



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.10.1998
COM(1998) 615 final

98/0099 (COD)

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

combating late payment in commercial transactions

(presented by the Commission pursuant to Article 189 a (2)
of the EC-Treaty)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

On 25 March 1998, the Commission adopted a proposal for a European Parliament and Council Directive combating late payment in commercial transactions¹.

The Economic and Social Committee gave its opinion on the Commission proposal on 10 September 1998².

On 17 September, under the co-decision procedure, the European Parliament adopted in the first reading the Report by the Committee on Economic and Monetary Affairs and Industrial Policy and the legislative resolution embodying the opinion of the European Parliament on the Commission proposal³. The European Parliament adopted 27 amendments, most of which the Commission finds acceptable as they clarify and complement the original wording of the proposal. In the case of some of these amendments, the Commission has accepted the substance of them but has reformulated their wording. The Commission therefore presents its amended proposal, the main features of which are described below.

There are some amendments which the Commission has not been able to accept. With regard to the amendment proposing an additional Article concerning the licensing of debt collection agencies the Commission has maintained its original position. The amendment proposing a new Article 6a which would state that Member States' arrangements on legal representation remain unaffected, clearly weakens the original text, which simply allows the creditor to choose his representative as long as the debtor has not disputed the debt, and is therefore not acceptable. This is also the case with the amendment which modifies Article 8(2) concerning the right to interest from contracting authorities by leaving out the words "without the necessity of a claim". The Commission cannot accept it as it should be made clear that the contracting authorities must pay interest on late payment automatically, i.e. without a request by the creditor.

The amendment adding a new recital concerning perishable foodstuffs singles out a particular sector and is not acceptable as it is contradictory to the general nature of the Directive. The amendment adding a new paragraph to Article 9 concerning the hearing of the chairman of the advisory committee does not conform to the texts on comitology and cannot therefore be accepted. The amendment concerning a new Article 9a on the progress report is made redundant by the amendment concerning the review of the Directive in Article 3(3) which the Commission accepts. The amendment proposing a new recital which asks Member States to be vigilant against unfair trading practises and the amendment adding a new paragraph which asks Member States to take all suitable measures to reduce long payment periods in Article 3 rather have the character of a recommendation and can therefore not be integrated into the present Directive.

In presenting this amended proposal, the Commission has equally taken account of the opinion of the Economic and Social Committee to as large an extent as possible.

¹ OJ C 168, 3.6.1998, p. 13.

² Adopted on 10.9.1998, not yet published in the OJ.

³ Opinion of the European Parliament adopted on 17.09.1998, not yet published in the OJ.

2. COMMENTS ON THE MAJOR AMENDMENTS

Article 2: Definitions

Article 2(1) concerning the definition of "commercial transactions" has been clarified in order to include undertakings, which are neither natural nor legal persons. These undertakings are unincorporated companies such as partnerships, which would have otherwise escaped the scope of the Directive. The Commission has, however, left out the reference to the institutions of the European Union because they are bound by the Financial Regulation⁴ which the Commission intends to modify with the aim of submitting the Community institutions to the same rules as contained in this Directive.

The term "public authorities" in Article 2(4) of the original proposal has been changed to that of "contracting authorities" and the definition has been simplified. The Commission accepts the principle behind the Parliament's amendment but has reformulated the text with the aim of using the existing definitions in the Directives on public procurement and not to create a new one. For the purposes of the present Directive, the new definition also comprises the "contracting entities" which can be found in Directive 93/38/EEC. This change is reflected throughout the articles of the amended proposal.

Article 3: Default date, interest and compensation for the damage incurred

Throughout the Directive, the concept of the "due date" has been replaced with that of the "default date" as under the laws of virtually all Member States, payment is in principle due at the time of delivery. It was not the Commission's intention to modify this, but rather to deal with the conditions for, and the consequences of the debtor's default.

Article 3(1) has been modified in order to take into account the correct delivery of goods and services as a precondition for the debtor's default.

In order to define an unambiguous way of calculating the default date, the European Parliament added a clarification in paragraph (1)(a) so that the default date is calculated from the receipt of the invoice. This necessitates the insertion of a new paragraph (1)(b) where a legal assumption is made that an invoice is deemed to have been received on the 5th calendar day following the date of the invoice unless one of the parties is able to prove receipt at another time.

The European Parliament raised the need to incite parties to a contract to agree reasonable payment periods without forcing them to do so. In particular, paragraph (1)(d) has been added to discourage the parties to agree on payment periods exceeding 45 calendar days. Here the Commission has modified the Parliament's amendment by changing the payment period from 60 to 45 days in order to avoid excessively long payment periods. While the contracting parties are still in principle free to agree longer payment periods, these will only be valid if the buyer provides the seller with a guaranteed Bill of Exchange. Paragraph (1)(d) should be read in conjunction with paragraph (1)(e) as the latter indicates the consequences of the buyer's failure to provide a Bill of Exchange.

⁴ OJ L 356, 31.12.1977, p. 1.

The Commission has maintained its original text for paragraph (1)(j) but takes the amendment into account within the framework of further negotiations in the Council.

A new paragraph 3(3) has been inserted at the request of the European Parliament in order to be able to evaluate the effectiveness of the Directive. The amendment has been reformulated as the Commission considers that an evaluation should be feasible after three years from the date defined in Article 10(1) in order to allow for changes in the payment practices to be examined.

Article 4: Retention of title

The Commission has taken the substance of the Parliament's amendments concerning Article 4 but has reformulated the wording and changed the order of the various provisions. Paragraphs 1 and 2 now deal with the conditions under which a valid retention of title can be agreed, paragraph 3 describes its effects and paragraph 4 specifies a number of areas where Member States remain free to complement the proposed text.

Article 4(1) has been amended in a way that clarifies the need for the parties to agree on the use of retention of title. This can be done either by way of an individual contract or through a tacit agreement on the basis of documents accompanying the goods or services concerned. In this context, the Commission considers that the limitation to "commercial transactions" is redundant.

