



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
combating late payment in commercial transactions

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

Late payment of contractual debts leads to cash-flow difficulties, undermines profitability and damages competitiveness. In the worst cases, they result in insolvencies and job losses. One out of four insolvencies is due to late payment¹. 33% of businesses in Europe see late payments as a serious problem or a problem threatening the survival of their business, with the figure as high as 51% in Greece, 50% in Italy and 46% in France². With the level of unemployment in Europe at around 18 million, late payment is an issue which cannot be ignored and which requires action at Community level. The Commission has pointed out time and again that the risk of business failures in Europe is unacceptably high, with 50% of newly created businesses failing to survive their first five years³. As late payment is a crucial factor in the mortality of businesses, any action which combats late payment needs to be undertaken now.

Failure to pay on time is a breach of contract. Yet all too often paying late has become the norm, rather than the exception, with debtors taking a cavalier approach to their contractual obligations to pay on time. The damaging effects on small and medium-sized businesses (SMEs) are particularly severe.

The lack of action by most Member States to tackle the problem, and the persistent damaging effects of late payments on the Single Market, have led the Commission to propose a Directive. This proposal therefore contains a package of measures to combat late payments in the Community. The proposals apply to late payments between businesses, and between the public sector and businesses. The general aim is to encourage respect for payment periods by businesses and the public authorities. The proposed measures respect the principle of contractual freedom in the private sector.

2. EFFECTS ON THE SINGLE MARKET AND THE PRINCIPLE OF SUBSIDIARITY

Late payments are hindering the smooth functioning of the Single Market and preventing SMEs from benefiting fully from the opportunities offered by the Single Market. The differences between payment practices in the Community are striking⁴, with average actual payment times over three times as high in South European countries than in Nordic countries. The differences in payment times and the problems of late payments are affecting competitiveness and are deterring firms from engaging in cross-border trade. On average 21% of European businesses would export more if there were shorter payment

¹ Source: Fédération Nationale de l'Information d'Entreprises et de la Gestion de Créances, Lyon, September 1997.

² European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

³ Enterprises in Europe, Fourth Report, p. 62, European Commission, 1996.

⁴ See section 2.2 of the Communication of 9 July 1997 for a summary of the most recent statistics comparing payment times in Europe.

delays from foreign customers (the figure was 48% in Ireland, 37% in the Netherlands and 35% in Belgium)⁵.

There are also wide variations between Member States' legislation on late payments⁶, such as the statutory right to interest on late payments: such a right does not exist in all Member States, and in those Member States where the right exists, the rate of interest and the mechanism for setting the rate differ widely. There are different redress procedures and different approaches to compensation for the various costs of pursuing debts. These differences make recovery of debts from other Member States a complex, hazardous and often time-consuming business.

Thus the question of the length of time it takes to make payments is not only of domestic interest to Member States. On the contrary, practices in this area will constitute a key element in the functioning of the Internal Market. For example, businesses which normally allow their customers to pay after 30 days will have calculated their prices on the basis of such terms. If they have to wait three times as long before receiving payment, their profit will be reduced, or in the worst case disappear. At the other end of the spectrum, firms which normally calculate their prices on the basis of payment after 90 days, will find themselves at a competitive disadvantage because they have calculated their prices too high compared to competitors in other Member States. The present situation therefore leads to distortions of competition which will be felt not only by traders involved in transborder operations but also by economic operators who are only active in the various domestic markets of the Member States. These distortions are incompatible with the proper functioning of the Internal Market and justify the adoption of a Directive under Article 100a of the Treaty.

This is why the Single Market Action Plan⁷, adopted by the Commission and endorsed by the Amsterdam European Council in June 1997, identified reducing late payment as a key priority for ensuring that the full benefit of the Single Market is achieved before the beginning of Stage III of Economic and Monetary Union, with a proposal for a Directive on late payments to be tabled.

As stated above, there is ample evidence that late payments hamper the free circulation of goods and services within the Internal Market. 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.

Therefore the Commission considers that the adoption of Community legislation in the form of a Directive is in conformity with the principle of subsidiarity as laid down in Article 3b of the Treaty.

⁵ European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

⁶ See the Annex of the Communication of 9 July 1997 for a comparison of the current law and practice in EEA countries.

⁷ SEC(97) 1 final, 4 June 1997, pp. 8 and 38.

