have a high interest in fair, stable and lasting service relationships with their suppliers and customers. In this regard, the proper implementation of the existing legislation is key to ensure a fair business environment.
2. Overall, the legal framework of the current directive has proven itself even though the relevance of late payment issue seems to differ among member states as well as sectors. As the directive allows EU countries to maintain or bring into force laws and regulations which are more favourable to the creditor than the provisions of the directive, certain member states went further than required by setting maximum payment terms in their national laws.
3. In the light of this, the Commission's plan to revise the directive could be understandable, but it should be taken extremely cautiously.
4. When stating that 25% of insolvencies of SMEs are due to late payments, it is important to check the geographical reference as this does not seem the case for some countries (e.g. Germany).
5. The question of whether late payment as such is a main explanation for insolvency and bankruptcies or is it rather primarily a question of pure credit losses, i.e. complete non-payment, needs to be further explored. In any case, in some countries, such as Sweden and Denmark, payment delays have not been highlighted as a particular problem for SMEs.
6. It is key to rely on data on payment terms which are relevant, robust, comparable and promptly updated, both in B2B and public administrations to business, before calibrating any proposals, in particular with regard to B2B relationships.



Making public authorities lead by example

7. An issue that deserves full attention are the payment terms and unfair contract terms in relation to the public sector. Late payment by public authorities still remains a huge problem in some countries. Public authorities have a special responsibility in this regard and should lead by example. The current directive recalls that, as a general rule, they benefit from more secure, predictable and continuous revenue streams than undertakings and long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. Moreover, it is telling that the European Commission in the recent past urged some member states to comply with the Late Payment Directive and ensure that businesses and SMEs are paid on time. Likewise, the case of the European Court of Justice condemning one member states for not paying its enterprises on time.
8. In this regard, to tackle liquidity problems, it is very important that public administrations pay their debts within the time limits set by the legislation. Many public administrations still have difficulties in paying suppliers and information on debts and payment terms is still fragmented and not timely. In order to strengthen public administrations' administrative capacity and improve their reorganisation, some fundamental, structural reforms are necessary (some examples are provided in the Annex 1 "Commercial debts of the public authorities: some reform proposals").

Preserving freedom of contract in B2B transactions

9. In any event, the protection of the contractual freedom, at least in B2B relations, and the flexibility deriving from it, is a key point of the current directive and must be preserved.
10. While capping payment terms in B2B transactions to 30 days could represent a viable option to increase creditors' cash flow, it should be considered only if the freedom of contract is maintained.
11. In order to preserve the basic principle that payment terms are a factor of free negotiation between the parties, measures such as the establishment of bodies that can carry out inspections, even on their own initiative, with sanctioning powers should not be introduced.
12. On the issue of late payment representing a main reason for SMEs choosing not to participate in public procurement, it should be considered that SMEs are demotivated to participate in tenders due to the design of tender documents as well as complex procedures and administrative burdens.



Enhancing the culture of prompt payment

13. There needs to be a decisive shift towards a new business culture in which prompt payment is the norm. This is particularly important in the current challenging times for companies.
14. Collecting and sharing best practices could be the first step to shift towards such new business culture and help minimise late payment.
15. One has to take into consideration the role representative and industry sector bodies take in educating and encouraging their members to take responsibility and use existing late payment measures. The former also have a role in publicising and promoting existing measures.
16. Nevertheless, how to change a culture remains a complex question and cannot be done overnight. It should pay off to pay on time, but there is also a need for a clear framework (clarity on maximum payment terms, consequences for not paying on time, different rules for large and small companies).
17. On-time payment is a matter of the given business environment. Formally, an increase in the flat-rate costs associated with claiming a claim could theoretically help.
18. Any potential action around the planned revision of the directive should take into consideration the impact that sustainability reporting will have on late payments. If today only the so-called public-interest entities, including listed companies, are required to report non-financially, with the evolution of European regulation on sustainability, in particular the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence, not only will the subjective scope of application be expanded, but they will have to indicate the management and quality of relations with customers, suppliers and communities affected by business activities, including payment practices, in particular as regards late payments to SMEs. This will affect the discussion regarding payment terms in B2B relationships improving the culture of payments on time.

Strengthening the foreseen automatic compensation

19. Digital solutions have the potential to mitigate some issues related to late payments. E-invoicing increases transparency and creates opportunities for using the agreed payments as collateral for financing.
20. The use of technology to manage the payment process such as accounting software including the use of automatic invoicing as well as utilising automatic reminders for overdue invoices can help businesses keep track.



21. Setting limits on the maximum legal payment terms might address the problem of lengthy payment periods in some commercial contracts between the purchaser and supplier, however a “one size fits all” approach is not the best way to deliver a culture change given that with different sectors, there would be significant variation in structures for payment terms for construction, retail, manufacturing, etc.
22. If a company does not pay on time, a surcharge normally kicks in which makes it best to pay on time. The time for payment differs greatly between countries, maybe even between regions and this puts planning and cash flow at stake. For an SME with small(er) margins, the potential gap between paying your supplier and getting paid from your customer can put the company at risk. So, clear rules can be anticipated and planned for, with clear consequences if not fulfilled, and there should be as much a level playing field as possible in the single market.

Supporting SMEs in enforcement of their rights



23. SMEs can be supported by providing them with the information on the tools and techniques that can help facilitate fair payment practices thereby empowering small businesses. An intervention which builds small businesses confidence and capability to negotiate payment terms and help them resolve payment disputes in a way which preserves business relationships would also be beneficial.
24. In principle, there are legal systems, like the Czech, which enables effective and, in undisputed cases, relatively quick recognition and recovery of debts to entrepreneurs with appropriate sanctions against the debtor. The fact that the debtor no longer has the money to pay can be difficult to improve. In general, speeding up the activity of the courts in disputed cases could help, i.e. so that the creditor does not have to wait several years for the right to be granted. However, any deadlines for the duration of a process might be tricky. Today, this problem is basically solved correctly by a possible claim for damages for the unreasonable length of the proceedings against the state.

Turning the current directive into a regulation



25. Maintaining a directive is more ideal. Accepted payment terms vary across the economy. There are a few reasons for which a regulation is not ideal. First, this could complicate the landscape even further for small businesses and EU-wide, secondly, while it could provide the possibility of a level playing field between countries and some problems with the interpretation of the national regulation would disappear, it could also bring additional administrative burden, and thirdly, there would be a restriction to businesses' ability to negotiate business to business contracts.

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Annex 1: Commercial debts of the public authorities: some reform proposals

In order to strengthen public authorities (PAs') administrative capacity and improve their reorganization, some fundamental, structural reforms are necessary. Some examples of such reforms could be:

- strengthening the administrative capacity of PAs through the establishment of specialized teams within PAs in charge of coordinating the complex payment procedures;
- within each PA attributing to a single person - who can make use of the team's activities - responsibility for the entire purchasing cycle: from the signing of supply contracts, to the authorization of payment, up to the transaction. In this way, the responsible person will be put in a position to fulfil his obligations in a timely manner, otherwise, to report to the bodies in charge of control;
- simplifying the rules that delay payments, without a real justification linked to verification and control;
- considering a substitute intervention by the State, as a last resort, for the most serious and repeated cases of inaction;
- developing a "universal" compensation mechanism that allows companies to offset commercial receivables from any branch of the PA against all tax and social security liabilities.

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