As the former Article 4(2) concerning the application of the retention of title to debts payable in single instalments has been deleted, it was necessary to clarify the clauses in the Annex to indicate that the seller remains the owner of the goods until the price has been fully paid.

In Article 4(3), it is now clearly stated that the retention of title must be made enforceable against third parties, including the case of bankruptcy of the debtor. This reflects the current situation in virtually all Member States, where the creditor is entitled to separate the goods in question from the bankrupt's assets.

Article 4(4) gives Member States the right to protect the third *bona fide* purchaser and decide on the treatment of down payments made by the debtor. They may also deal with goods, which are incorporated in other movable or immovable property.

Article 7: Transparency in public procurement contracts

Article 7 has been enlarged to include the whole supply chain by requiring the main contractor to apply the same obligation of transparency to his subcontractors.

Article 8: Prompt payment, default date and automatic interest

Article 8(1) has been clarified by defining the default dates of public procurement more specifically. The Commission accepts the Parliament's amendment in principle but proposes a ceiling of ECU 100,000 for smaller contracts with a maximum default date of 45 days whereas the 60-day payment period is proposed for contracts above that amount.

The Commission considers the 90-day payment period as suggested by the Parliament too long for the final payment.

Similarly to Article 7, Article 8 has also been modified in order to guarantee the equal treatment of subcontractors and suppliers with the main contractor. Moreover, as subcontractors and suppliers are in a situation of dependence on the main contractor, the latter should be required to provide a guarantee made out to the subcontractor or supplier in order to ensure payment of all the amounts due.

Article 10: Transposition

Paragraph 10(2) has been modified at the request of the European Parliament in order to clarify the original wording. It was indeed the intention to allow Member States to adopt provisions, which are more favourable to the creditor.

Amended proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

combating late payment in commercial transactions

(Text with EEA relevance)

(presented by the Commission in accordance with Article 189b of the EC Treaty)

ORIGINAL PROPOSAL

AMENDED PROPOSAL

THE EUROPEAN PARLIAMENT AND
THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the
European Community, and in particular
Article 100a thereof,

Having regard to the proposal from the
Commission⁵,

Having regard to the opinion of the
Economic and Social Committee⁶,

Acting in accordance with the procedure
laid down in Article 189b of the Treaty⁷,

1. Whereas the European Parliament in its Resolution⁸ on the Integrated Programme in favour of SMEs and the craft sector⁹, emphasised that the Commission should forward proposals to deal with the problem of late payment; Unchanged

2. Whereas on 12 May 1995 the Commission adopted a Recommendation on payment periods in commercial transactions¹⁰; Unchanged

3. Whereas the European Parliament in its Resolution on the Commission Recommendation on payment periods in commercial transactions¹¹ called on the Commission to consider transforming its recommendation into a proposal for a Council Directive to be submitted as soon as possible; Unchanged

⁵ OJ C 168, 3.6.1998, p. 13.

⁶ Adopted on 10.9.1998, not yet published in the OJ.

⁷ Opinion of the European Parliament adopted on 17.09.1998, not yet published in the OJ.

⁸ OJ C 323, 21.11.1994, p. 19.

⁹ COM(94) 207 final of 3 June 1994.

¹⁰ OJ L 127, 10.6.1995, p. 19.

¹¹ OJ C 211, 22.7.1996, p. 43.

4. Whereas on 29 May 1997 the Economic and Social Committee adopted an opinion on the Commission's Green Paper on Public procurement in the European Union: Exploring the Way Forward¹², recommending maximum payment periods and interest on late payments by public authorities; Unchanged
5. Whereas on 4 June 1997 the Commission published an Action Plan for the Single Market¹³, which underlined that late payment represents an increasingly serious obstacle for the success of the Single Market; Unchanged
6. Whereas on 17 July 1997 the Commission published a Report on late payments in commercial transactions¹⁴, summarising the results of an evaluation of the effects of the Commission's Recommendation of 12 May 1995; Unchanged
7. Whereas heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of late payment; whereas moreover, late payments are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses; 7. Whereas heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of the excessive payment periods and late payment; whereas moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses;
8. Whereas the differences between the payment rules and practices in the Unchanged

¹² OJ C 287, 22.9.1997, p. 92.

¹³ CSE(97) 1 final, 4 June 1997, pp. 8 and 38.

¹⁴ OJ C 216, 17.7.1997, p. 10.

¹⁵ OJ L 209, 24.7.1992, p. 1.

¹⁶ OJ L 199, 9.8.1993, p. 54.

¹⁷ OJ L 199, 9.8.1993, p. 84.

¹⁸ OJ L 209, 24.7.1992, p. 1.

¹⁹ OJ L 199, 9.8.1993, p. 54.

²⁰ OJ L 199, 9.8.1993, p. 84.

Member States constitute an obstacle to the proper functioning of the internal market; whereas a creditor who needs to collect receivables from debtors situated in several Member States is confronted with widely differing rules of national legislation making it difficult, time consuming and costly for him to do so;

9. Whereas this has the effect of considerably limiting commercial transactions between Member States; whereas this is in contradiction with Article 7a of the Treaty as entrepreneurs should be able to trade throughout the Internal Market under conditions which ensure that transborder operations do not entail greater risks than domestic sales; whereas it would lead to distortions of competition if different rules applied to domestic and transborder operations; Unchanged
10. Whereas the most recent statistics indicate that there has been, at best, no improvement in late payments in many Member States since the adoption of the Recommendation of 12 May 1995; Unchanged
11. Whereas, in accordance with the principle of subsidiarity and the principle of proportionality as set out in Article 3b of the Treaty, the objective of combating late payments in the internal market cannot be sufficiently achieved by the Member States acting individually and can, therefore, be better achieved by the Community; whereas this Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose; Unchanged
12. Whereas late payment constitutes a breach of contract which has been made financially attractive to Unchanged

debtors in most Member States by low interest rates on late payments and/or slow redress procedures; whereas a decisive shift is necessary to reverse this trend and the consequences of late payments must be such as both to discourage late payment and to fully compensate creditors for the costs incurred;

