



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT**

**pursuant to the second subparagraph of Article 251 (2) of the EC-Treaty**

**concerning the**

**Common position of the Council on the proposal for a European Parliament and  
Council Directive combating late payment in commercial transactions**

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**Common position of the Council on the proposal for a European Parliament and  
Council Directive combating late payment in commercial transactions**

**(Text with EEA relevance)**

**1. THE BACKGROUND**

Date of transmission of the proposal to the European Parliament and Council:  
23 April 1998

Date of the opinion of the Economic and Social Committee: 10 September 1998

Date of European Parliament opinion, first reading: 17 September 1998

Date of transmission of the amended proposal: 30 October 1998

Date of adoption of the common position: 29 July 1999

**2. SUBJECT OF THE COMMISSION PROPOSAL:**

The Commission proposed this Directive after it had found<sup>1</sup> that most of the Member States had failed to follow its Recommendation of 1995<sup>2</sup>. Thus, there had not been any reduction of payment delays nor any improvement of the legal position of creditors vis-à-vis their debtors. It was therefore necessary to propose a Directive in order to achieve a substantial and lasting improvement in the situation. The European Parliament supported this proposal and reinforced a number of its provisions. This was reflected in the Commission's amended proposal of October 1998<sup>3</sup>.

The economic rationale behind the Commission's proposal lies in the fact that one out of four insolvencies is due to late payment. This leads to the loss of 450,000 jobs per year thus adding to the existing high level of unemployment. In addition, receivables worth 23.6 billion Euros are lost every year through the insolvencies caused by late

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<sup>1</sup> See Commission Communication – Report on late payments in commercial transactions, OJ C 216, 17.7.1997, p. 10.

<sup>2</sup> Commission Recommendation of 12 May 1995 on payment periods in commercial transactions, OJ L 127, 10.6.1995, p. 19, also see Communication on the Commission recommendation of 12 May 1995 on payment periods in commercial transactions, OJ C 144, 10.6.1995, p. 3.

<sup>3</sup> Document COM (1998) 615 final of 29.10.1998, OJ C 374, 3.12.1998, p. 4.

payment. This made Community action imperative in order to prevent the European economies from incurring these losses any longer.

### **3. COMMENTS ON THE COMMON POSITION**

#### **3.1. General remarks**

In its amended proposal, the Commission had accepted and/or reformulated 20 of the 27 amendments that the European Parliament had proposed. In particular, the Commission had agreed that it would be useful to introduce or reinforce provisions dealing with long contractual payment periods (Art. 3 (1) d) and e) of the amended proposal) and public procurement contracts (Art. 7 and 8 of the amended proposal). The Commission had also largely accepted the Parliament's modifications relating to retention of title (Art. 4 of the amended proposal).

The Council reached agreement on a number of basic provisions of the directive, in particular on the period after which interest becomes due, the level of such interest and the recovery procedure for unchallenged claims. The Council also found a partial solution to the problem of long contractual payment periods (Art. 3 (2) and (3)<sup>4</sup>), but failed to tackle the specific problems of public procurement contracts. It did not accept the proposal on retention of title either.

#### **3.2. The fate of the Parliament's amendments**

##### *3.2.1. Amendments accepted by the Commission and included in the common position*

In Recital 6 of the common position, the Council retained the Parliament's desire to underline that SMEs suffer as much from excessively long payment periods as they do from late payment.

The Parliament's definitions of 'commercial transactions' and 'undertakings' were largely accepted (Art. 2 (1)). However, the Council added that the undertaking must have acted 'in the course of its independent economic or professional activity', thereby excluding entrepreneurs who acquire goods or services for private purposes and thus are comparable to consumers. The Commission accepted this since in its original proposal<sup>5</sup>, it had also aimed at excluding consumers from the scope of the Directive, using a slightly different formulation.

The obligation for the Commission to report on the operation of the legislation in practice, originally foreseen in Art. 3 (3) of the amended proposal, was accepted and is now contained in Art. 5 (5). The Council also accepted the amendment according to which Member States should be able to maintain or bring into force provisions which are 'more favourable to the creditor' (now in Art. 5 (2)).

Thus, amendments nos. 1, 9, 15 and 31 were fully or partly accepted.

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<sup>4</sup> References to Articles concern the common position, unless otherwise specified.

<sup>5</sup> Document COM (1998) 126 final of 25.3.1998, OJ C 168, 3.6.1998, p. 13.