The Commission's proposal contains a number of minimum requirements. In particular, it does not aim at full harmonization of national law in the fields covered by this Directive, but leaves the Member States a wide margin of appreciation. Wherever possible, it aims at mutual recognition of Member States' provisions. The proposed provisions are limited to what is necessary to achieve the proper functioning of the Internal Market. The Directive is therefore in accordance with the principle of proportionality as contained in Article 3b, paragraph 3, of the Treaty.

3. THE IMPACT OF LATE PAYMENT ON SMEs

SMEs are the hardest hit by their clients' failure to pay on time, because of the vulnerability of their cash flow, their frequent reliance on a limited number of suppliers and their weakness vis-à-vis the large firms that they usually supply. The financial costs of late payment for SMEs are particularly high, with cash-flow needs having to be met by short-term bank loans or overdrafts with relatively high interest charges. The administrative costs of pursuing debts are disproportionately high for SMEs, which do not have specialized staff or the time or manpower to manage outstanding claims. SMEs therefore stand most to gain from effective legislation tackling late payments.

There have been some concerns that legislation to tackle late payments, for example by introducing a strong statutory right to interest, might backfire on SMEs. However, the example of Nordic countries shows that SMEs have not suffered from a high interest rate on late payment, but have benefited from it. The great majority of businesses in Nordic countries do in fact exercise their right to interest on late payments, including small businesses⁸. As SMEs are owed more money than they owe themselves to larger businesses, SMEs would be net beneficiaries from higher statutory interest rates on late payment as well as from reductions in the overall volume of debt. A survey of private businesses in the UK in 1994 showed that SMEs were owed twice as much trade credit as they themselves owed to other economic operators (GBP 40 billion trade credit owed to private businesses compared to GBP 20 billion owed by them). The proportion is the same for total amounts of late payment, with GBP 20 billion late trade credit owing to SMEs and GBP 10 billion late trade credit owed by SMEs. This means that if late payment were to be eliminated, SMEs in the UK alone would benefit by the timely reception of the net total of GBP 10 billion⁹.

The speed with which creditors can recover claims has a big impact on SMEs' liquidity. It is therefore important that they have at their disposal accelerated recovery procedures which permit them to obtain a writ of execution within a short period of time. This would enable SMEs to benefit from the functioning of the Internal Market to a much higher degree than is at present the case.

The same is true for simplified legal procedures which are available in most Member States for the recovery of small debts (Small Claims Court, *juge de paix*, *Amtsgericht*, etc.). It is the ease of access to these Courts, which makes them attractive for SMEs.

⁸ In Sweden, 94% of businesses always or sometimes charge interest on late payments, with 88% in Finland, 83% in Norway and 79% in Denmark (source: European Business Survey, Grant Thornton International, London, May 1997, page 24).

⁹ Source: Forum of Private Business, London, 31 March 1994.

4. THE PUBLIC SECTOR

In many countries the public sector is one of the worst payers¹⁰. There are two main reasons why special measures for this sector are necessary.

First, late payment by public authorities sets a bad example to all economic operators. Public bodies have the obligation to serve the general interest before their own and should observe strict discipline in paying their suppliers. As part of the policy to speed up payments in the Union, public administrations, which through the volume of their purchases exert a considerable impact on the economy, should take the lead and carry the entire economy along in improving payment practices.

Secondly, there is an imbalance between the parties. A large number of firms are dependent on public contracts, especially in certain industries (for example construction and defence), and fear losing their only or main client. Because of their respective bargaining positions and the public sector's own rules regarding payments conditions which do not allow or encourage negotiations on payments conditions, firms cannot genuinely negotiate with the public sector.

The written comments and the public hearing referred to in point 6 below showed unanimous support in favour of Community-wide action to tackle the problem of late payments by the public sector.

For payments executed by Community institutions, which are not covered by this Directive, the Commission will make appropriate proposals aiming at a rules equivalent to those applied to public authorities in this Directive.

5. RECENT INITIATIVES

The Commission's Recommendation of 12 May 1995 on payment periods in commercial transactions¹¹ invited Member States to tackle the problem of late payments. However, the Commission's Communication of 9 July 1997¹² showed that some action had been taken in only a limited number of countries to improve the payments situation between firms. Moreover, the latest statistics indicated that average payment times in Europe in 1996 lengthened, with all payment being on average 15 days late. The Communication concluded that the Commission would make proposals for the minimum requirements which should be included into national legislation in order to combat late payment.