13. Whereas the use of retention of title clauses as a means of speeding up payment is at present constrained by a number of differences in national law; whereas it is necessary to ensure that creditors are in a position to exercise the retention of title throughout the Community, using a single clause recognised by all Member States;

14. Whereas the consequences of late payment can be dissuasive only if they are accompanied by redress procedures which are rapid, effective and inexpensive for the creditor; whereas in conformity with the principle of non-discrimination contained in Article 6 of the Treaty, these procedures should be available to creditors from all Member States irrespective of their residence;

15. Whereas public authorities handle a considerable volume of payments to businesses; whereas strict payment discipline on the part of these authorities would have a beneficial trickle-down effect on the economy as a whole; whereas for payments executed by the Commission it has already been decided to give certain creditors the right to receive default interest on late payments;

13. Whereas the use of retention of title clauses as a means of speeding up payment is at present constrained by a number of differences in national law; whereas it is necessary to ensure that creditors are in a position to exercise the retention of title throughout the Community, using a single clause recognised by all Member States, and that excessive length of payment periods and late payments do not distort commercial transactions in the functioning of the internal market;

Unchanged

15. Whereas public authorities handle a considerable volume of payments to businesses; whereas strict payment discipline on the part of these authorities would have a beneficial trickle-down effect on the economy as a whole; whereas, with regard to public contracts, contracting enterprises in turn likewise delay payments to their suppliers and subcontractors, habitually imposing disproportionate payment periods - practices which seriously damage the interests of many businesses,

especially SMEs; whereas for payments executed by the Commission it has already been decided to give certain creditors the right to receive default interest on late payments;

16. Whereas for the purposes of the implementation of this Directive, the Commission should be assisted by a committee of an advisory nature, Unchanged

17. Whereas it could be necessary, when this Directive is reviewed, to take into consideration the possibility of addressing the consequences of long contractual payment periods;

18. Whereas the term "contracting authorities" should correspond to the definition laid down in Directive 92/50/EEC¹⁵ and Directive 93/37/EEC¹⁶ and should include, for the purposes of the present Directive, the "contracting entities" as defined in Directive 93/38/EEC¹⁷.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

Article 1 Scope

The provisions of this Directive shall apply to all payments made in commercial transactions. Unchanged

Article 1 Scope

Article 2 Definitions

For the purposes of this Directive:

1. "commercial transactions" means transactions between two or more natural or legal persons carrying on a trade or profession acting in the course of their business, or between such persons and public authorities,

Article 2 Definitions

For the purposes of this Directive:

1. "commercial transactions" means transactions between undertakings which lead to delivery of goods or provision of services for remuneration; an undertaking is any organisation set up on a permanent

which lead to delivery of goods or provision of services for remuneration;

basis with an independent economic activity, even where it is carried on by a single person and even where it is not intended to make a profit; contracting authorities shall in every case be deemed to be undertakings for the purposes of this Directive;

2. "late payment" means failure to observe the contractual or statutory terms of payment; Unchanged
3. "retention of title" means retention by the seller of title to the goods in question until the buyer has paid the price in full; 3. "retention of title" means the agreement, irrespective of any formal requirements, that the seller remains the owner of the goods in question until the price has been paid in full;
4. "public authorities" means the State, regional or local authorities, bodies governed by public law, or associations formed by one or more of such authorities or bodies governed by public law. A body is considered to be governed by public law where it is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature, has legal personality, and is financed for the most part by the State, or regional or local authorities, or other bodies governed by public law, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or other bodies governed by public law; 4. "contracting authorities" corresponds to the definition laid down in Directive 92/50/EEC¹⁸ and Directive 93/37/EEC¹⁹ and includes the "contracting entities" as defined in Directive 93/38/EEC²⁰.
5. "public procurement contracts" means contracts for pecuniary interest concluded in writing between a natural or legal person and public authorities. 5. "public procurement contracts" means contracts for pecuniary interest concluded in writing between a contracting authority within the meaning of paragraph 4 and an undertaking which is not a contracting authority.

CHAPTER II

Article 3

Due date, interest and compensation for the damage incurred

1. Member States shall ensure that:
 - (a) the due date for the payment of debts shall not be more than 21 calendar days from the date of the invoice, unless otherwise specified in the contract or in the seller's general conditions of sale;
 - (b) in the absence of an invoice or if the date of the invoice cannot be determined with certainty or if the date of the invoice is earlier than the date of delivery, the due date shall be calculated from the date of delivery of the goods or services;

CHAPTER II

Article 3

Default date, interest and compensation for the damage incurred

1. Member States shall enact the necessary legislation and amend their procedural rules in such a way that, subject to the goods or services having been duly provided and the underlying legal conditions being correctly fulfilled, the following is ensured:
 - (a) the default date for the payment of debts shall not be more than 21 calendar days from the date of receipt of the invoice, unless otherwise specified in the contract or in the seller's general conditions of sale;
 - (b) the invoice shall be deemed to have been received no later than the fifth calendar day following the date of the invoice, unless the buyer or seller is able to furnish proof of receipt at another time;
 - (c) in the absence of an invoice or if the date of its receipt cannot be determined with certainty or if the date of receipt is earlier than the date of supply of the goods or services concerned, the default date shall be calculated from the latter date;
 - (d) where the default date specified in the contract or in the seller's general conditions of sale is more than 45 calendar days from the date of receipt of the invoice, the buyer shall provide the seller, at the buyer's cost, with a bill of exchange, specifying explicitly the date for its payment and guaranteed by an

accepted credit institution;

(e) where the buyer fails to provide the seller with a bill of exchange in accordance with point (d) above, the normal default date and level of interest as foreseen in this article shall be applicable and any contractual derogations therefrom to the detriment of the seller shall be automatically null and void; the remainder of the contract shall remain in force;

(c) the creditor shall be entitled to claim interest from the debtor on any outstanding amount when the due date as determined under points (a) and (b) has been exceeded without the creditor having received the amount due;

(d) interest shall accrue automatically from the day after the due date without the necessity of a reminder;

(e) the level of interest for late payment (the "statutory rate"), which the creditor is entitled to claim, shall be the sum of the tender (repo) interest rate of the European Central Bank (the "reference rate") plus at least 8 percentage points (the "margin"), unless otherwise specified in the contract or in the seller's general conditions of sale; for Member States which do not participate in the third phase of Economic and Monetary Union, the reference rates referred to above shall be the equivalent rates set by their central banks;

(f) the statutory rate for interest on late payment shall change

(f) the creditor shall be entitled to claim interest from the debtor on any outstanding amount when the default date as determined under points (a) to (e) above has been exceeded without the creditor having received the amount due;

(g) interest shall accrue automatically from the day after the default date without the necessity of a reminder;

New numbering: (e) becomes (h), otherwise unchanged.