### 3.2.2. *Amendments accepted by the Commission but not included in the common position*

#### 3.2.2.1. Interest in case of late payment

In Art. 3 (1)(a), the Council established the principle that interest shall become payable in case of late payment, but avoided any reference to the concept of a 'due date'. It accepted the Parliament's amendment requesting to use the date of 'receipt' of the invoice rather than that of the invoice itself. On the other hand, there was no majority for the amendment according to which the invoice was deemed to have been received after a certain number of calendar days (Art. 3 (1)(b) of the amended proposal).

The Council fixed the point in time when interest shall become payable at 30 rather than 21 days following the date of receipt of the invoice (Art. 3 (1)(b)(i)). The Commission accepted this because the 30 day period is at any rate a considerable improvement given the fact that the Community average of contractual payment periods is at present 39 days. The 30 day period is being exceeded by eight Member States, with the average in some Member States being as high as 65, 68 or 75 days<sup>6</sup>.

As the European Parliament had requested, the Council made it clear that the creditor is only entitled to interest after having fulfilled the contractual and legal obligations (Art. 3 (1)(c)(i)).

As to the level of interest, the Council reduced the margin from 8 to 6 percentage points (Art. 3 (1)(d)). As the European Central Bank's rate for refinancing operations stands at 2.5 % at present, this will result in 8.5 % interest to be paid by the debtor. The Council also removed the Committee procedure for modifying the margin (Art. 3(2) of the amended proposal).

The Commission regretted both decisions as the level of interest will now be below what is necessary to adequately compensate the creditor for the loss of liquidity incurred through the debtor's late payment. On the other hand, considering the existing situation in the majority of Member States where considerably lower interest rates are in force, the Commission reached the conclusion that the Council's position constitutes a clear improvement and merits being submitted to the Parliament for second reading.

#### 3.2.2.2. Compensation of the damage incurred

The Council eliminated the provision that would have entitled the creditor to claim full compensation for the damage incurred (Art. 3 (1)(j) of the amended proposal). It did so although the Commission had drawn the Council's attention to the fact that the Parliament's amendment no. 14 placed particular emphasis on this aspect. The Commission, supported by a number of Member States, tried hard to convince the Council that the creditor should at least be entitled to the reimbursement of collection cost. In this context, the Commission showed the Council that failure to include such a provision would discriminate against small creditors, as the interest on small debts

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<sup>6</sup> See Table 1 in Commission Communication, OJ C 216, 17.7.1997, p. 10, at p. 13.

(e.g. € 1000 being paid 1 month late) is far too low (€ 7.08). Such an amount has little impact on the debtor's payment behaviour and in no way does it cover the creditor's collection cost (€ 100 to 300). The Directive would therefore help SMEs to pursue their amounts receivable much more effectively if such a provision were adopted.

Although a considerable number of Member States were prepared to accept such a provision, the Council finally decided to eliminate it. The Commission regretted this decision and hopes that there will be an occasion to reconsider it.

### 3.2.2.3. Long contractual payment periods

The Council failed to adopt the Parliament's amendments (contained in Art. 3 (1)(d) and (e) of the amended proposal) that were designed to discourage the parties from agreeing on long contractual payment periods. However, the Council agreed on Art. 3 (2) and (3), which permit to reach a similar result. Under certain conditions, Art. 3 (2) authorises Member States to restrain the parties to a contract from exceeding a period of 60 days after which interest becomes payable. Member States can choose this option for certain categories of contract where SMEs are typically faced with payment periods far in excess of 60 days, e.g. those concluded by public authorities, by main contractors in their relations with subcontractors and by large supermarket chains vis-à-vis their suppliers. In these areas, the Commission has received complaints showing that SMEs are frequently confronted with payment periods ranging from 90 to 150 days. In some cases, payment periods have been as long as 200 to 500 days.

Art. 3 (3) permits national courts to combat long contractual payment periods and low contractual interest rates if these are considered 'grossly unfair' to the creditor. Contrary to Art. 3 (2), this provision is not an option, but applies to all Member States and all categories of contract. The Commission is aware of the risk inherent in court proceedings aiming at the application of this provision in individual cases. It would therefore have preferred a more precise formulation and had made proposals towards this aim. However, it turned out that there was no majority for a more far-reaching provision.

Taken together, Art. 3 (2) and (3) permit a reasonable combat against long contractual payment periods and low contractual interest rates. The Commission therefore accepted that they replace the proposed amendments.

### 3.2.2.4. Retention of title

Following the Parliament's amendments nos. 18, 19 and 21, the Commission had proposed a considerably improved text on retention of title. Nevertheless, the Council did not retain this proposal.