There have been calls from both the European Parliament and the Economic and Social Committee for stronger, Community-wide action. The European Parliament, in a resolution of 4 July 1996¹³, called on the Commission to consider transforming its Recommendation into a proposal for a Directive as soon as possible. The Economic and

¹⁰ Payment times averaging 307 days by public hospitals to businesses supplying health equipment in Italy and 305 days in Spain have been reported. Source: European Diagnostic Manufacturers Association, October 1997.

¹¹ OJ L 127, 10.6.1995, p. 19, and for the Communication, OJ C 144, 10.6.1995, p. 3.

¹² OJ C 216, 17.7.1997, p. 10.

¹³ OJ C 211, 22.7.1996, p. 42.

Social Committee, in an opinion of 29 May 1997¹⁴, proposed maximum payment periods and interest on late payments by the public authorities.

6. CONSULTATION

The Commission consulted interested parties on the best way forward to combat late payments in Europe, with both written responses to the July 1997 Communication and at a public hearing on late payments held in Brussels on 7 October 1997. There was a very strong response in favour of Community-wide action to create a level playing field within the Single Market for the non-respect of contractual payment periods. More than one hundred written responses were received, mainly from national trade associations, as well as from European organizations, including those representing businesses, lawyers and debt collection agencies. 91 (80%) were in favour of EU legislation on late payments. The Commission also organized a public hearing on 7 October 1997, where more than 200 people participated. 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. A high proportion of responses favoured simplifying redress procedures.

7. THE DIRECTIVE: ARTICLES

Article 1: Scope

The Directive applies to debts in all commercial transactions, i.e. between businesses, and between businesses and the public authorities. It applies to all businesses, including incorporated and unincorporated businesses and the self-employed who carry on a trade or profession of any kind. Thus, the Directive does not apply to, nor prejudice future measures in the area of consumer credit.

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

The majority of SMEs conduct trade without written contracts, and it is primarily for them that this Directive is being proposed. In the absence of a written contract, or if the contract or general conditions of sale are silent on the due date for payment, it is necessary to have a clear subsidiary legal provision for a statutory payment period. The time limit proposed here is 21 days from the date of the invoice (paragraph 1(a)). That follows the best practice in Nordic countries, where contractually agreed credit periods average in practice 19 days (Finland) and 21 days (Norway)¹⁵. The rule does not infringe the principle of contractual freedom, as the statutory payment period of 21 days would only apply when the payment

¹⁴ CES 607/97 of 29 May 1997, OJ C 287, 22.9.1997, p. 92.

¹⁵ See European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

period had not been specified in the contract. Nevertheless, it would - in the course of time - encourage the parties to reduce their present payment periods.

Paragraph 1(c) gives the creditor the statutory right to interest on late payment. If the statutory right to interest is to have a deterrent effect and is to provide adequate compensation for being paid late, the rate of interest needs to be set at a sufficiently high level. In other words, it should be at least as expensive to borrow money by paying late than to borrow from banks or other lenders at commercial interest rates. At present, however, the level of the statutory interest rate is far too low in almost all Member States compared to typical commercial interest rates on unforeseen bank overdrafts¹⁶. This situation encourages debtors to prefer suppliers' credit over bank loans to the detriment of creditors. While suppliers' credit is perfectly acceptable as long as it has been agreed between the parties, it becomes an unacceptable problem both for individual suppliers and with macro-economic dimensions if the law encourages debtors to exceed contractually agreed credit periods unilaterally. The situation is particularly serious for SMEs who have more difficulty in obtaining bank loans when their cash-flow is disrupted by late payments.

Paragraph 1(e) therefore aims to set a **minimum** rate for the statutory right to interest in Member States. It leaves Member States the flexibility of setting a higher rate in order to reflect typical commercial interest rates in each country. It also fully respects the principle of contractual freedom, as the parties to an individual transaction would be free to negotiate a higher or a lower rate than the statutory rate applicable in the Member State. The statutory rate applies only if no other rate has been specified in the contract or in the general conditions of sale. Nevertheless, the Commission believes that a higher statutory interest rate would have the effect of reducing late payment. The experience of the Nordic countries where statutory interest rates are twice as high as in most other Member States shows that this has had the effect of drastically reducing payment delays, although the high statutory interest rates are not mandatory. In fact, the statutory rate has become standard commercial practice in these countries where a very high proportion of all businesses actually claim interest on late payments. The high statutory rate has certainly facilitated the creditor's claim for interest in cases where there is no contract or the contract is moot on this point. It also strengthens the seller's hand in negotiations about the level of interest should the buyer wish to fix a lower rate.