New numbering: (f) becomes (i) and the reference to point (e) becomes

automatically in accordance with changes to the reference rate mentioned in point (e);

(g) in addition to the right to interest, the creditor shall be entitled to claim full compensation from the debtor for the damage incurred.

2. The margin referred to in paragraph 1(e) may be modified by the Commission in accordance with the procedure referred to in Article 9 if it becomes apparent that the statutory rate is no longer sufficiently high to discourage the buyer from paying late and to compensate the seller for any loss incurred as a result of late payment, in particular for any interest he would have to pay on overdraft credit.

Article 4
Retention of title

1. Member States shall ensure that the seller retains title if he notifies the buyer of his intention of doing so in writing no later than the date of delivery of the goods.

(h), otherwise unchanged.

New numbering: (g) becomes (i), otherwise unchanged.

2. New numbering: the reference to point 1(e) becomes 1(h), otherwise unchanged.

3. Three years after the end of the period defined in Article 10(1) of the Directive, the Commission, having been advised by the Committee referred to in Article 9, shall undertake a review of, *inter alia*, the statutory rate 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.

Article 4
Retention of title

1. Member States shall ensure that the seller retains title if a retention of title clause has been agreed. Apart from an individual contract, such an agreement shall be considered valid if the retention of title clause is contained in the seller's standard contract, on the invoice, or on delivery documents accompanying

the goods, which the buyer has received no later than at the time of delivery, and to which he has not objected. No other formality shall be required.

Once the due date has passed without the buyer having paid, the seller may claim that the goods in question be returned to him. As soon as the buyer takes possession of the goods, he becomes responsible for any damage to or loss of the goods. A valid notification may be made in the seller's standard contract, on the invoice, or in an individual contract.

2. Member States shall recognise the validity of the clauses contained in the Annex or of clauses having equivalent effect.

3. Once the default date has passed without the buyer having paid, the seller may claim that the goods in question be returned to him. Member States shall provide for the retention of title to be enforceable against third parties, even in the case of bankruptcy of the debtor or in the case of any other procedure recognised as being similar under the legislation of the Member States. No later than when the buyer takes possession of the goods, he becomes responsible for any damage to or loss of the goods.

Member States shall recognise the validity of the clauses contained in the Annex or of clauses having equivalent effect.

New numbering: this paragraph becomes 4(2), otherwise unchanged.

2. Paragraph 1 shall apply only to debts payable in a single instalment.

Deleted

3. Member States shall define the effect of the retention of title clause as regards those aspects not covered by this Directive and in particular as regards the effect on third parties acting in good faith.

4. Member States may adopt provisions for the protection of third parties acting in good faith, and as regards down payments already made by the debtor. They may also adopt provisions concerning goods which are incorporated in other movable or immovable property.

Article 5

Accelerated recovery procedures for undisputed debts

Article 5

Accelerated recovery procedures for undisputed debts

1. Member States shall ensure that there is an accelerated debt recovery procedure for undisputed debts.

Unchanged

- | | | |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 2. | This procedure shall apply irrespective of the amount of the debt. | Unchanged |
| 3. | This procedure shall be available to creditors from all Member States, irrespective of their place of residence. | Unchanged |
| 4. | The creditor shall be able to choose whether or not he wishes to be represented by a third person. | Unchanged |
| 5. | The procedure before the court shall be formulated in such a way that a period of 60 calendar days is not exceeded from the receipt of the creditor's request to the time when the writ of execution or equivalent document becomes enforceable. This period is without prejudice to: | Unchanged |
| | (a) the application of the rules governing notification or service; and | Unchanged |
| | (b) the rights of the defendant to dispute the debt. | Unchanged |

Article 6
Simplified legal procedures for small debts

Member States shall ensure that simplified procedures are available for debts up to a threshold, which shall not be less than ECU 20 000. These procedures shall provide for simple, low-cost methods for taking legal action for the settlement of debts.

This sum can if necessary be modified by the Commission to reflect changing economic conditions in accordance with the procedure referred to in Article 9.

These procedures shall be available to creditors from all Member States irrespective of their place of residence.

Article 6
Simplified legal procedures for small debts

Member States shall ensure that simplified procedures are available for debts up to a ceiling, which shall not be less than ECU 20 000. These procedures shall provide for simple, low-cost methods for taking legal action for the settlement of debts.

Unchanged

Unchanged

CHAPTER III

Article 7

Transparency in public procurement contracts

Member States shall ensure that public procurement contracts contain precise details of the payment periods and deadlines applied by the public authorities. In particular, time limits shall be fixed for the completion of pre-payment administrative formalities, such as public works reception procedures.

Article 8

Prompt payment, due date and automatic interest

Member States shall ensure that:

1. the due date for the payment of contractual debts by the public authorities as determined under Article 3(1)(a) and (b) does not exceed 60 calendar days; the contract shall in no circumstances override that maximum payment period;

CHAPTER III

Article 7

Transparency in public procurement contracts

Member States shall ensure that public procurement contracts contain precise details of the default dates and deadlines applied by the contracting authorities, even if these default dates and deadlines are determined in general contract conditions laid down by law. In particular, time limits shall be fixed for the completion of pre-payment administrative formalities, such as public works reception procedures. A similar obligation of transparency shall apply in the relationship between a main contractor and a subcontractor carrying out public works.