The Commission regretted this, as the Community wide mutual recognition of retention of title clauses constitutes an indispensable instrument for making the debtor pay on time. This instrument is all the more necessary in transborder operations where debtors tend to be more evasive than in purely national transactions. The increased level of interest alone will often not suffice to make the debtor pay on time. It is the risk of having to return the goods to the creditor that will induce most debtors to pay promptly.

The fact that contractual retention of title clauses are at present not mutually recognised by the Member States constitutes a serious malfunctioning of the Internal Market and should no longer be tolerated. Since the Commission's proposal does not seek harmonisation of all aspects of retention of title, but is limited to requiring mutual recognition of such clauses, it would not have necessitated major adaptations of national law.

The Commission therefore hopes that there will be an occasion to reconsider this issue.

#### 3.2.2.5. Recovery procedures

The common position contains a provision for recovery procedures for unchallenged claims in Art. 4. This Article has been modified to take into account the comments of the Council Legal Service concerning the implementation of this Article "in conformity with Member States' legislation". Recital no. 18 further underlines the objective of this provision.

On the other hand, the Council eliminated Article 6 of the amended proposal because a number of Member States were reluctant to modify national provisions relating to the organisation of their courts. They also feared that this proposal would have had repercussions on the need for the plaintiff to be represented by a lawyer.

The Commission accepted these modifications as the present Art. 4 incorporates most of the substance of its proposal.

#### 3.2.2.6. Public procurement

The Council eliminated Articles 7 and 8 of the amended proposal, thereby scrapping any specific rules on public procurement. On the other hand, the Council made it clear that the Directive applies to transactions between private enterprises and public authorities (see Art. 2 (1)). Public authorities will therefore be subject to the same rules as private enterprises. The Council refused to accept the argument that public authorities paid later than private enterprises. In particular, the Council was of the opinion that large private enterprises could equally abuse their position on the market and pay their suppliers extremely late.

In order to combat this kind of abuse, the Council introduced an 'anti-abuse clause', contained in Art. 3 (3), which has been commented upon under point 3.2.2.3. above. In addition, Art. 3 (2) permits Member States to combat long contractual payment periods by fixing an upper limit of no more than 60 days, which the parties to the contract cannot exceed.

The Commission accepted these provisions as they offer a reasonable solution to the problem of abuse of an economic operator's superior market power, irrespective of its private or public status. The Commission regretted, however, that the Parliament's amendments nos. 24, 33/26 and 28 concerning the protection of subcontractors fell victim to this operation.

### **3.3. New provisions introduced by the Council**

Art. 2 (3) has been introduced in order to define the concept of 'enforceable title', which is being used in Art. 4. This did not change the substance of the proposal.

Art. 3 (1)(b)(iv) adds the procedure of acceptance or verification as a possible date that may trigger the 30-day period after which interest becomes due. In the Commission's opinion, this constitutes a useful addition to its proposal as it reflects the particular procedures in the construction industry.

Art. 3 (2) and (3) have been introduced in order to combat long contractual payment periods (see point 3.2.2.3. above). The Commission accepted this since the Council thereby offered a compensation for the elimination of the particular rules on public procurement (see point 3.2.2.6. above).

### **3.4. Problems relating to the committee procedure and the legal basis**

#### *3.4.1. The Committee Procedure*

The Council eliminated the Committee Procedure (Art. 9 of the amended proposal) because a number of Member States feared that this procedure could be used for too wide-ranging modifications of the interest rate. The Commission did not insist on maintaining the procedure, although it regretted that the legislation may become less operational and efficient over time with no possibility of a rapid reaction to changing circumstances.

#### *3.4.2. The Legal Basis*

The Council Legal Service questioned the validity of Art. 95 as the legal basis for the Commission's amended proposal, in particular for its Articles 4, 5 and 6. However, the Commission's Legal Service confirmed the validity of its approach.

As the text of the common position was considerably modified, the Council Legal Service confirmed in the end that the outcome is now firmly based on Art. 95.

## **4. CONCLUSIONS**

The Commission is of the opinion that the common position constitutes considerable progress on the issue of combating late payment. It would have preferred more decisive action on a number of issues and has regretted the elimination of the obligation for the debtor to pay full compensation (see point 3.2.2.2. above) and of the mutual recognition of retention of title (see point 3.2.2.4. above).

However, the Commission accepted the present common position because there did not seem to be any chance for improvement without a fresh impetus from the European Parliament.