The mechanism for setting the statutory rate also varies between countries. The objective should be to have a mechanism which allows the statutory rate on late payments to track typical commercial interest rates. In Sweden, for example, the mechanism is the central bank discount rate plus 8 percentage points. The rate should also be easily ascertainable by citizens, and so be based on an interest rate which can be easily identified for example in the financial press. Moreover, the formula should be such that the rate is not changed too frequently, but is relatively stable.

In order to meet these different criteria, the proposal is that the minimum statutory rate for late payments should be the sum of two elements. The first element is a reference rate which tracks movements in European market rates. The Commission considered a number of possibilities for the reference rate and concluded that the rate which best meets the

¹⁶ See the summary in the first and third columns of the second table in the Annex of the Communication of 9 July 1997.

criteria set out above is the tender (repo) rate of the European Central Bank. This will be one of the major policy rates set by the European Central Bank, aimed at controlling short-term market rates. It will have effect as from 1 January 1999. For Member States which do not participate in the third phase of Economic and Monetary Union, the reference rate shall be the equivalent rate set by their central bank.

The second element is a margin to ensure that the overall minimum statutory rate is set at a sufficiently high level to dissuade late payers. The margin of 8 percentage points follows the example of Sweden, which is generally recognized as having efficient and effective legislation on interest on late payments. The overall result should be that the statutory rate of interest on late payments set by Member States also compensates the average SME for financing costs which are equivalent to the rate on unforeseen bank overdrafts¹⁷.

Apart from the right to interest, it is also essential to recognize the right for the creditor to be fully compensated for the other costs of pursuing debts, such as the administrative or legal costs. The right to compensation for these costs varies between Member States¹⁸. Paragraph 1(g) aims to ensure that such costs are fully recoverable from the debtor.

Article 4: Retention of title

Retention of title is a legal mechanism which delays the transfer of ownership of goods until the purchase price has been paid in full. In the Communication of 9 July 1997, the Commission identified retention of title as one area where action at Community level could be beneficial for exporters and for reducing late payments. The problem at present is that there are different legal requirements in the Member States, so that exporters cannot rely on a single retention of title clause for all Community countries. In the consultation exercise following the Communication of 9 July 1997 there was unanimous support for Community legislation on retention of title by all those who commented on this point.

This Article aims to provide a uniform retention of title clause applicable in all Member States. It does not aim at full harmonization of national law in this area. It rather obliges Member States to recognize a retention of title clause if a number of minimum requirements are met. It does not interfere with the rules protecting a third *bona fide* purchaser. The Article does not aim at making retention of title clauses mandatory, but respects the parties' freedom of contract.

Article 5: Accelerated recovery procedures for undisputed debts

The objective of this Article is to introduce and to improve accelerated recovery procedures for undisputed debts. Procedures of this kind (e.g. the "summons production procedure" in the UK, the "*injonction à payer*" procedure in France and the "*Mahnverfahren*" in Germany) already exist in a considerable number of Member States. The advantages of such procedures are that they are rapid, do not involve the intervention of a judge (unless the debt is disputed) and involve few formalities and little cost. As about 90% of the cases are undisputed, this would considerably reduce the number of cases

¹⁷ See the summary of commercial interest rates for unforeseen bank overdrafts in the third column of the second table in the Annex of the Communication of 9 July 1997.

¹⁸ See the summary in the fifth column of the fourth table in the Annex of the Communication of 9 July 1997.

which judges would have to deal with. This would free valuable resources which could be used to speed up ordinary legal proceedings.

If the debtor contests the debt in the course of these proceedings, the normal rules regarding procedure and representation will apply, i.e. the procedure will then either fall under Article 6 (if the debt is below the threshold for small debts) or will be subject to national rules dealing with the procedure for larger debts.

In the Commission's view, the accelerated recovery procedures should be available in all Member States. These procedures would be particularly useful for the recovery of debts when the debtor and the creditor are in different Member States. In such cases it would be advisable for the creditor to pursue the debtor in the debtor's Member State, so that the writ of execution (*titre exécutoire*, *Vollstreckungsbescheid*) can be enforced without delay. The presently widespread practice of suing the debtor in the creditor's country of residence leads to long delays in the execution of the judgement obtained. Creditors have hesitated up to now to address themselves to the Courts of the debtor's country of residence because of a lack of confidence in their speed and their accessibility for foreign creditors. This unsatisfactory state of affairs is incompatible with the completion of the Internal Market. Creditors in all Member States must have available similar recovery procedures which are fast, easily accessible and in which they have confidence.