Article 8

Prompt payment, default date and automatic interest

Member States shall ensure that:

1. the default date for the payment of contractual debts by the contracting authorities as determined under Article 3(1)(a) to (c) shall not be more than 45 calendar days except where the value of the contract exceeds ECU 100,000 where the maximum default date will be 60 calendar days; the contract shall in no circumstances override these maximum default dates; in a public contract, the main contractor has to grant conditions to the suppliers and subcontractors which are at least as favourable as those granted to the main contractor by the contracting authority;

In order to guarantee these conditions to suppliers and subcontractors, the main contractor shall be required to provide a guarantee made out to the supplier or subcontractor covering payment of all the amounts owed. This

guarantee shall be executable upon expiry of 60 calendar days from the date of submission of the invoice to the main contractor by the supplier or subcontractor.

2. a creditor shall be entitled to interest from the public authority on any outstanding amount when the due date has been exceeded; the interest shall be calculated as set out in Article 3(1)(d) and (e), and shall be paid automatically by the public authority without the necessity of a claim;
3. the public authority is not permitted to request or require that the creditor waives any of the rights referred to in this Article.

CHAPTER IV

Article 9 **Committee**

For the purposes of reviewing the functioning of this Directive and in particular for the cases mentioned in Article 3(2) and Article 6, the Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost

2. a creditor shall be entitled to interest from the contracting authority on any outstanding amount when the default date has been exceeded; the interest shall be calculated as set out in Article 3(1)(g) and (h), and shall be paid automatically by the contracting authority without the necessity of a claim;
3. the contracting authority is not permitted to request or require that the creditor waives any of the rights referred to in this Article, nor may the main contractor request or require that his suppliers or subcontractors waive those rights.

CHAPTER IV

Article 9 **Committee**

Unchanged

account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

Article 10
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2000 at the latest. They shall forthwith inform the Commission thereof. Unchanged

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States may maintain or bring into force provisions which are stricter than the provisions necessary to comply with this Directive. 2. Member States may maintain or bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with this Directive.
3. Member States shall communicate to the Commission the text of the main laws, regulations or administrative provisions which they adopt in the field covered by this Directive. Unchanged

Article 11
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Communities*. Unchanged

Article 10
Transposition

Article 11
Entry into force

Article 12
Addressees

Article 12
Addressees

This Directive is addressed to the Member States. Unchanged

Done at Brussels,

For the European Parliament, For the Council,

The President

The President

Annex

List of clauses to be recognised by Member States for the purposes of Article 4

- ES:** "El vendedor conservará la propiedad de los bienes hasta el pago."
- DA:** "Varen forbliver sælgerens ejendom, indtil den er betalt."
- DE:** "Die Ware verbleibt bis zur Bezahlung im Eigentum des Verkäufers."
- EL:** "Ο πωλητής παρακρατεί την κυριότητα των αγαθών μέχρι να εξοφληθεί το τίμημά τους."
- EN:** "The goods remain the property of the seller until payment."
- FR:** "Les marchandises restent la propriété du vendeur jusqu'au paiement."
- IT:** "Le merci restano di proprietà del venditore fino al pagamento."
- NL:** "De waren blijven tot de betaling eigendom van de verkoper."
- PT:** "O vendedor conservará a propriedade dos bens até ao momento do pagamento."
- FI:** "Tavara on myyjän omaisuutta, kunnes kauppahinta on maksettu."
- SV:** "Varorna förblir säljarens egendom tills de betalats."

Annex

List of clauses to be recognised by Member States for the purposes of Article 4

- ES:** "El vendedor conservará la propiedad de los bienes hasta el pago final."
- DA:** "Varen forbliver sælgerens ejendom, indtil den er fuldstændig betalt."
- DE:** "Die Ware bleibt bis zur vollständigen Bezahlung im Eigentum des Verkäufers."
- EL:** "Ο πωλητής παρακρατεί την κυριότητα των αγαθών μέχρι την πλήρη εξόφληση του τιμήματος."
- EN:** "The goods remain the property of the seller until fully paid."
- FR:** "Les marchandises restent la propriété du vendeur jusqu'au paiement complet."
- IT:** "Le merci restano di proprietà del venditore fino al pieno pagamento."
- NL:** "De waren blijven tot de volledige betaling eigendom van de verkoper."
- PT:** "O vendedor conservará a propriedade dos bens até ao momento do pagamento final."
- FI:** "Tavara on myyjän omaisuutta, kunnes kauppahinta on kokonaisuudessaan maksettu."
- SV:** "Varorna förblir säljarens egendom tills de betalats helt och hållet."

BUSINESS IMPACT ASSESSMENT

THE IMPACT OF THE PROPOSAL ON BUSINESS

with special reference to small and medium-sized businesses (SMEs)

Title of Proposal: Amended proposal for a European Parliament and Council Directive combating late payment in commercial transactions

Document reference number: 98016.

THE PROPOSAL

1. *Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?*

This proposal contains a package of measures to combat late payment in commercial transactions in the European Community. The measures apply to all late payments between businesses, and between the public sector and businesses. They apply to all undertakings, including incorporated and unincorporated businesses and the self-employed, who meet the definition of "undertaking" contained in Article 2 (1).

The general aim of this proposal is to encourage respect of contractually agreed payment periods, for the benefit of all businesses. It provides a legal framework to deter late payers from paying late, to give rights to creditors for adequate compensation when they are paid late and to provide or improve procedures for recovering debts so that these procedures are efficient, inexpensive and fast. Finally, there are also specific measures to improve the payment performance of the public authorities.

There is evidence that late payments are hindering the smooth functioning of the Internal Market²¹. There are large differences between payment practices in the Community, and these differences are deterring firms from engaging in cross-border trade. The differences between Member States' legislation on late payments, different redress procedures and different approaches to compensation for the costs of recovering debts are also acting as a barrier to cross-border trade. Finally, differences in payment times and problems of late payment are also damaging firms' competitiveness²².

The Commission's Recommendation of 1995 on payment periods in commercial transactions²³ gave Member States the opportunity to tackle the problem themselves,

²¹ See for example European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

²² See Commission Report on late payments in commercial transactions, OJ C 216, 17.7.1997, p. 10, in particular sections 3.1 and 3.2.

²³ OJ L 127, 10.6.1995, p. 19.

in the form of a non-binding instrument. However, the Commission's report of July 1997 concluded that there had been insufficient action by the Member States, and that further measures to reduce late payments in the Community, such as a Directive, should be proposed²⁴. The latest statistics also indicate that the problems of late payment have not improved in many Member States since the Commission's Recommendation was issued²⁵.

Given the insufficient action by the Member States and the persistent damaging effects of late payment on the smooth functioning of the Single Market, it now appears that a binding instrument in the form of a Directive should be proposed. Taking into account the principle of subsidiarity in Article 3b of the Treaty, it is now apparent that the objective of reducing late payment within the Single Market cannot be sufficiently achieved by the Member States acting individually and can be better achieved by action by the Community as a whole.

THE IMPACT ON BUSINESS IN GENERAL

2. *Who will be affected by the proposal?*

There are basically two situations where businesses in general will be affected by the proposal:

- (a) When a business is paid late by another business;
- (b) When a business pays another business late.

According to a number of surveys, there are wide variations between contractually agreed payment times and actual payment times in EEA countries²⁶. The longest average payment times tend to be in Greece, Portugal and Italy. The shortest average payment times are in Norway, Finland and Sweden. The countries with the longest average overdue record (i.e. the number of days between the actual payment period and the contractual credit period) are Portugal, Italy, Belgium, Greece, the Netherlands and the United Kingdom.

The sectors, which are frequently rated as the worst payers in Europe, tend to be construction, the public sector, transport/logistics, retail/wholesale and primary industries. By contrast, banking/insurance, chemicals and telecommunications are rated as the best paying sectors²⁷.

Large businesses are the customers, which tend to take the longest to pay across Europe, followed by the public sector and small businesses. Large enterprises are quoted as the type of customers, which take the longest to pay in 32% of cases for the EU average, with the figures particularly high in Spain (49%) and Italy (41%)²⁸.

One survey for the United Kingdom in 1994 found the highest levels of total net sums outstanding late were in the manufacturing, construction and wholesale

²⁴ OJ C 216, 17.7.1997, sections 2.1 and 4.

²⁵ OJ C 216, 17.7.1997, section 2.2.

²⁶ See summary of recent statistics in OJ C 216, 17.7.1997, section 2.2.

²⁷ European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

²⁸ European Business Survey, Grant Thornton International Business Strategies Ltd., spring 1997, p. 25.

sectors, with the lowest levels in retail, primary industries and transport²⁹. There were also significant regional differences. Another recent survey for the UK confirmed that the manufacturing sector had the worst payment record (14.0% of payments on time), followed by construction (20.4%) and wholesalers (20.6%), with the best payment performance by far in the financial services sector (31.6%)³⁰. The survey also found that twice as many small businesses paid their bills on time compared with larger companies (23.2% of small businesses paid on time compared to 13.8% of medium-sized businesses and 9.7% of large businesses).

In France, net borrowers (*i.e.* those who benefit most from trade credit) are concentrated in the retail sector, particularly in large-scale food distribution, and in the wholesale, automobile, and car sales/repairs sectors³¹. The amounts of trade credit are concentrated in large businesses, with 43% of trade credit enjoyed by businesses with more than 500 employees and 31% by businesses with more than 2 000 employees. Net lenders are more dispersed in different sectors but are found mainly in producers of intermediary goods and plant and machinery, the wholesale sector and business services. 57% of trade credit is given by firms with less than 500 employees. Recent trends in trade credit have favoured the largest enterprises and disadvantaged SMEs. This is confirmed by a recent study by Experian for the UK market which found that large companies were getting slower at paying their invoices (plus 23.3% compared to the average) whereas small businesses were paying faster³².

Finally, particularly acute payment problems have been reported in the construction industry in Spain, with average payment times of 215 days by large construction firms to SMEs supplying construction materials³³. There have also been very severe payment problems reported for the suppliers of health equipment to public hospitals in Italy (average payment time of 307 days), Spain (305 days), Portugal and Greece, with wide regional variations³⁴.

The proposal will also set new requirements to ensure prompt payment by the public authorities in all Member States. The statistics published by Creditreform have consistently shown that public contracting authorities take much longer to pay their invoices than private businesses. For example, in Austria, the portion of businesses which are paid after more than 60 days, is 28.8% in the case of **public debtors** whereas this number drops to only 16% in the case of private debtors³⁵. The Experian study confirms that public utilities have the worst payment record in the UK³⁶. Moreover, there is evidence that public contracting authorities treat the smallest enterprises, namely craft businesses, even worse than other SMEs³⁷.

²⁹ Forum of Private Business, London, 31 March 1994.

³⁰ Survey of the payment performance in Britain, Dun & Bradstreet, London, October 1997.

³¹ Observatoire des délais de paiement, cinquième rapport, Paris, septembre 1997, p. 10.

³² News release of 16.7.1998, Experian, Nottingham.

³³ Confederation of Suppliers of Construction Materials (CEPCO), Report on the Spanish Construction Industry, Madrid, September 1996.

³⁴ European Diagnostic Manufacturers Association, October 1997.

³⁵ "Wirtschaftslage Mittelstand in Österreich, Frühjahr 1998", Creditreform, Vienna 1998, p. 12-13.

³⁶ News release of 16.7.1998, Experian, Nottingham.

³⁷ "Wirtschaftslage Handwerk, Frühjahr 1998", Creditreform, Neuss 1998, p. 20.

3. *What will business have to do to comply with the proposal?*

For businesses generally, the provisions in the proposal relating to compensation for late payment (Article 3) will introduce new rights and obligations. Businesses will have to respect these new rights and obligations, which aim to provide adequate compensation for creditors who are paid late and to deter late payers from paying late. At the same time, the amended proposal largely respects the principle of contractual freedom so that the parties to a contract will remain free to negotiate and agree for example the default date for payment and the rate of interest on late payment.