The Commission's proposals on simplified legal procedures and on accelerated recovery procedures for commercial debts represent a first stage in the wider debate on legal procedures in the European Union. They do not preclude any further proposals from the Commission, which might emerge following the consultation on legal procedures launched in its Communication "Towards improving efficiency in the obtention and execution of decisions in the European Union"¹⁹.

Article 6: Simplified legal procedures for small debts

For debts below the threshold of ECU 20 000, the creditor should have the choice of pursuing debts rapidly, efficiently and at minimum cost through simplified legal procedures, irrespective of whether they are disputed or not. These procedures tend to be conducted in local Courts, do not involve the presence of a bailiff or a lawyer and tend to be fairly informal. As with accelerated recovery procedures, the Commission takes the view that such procedures should be available for creditors in all Member States, in particular for debts where the creditor and the debtor are in different Member States. Again the objective of the Article is to set the main principles underlying best practice.

Article 7: Transparency in public procurement contracts

The Directives on public procurement contracts²⁰ stipulate that notices of invitation to tender must indicate the basic arrangements for financing and payment. However, Member States interpret this requirement differently, and payment periods are often omitted from invitations to tender. This Article therefore aims to strengthen transparency in public procurement contracts by requiring public authorities to indicate precise details of the payment periods and payment deadlines used by the awarding authority. Public

¹⁹ OJ C 33, 31.1.1998, p. 3.

²⁰ Council Directives 93/36/EEC, 93/37/EEC and 93/38/EEC of 14 June 1993, OJ L 199, 9.8.1993.

procurement contracts are used in a broad sense here and are not defined by reference to the public procurement Directives which only apply to contracts over a certain threshold.

Article 8: Prompt payment, due date and automatic interest

In view of the particular position of the public sector, the Commission takes the view that a maximum payment period by the public sector should be set. A maximum payment period of 60 days is proposed here (paragraph 1). This is without prejudice to any shorter times currently in effect. Unlike transactions in the private sector (see Article 3(1)), this maximum payment period could not be overridden by any provision in a contract with the public authorities, except if it was agreed between the parties that a shorter time limit should apply. The date from which the 60 day period starts to run is otherwise the same as for all other transactions (see Article 3, paragraphs 1(a) and 1(b)), i.e. normally from the date of invoice. In the absence of a written contract, or if there is a written contract but it is silent on the payment period, the 21-day rule set out in Article 3, paragraph 1(a), would apply equally to transactions with the public sector.

Paragraph 2 provides for interest on late payment by public authorities. The rate of interest is the same as for other transactions (see Article 3, paragraphs 1(d) and 1(e)). In addition, the payment of interest is to be made automatically by the public authorities, without the need for the creditor to make a claim. This is in line with best practice in the Member States (F, B, IRL) and gives public authorities a strong financial incentive to pay on time.

Article 9: Committee

The setting up of a Committee with a view to reviewing the functioning of this Directive seems necessary, as none of the existing committees is capable of fulfilling this task.

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

combating late payment in commercial transactions

(Text with EEA relevance)

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 Commission²¹,

Having regard to the opinion of the Economic and Social Committee²²,

Acting in accordance with the procedure laid down in Article 189b of the Treaty²³,

1. Whereas the European Parliament in its Resolution²⁴ on the Integrated Programme in favour of SMEs and the craft sector²⁵, emphasized that the Commission should forward proposals to deal with the problem of late payment;
2. Whereas on 12 May 1995 the Commission adopted a Recommendation on payment periods in commercial transactions²⁶;
3. Whereas the European Parliament in its Resolution on the Commission Recommendation on payment periods in commercial transactions²⁷ called on the Commission to consider transforming its recommendation into a proposal for a Council Directive to be submitted as soon as possible;
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 Forward²⁸, recommending maximum payment periods and interest on late payments by public authorities;
5. Whereas on 4 June 1997 the Commission published an Action Plan for the Single Market²⁹, which underlined that late payment represents an increasingly serious obstacle for the success of the Single Market;

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²⁴ OJ C 323, 21.11.1994, p. 19.

²⁵ COM(94) 207 final of 3 June 1994.

²⁶ OJ L 127, 10.6.1995, p. 19.

²⁷ OJ C 211, 22.7.1996, p. 43.

²⁸ OJ C 287, 22.9.1997, p. 92.