However, if they choose a default date of more than 45 calendar days, the amended proposal obliges the buyer to provide the seller with a guaranteed Bill of Exchange (Article 3 (1)(d)). The cost involved in providing such Bill of Exchange has to be borne by the buyer. It is expected that this will greatly reduce the number of contracts where such long payment periods are used. In fact, the average contractual payment period of the six best Member States is only 25 days. The Community average is 39 days. Payment periods of more than 45 days should therefore be considered an exception and be restricted to a very limited number of cases. Where they nevertheless occur they are usually not necessary for examining the invoice or the quality of the goods and services supplied. Rather, they tend to reflect superior market power on the part of the buyer who wishes to obtain trade credit at the expense of his supplier so that it appears justified making the buyer bear the cost of the Bill of Exchange.

The amended proposal also obliges the main contractor in a public procurement contract to provide a guarantee made out to his subcontractors and suppliers covering payment of all the amounts owed within 60 days. This obligation reflects the fact that subcontractors and suppliers are dependent on the main contractor who should be prevented from exploiting his position for obtaining unusually long trade credit at their expense. It is expected that this will greatly reduce the number of cases where suppliers and subcontractors go bankrupt because of the main contractor's unreasonably delaying payment.

Whenever the contractual obligation or the statutory requirement to pay is breached, businesses which are paid late will be able to seek compensation and businesses which pay late will be required to pay compensation in the form of payment of interest and of the other costs of pursuing debts, such as legal fees and administrative costs.

The interest on late payment will accrue automatically, without the need for the creditor to send a reminder (Article 3, paragraph 1(g)). This will bring administrative savings for businesses in those Member States (e.g. Belgium) where a reminder is currently required.

The uniform retention of title clause (Article 4) will bring administrative savings for businesses, which use retention of title clauses, in particular for exports. The present situation is that exporters may need to have a specific retention of title clause for each Member State to which they are exporting, in order to comply with the different legal requirements in each Member State. That imposes additional burdensome requirements on businesses. Businesses will now be able to use a single retention of title clause by using one of the formulae or an equivalent formula in the proposal. There will also be savings of legal and administrative costs by removing the need for

businesses in some Member States to go through formal requirements such as registering the contract or using a notary. Initially, businesses may have to modify their standard contract or individual contracts to ensure that they comply with the uniform retention of title clause. However, these modifications should involve little cost and should be one-off. The costs should be far outweighed by the long-term administrative savings, as well as by the stimulus to exports, which the uniform retention of title clause will bring.

The proposals on redress procedures (Articles 5 and 6) aim to ensure that creditors can pursue debts quickly, efficiently and at minimum expense. The changes should bring savings to businesses which use these procedures by reducing the formalities involved and keeping the financial cost to a minimum, in particular for cases where the debtor and creditor are in different Member States. Regarding accelerated recovery procedures (Article 5), the removal of the ceiling (based on the amount of the debt) to which the procedures apply in some Member States will allow more debts to be subject to accelerated procedures. In Germany, the accelerated recovery procedure (*Mahnverfahren*) has no ceiling and in 1996 over eight million cases were processed through the system. In this system, the average fee for a typical debt is around ECU 17 compared to ECU 100 for using the more traditional legal procedures for pursuing debts.

For the simplified legal procedures for small debts (Article 6), the ceiling of ECU 20 000 will mean that many more commercial transactions are covered by these procedures, so that more businesses can benefit from the relative speed and low cost of "Small Claims Courts".

The public authorities will have to ensure that notices of public procurement and tender specifications contain precise details of payment times (Article 7). This will involve some administrative costs, although if standard details of payment times are used then the costs will be one-off.

Public authorities will also have to comply with obligations regarding maximum payment periods and automatic payment of interest on late payment (Article 8). This will involve the modification of contractual clauses as well as the setting up of administrative systems and procedures within public authorities to ensure that payment deadlines are met. There may be costs related to changing computer systems. The need to set up such procedures was already highlighted in the Commission's Recommendation of 1995 (Article 6(b) and (c)). In Ireland, which has recently introduced a law on prompt payment by the public sector, the administrative costs of setting up and running systems for automatic payment of interest on late payment are not thought to be significant. It is thought that no additional manpower will be required to handle the new procedures.

4. *What economic effects is the proposal likely to have?*

This proposal is expected to bring very significant benefits to businesses, in particular to SMEs. Reducing late payment will improve businesses' cash flow. It will also reduce financing costs, which are caused by being paid late. Businesses will benefit from reductions in the heavy administrative costs of pursuing debts, saving time and manpower on for example sending reminders, managing outstanding claims and pursuing debts through various redress procedures. There will also be savings on the legal costs of pursuing debts.

Moreover, when businesses are paid late, they will be adequately compensated for all of the costs incurred. This will again have a positive impact on businesses' profitability and on competitiveness.

Shorter payment times will strengthen businesses' balance sheet position by reducing the proportion of trade receivables in their total assets. Businesses will thus be less likely to fail. Having cash flowing more rapidly through the chains of buyers and suppliers will also make chains of insolvencies less likely when one major customer fails to pay on time.

To give some idea of the scale of the potential benefits, one survey for the United Kingdom in 1994 estimated that there was GBP 10 billion (ECU 14.8 billion) net late trade credit owed to private businesses in the UK, so that eliminating late payment altogether would result in businesses benefiting by receiving that net amount³⁸. Assuming that the amount of trade debt in the UK was roughly representative for other Member States, and based on the total number of UK businesses as a proportion of the total number of enterprises in the Community³⁹, the total amount of net late trade debt owing to EU businesses could be in the region of ECU 90 billion.

Assuming an average bank lending rate of 12%, the interest cost to EU businesses of late payment could be around ECU 10.8 billion per annum.

The proposals will also have a positive impact on employment. According to one source, one out of four insolvencies in Europe is due to late payment⁴⁰. There were an estimated 207,800 insolvencies in Western Europe in 1997⁴¹, with micro-enterprises (less than 10 employees) representing the bulk of these cases⁴². This led to a loss of 1.8 million jobs and of 94.5 billion ECU in receivables⁴³. The number of jobs lost as a result of late payment could therefore be in the region of 450 000 per year whereas the amount of receivables lost due to late payment amounts to 23.6 billion ECU per year. Apart from maintaining these jobs and economic values, the proposals, by improving businesses' cash flow, profitability and competitiveness, and by creating a healthy payment climate in European economies, are likely to lead to firms hiring more staff.

The proposals will also have a positive impact on competitiveness. Firms will be able to take the payment period more accurately into account when calculating prices. Those firms, which currently increase prices to take into account long payment times and anticipated late payment, in particular for exports, will be able to reduce prices if they are confident of being paid more quickly. Moreover, reducing the amount of late trade debt will free resources for more productive uses such as for research and technological development.

³⁸ Forum of Private Business, London, 31 March 1994.

³⁹ The figures are 2.549 million and 15.777 million respectively: Enterprises in Europe, Fourth Report, European Commission/Eurostat, 1996.

⁴⁰ Fédération Nationale de l'Information d'Entreprises et de la Gestion de Créances, Lyon, September 1997.

⁴¹ "Insolvenzen in Europa 1997/98", Creditreform, Neuss 1998, p. 3 (figures for the EU Member States minus Portugal for lack of reliable statistics plus Switzerland and Norway).

⁴² Fifth Report of the European Observatory for SMEs, European Network for SME Research, November 1997, chapter 7: "Failures and bankruptcies".

⁴³ "Insolvenzen in Europa 1997/98", Creditreform, Neuss 1998, p. 34.

An overall reduction of late payment in the Community, improved procedures for recovering debts in another Member State and the uniform retention of title clause will also encourage intra-Community trade. This will intensify participation in the Single Market and contribute to achieving the objective of economic and social cohesion.

Finally, prompt payment by the public authorities will have a positive effect on the economy as a whole. Suppliers to the public authorities who are paid on time will in turn be in a position to pay their suppliers on time, and this will have a beneficial trickle-down effect on the economy. This will be all the more true as the amended proposal foresees that in a public procurement contract the main contractor must pass on to his subcontractors or suppliers any favourable conditions which he has obtained from the contracting authority.

IMPACT ON SMEs

5. *Does the proposal contain measures to take account of the specific situation of small and medium sized firms (reduced or different requirements etc.)?*

The amended proposal contains two measures, which will particularly benefit SMEs. The first consists of Article 3(1)(d) which obliges the buyer to provide a guaranteed Bill of Exchange at his cost if the default date is more than 45 calendar days from the date of receipt of the invoice. It is clear that it will usually be larger enterprises who insist on such long payment periods, and it will therefore be SMEs who benefit from the security provided by a Bill of Exchange or alternatively from the buyer's willingness to fix shorter payment periods in order to avoid the need for a Bill of Exchange.

The second measure, which will particularly benefit SMEs, consists of the guarantee which the main contractor has to provide to his suppliers and subcontractors according to the second subparagraph of Article 8(1). Here again, it will most likely be SMEs who are confronted with the main contractor and who will henceforth be protected against unusually long payment periods on his part.

While the Directive applies to all businesses, it will be of particular benefit to those SMEs, which sell goods or services without written contracts (the majority of SMEs' commercial transactions are estimated to be carried out without written contracts). The proposal will provide clarity and certainty on the default date and the consequences of paying late.

It has been argued - most often by organisations representing the interests of large businesses - that SMEs may suffer from the increased interest rate foreseen in Article 3(1)(h). This is however contradicted by the organisations representing SMEs and craft businesses, notably UEAPME who support the proposed directive, including the increased interest rate. Some of the SME organisations have reported that their members have pleaded for an even higher interest rate than the one proposed here, as their members have to pay overdue interest to their banks at a level of up to 17% which may not be fully compensated by the interest rate proposed here.

Moreover, the statistical material cited under point 2 above and notably the statistics presented by the French Observatoire des Délais de Paiement show that the bulk of the interest, which will have to be paid, namely 74%, will have to be shouldered by large enterprises whereas SMEs (defined here as enterprises of up to 500

employees) will have to pay the remainder. SMEs will therefore be net beneficiaries of this Directive.

CONSULTATION

6. *List the organisations which have been consulted about the proposal and outline their main views*

There has been widespread consultation with interested parties on the problem of late payments over a number of years. A first round of consultation was based on a Commission working document on the problem of the time taken to make payments in commercial transactions⁴⁴. More than 130 written comments were received from national and European professional organisations and from some Member States. A public hearing was also organised on 7 and 8 July 1993, where some 30 organisations expressed their views.

A second round of consultation followed the publication of the Commission's report of July 1997. 114 written responses were received, mainly from national trade associations, as well as from European organisations, including those representing businesses, lawyers and debt collection agencies. 91 (80%) were in favour of EU legislation on late payments, and 23 (20%) were broadly against. The Commission also organised a public hearing on 7 October 1997, where more than 200 people were present. There was also strong support for EU legislation at the public hearing, including from members of the European Parliament and the Economic and Social Committee.

The responses showed strong support for a right to interest on late payments with a rate of interest set high enough to deter late payers. There was also strong support for the right for the creditor to be compensated for the full costs of pursuing debts, such as administrative and legal costs. All those who commented on the public sector were in favour of legislative action, for example setting maximum payment times and an automatic right to interest for late payments by the public sector. There was also unanimous support for an EU-wide retention of title clause. Many responses favoured simplifying redress procedures. Finally, debt collection agencies at both European and national level have called for licensing of debt collection agencies in all Member States and for a proper Single Market for the recovery of debts with mutual recognition of licences in the Community.

⁴⁴ SEC (92) 2214 final, 18.11.1992.

ISSN 0254-1475

COM(98) 615 final

DOCUMENTS

EN

08 09 10 01

Catalogue number : CB-CO-98-602-EN-C

Office for Official Publications of the European Communities
L-2985 Luxembourg