²⁹ SEC(97) 1 final, 4 June 1997, pp. 8 and 38.

6. Whereas on 17 July 1997 the Commission published a Report on late payments in commercial transactions³⁰, summarizing the results of an evaluation of the effects of the Commission's Recommendation of 12 May 1995;
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;
8. Whereas the differences between the payment rules and practices in the 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;
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;
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;
12. Whereas late payment constitutes a breach of contract which has been made financially attractive to 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 recognized by all Member States;

³⁰ OJ C 216, 17.7.1997, p. 10.

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

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

Article 1

Scope

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

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, which lead to delivery of goods or provision of services for remuneration;
2. "late payment" means failure to observe the contractual or statutory terms of payment;
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;
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;

5. "public procurement contracts" means contracts for pecuniary interest concluded in writing between a natural or legal person and public authorities.

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;
 - (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 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.

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.

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

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

Article 5
Accelerated recovery procedures for undisputed debts

1. Member States shall ensure that there is an accelerated debt recovery procedure for undisputed debts.
2. This procedure shall apply irrespective of the amount of the debt.
3. This procedure shall be available to creditors from all Member States, irrespective of their place of residence.
4. The creditor shall be able to choose whether or not he wishes to be represented by a third person.
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:
 - (a) the application of the rules governing notification or service; and
 - (b) the rights of the defendant to dispute the debt.

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.

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;
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 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.

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.
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.

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*.

Article 12
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

List of clauses to be recognized 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.”

BUSINESS IMPACT ASSESSMENT

THE IMPACT OF THE PROPOSAL ON BUSINESS

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

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

Document reference number: 97012.

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 businesses, including incorporated and unincorporated businesses and the self-employed who carry on a trade or profession of any kind.

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 Market³¹. 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' competitiveness³².

³¹ See for example European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

³² 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.

The Commission's Recommendation of 1995 on payment periods in commercial transactions³³ gave Member States the opportunity to tackle the problem themselves, 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 proposed³⁴. The latest statistics also indicate that the problems of late payment have not improved in many Member States since the Commission's Recommendation was issued³⁵.

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 three 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;
- (c) When a business is paid late by a customer (an individual person rather than a business customer).

According to a number of surveys, there are wide variations between contractually agreed payment times and actual payment times in EEA countries³⁶. 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 sectors³⁷.

³³ OJ L 127, 10.6.1995, p. 19.

³⁴ OJ C 216, 17.7.1997, sections 2.1 and 4.

³⁵ OJ C 216, 17.7.1997, section 2.2.

³⁶ See summary of recent statistics in OJ C 216, 17.7.1997, section 2.2.

³⁷ European Payment Habits Survey 1996, Intrum Justitia, Amsterdam, April 1997.

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%)³⁸.

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 sectors, with the lowest levels in retail, primary industries and transport³⁹. 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%)⁴⁰. 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 sectors⁴¹. 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.

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 materials⁴². 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 variations⁴³.

The proposal will also set new requirements to ensure prompt payment by the public authorities in all Member States.

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 proposals fully respect the principle of contractual

³⁸ European Business Survey, Grant Thornton International Business Strategies Ltd., spring 1997, p. 25.

³⁹ Forum of Private Business, London, 31 March 1994.

⁴⁰ Survey of the payment performance in Britain, Dun & Bradstreet, London, October 1997.

⁴¹ Observatoire des délais de paiement, cinquième rapport, Paris, septembre 1997. p. 10

⁴² Confederation of Suppliers of Construction Materials (CEPCO), Report on the Spanish Construction Industry, Madrid, September 1996.

⁴³ European Diagnostic Manufacturers Association, October 1997.

freedom so that the parties to a contract will remain free to negotiate and agree for example the due date for payment and the rate of interest on late payment.

When, however, either 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(d)). 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 20 000 euros 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 amount⁴⁴. 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 Community⁴⁵, 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.

⁴⁴ Forum of Private Business, London, 31 March 1994.

⁴⁵ The figures are 2.549 million and 15.777 million respectively: Enterprises in Europe, Fourth Report, European Commission/Eurostat, 1996.

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 payment⁴⁶. There were an estimated 44 567 insolvencies or liquidations in five Member States (Belgium, Italy, the Netherlands, Finland, Sweden) in 1995⁴⁷, with micro-enterprises (less than 10 employees) representing the bulk of these cases. Assuming that the average number of employees in these businesses was five, the number of jobs lost in these five countries alone as a result of late payment in one year could be in the region of 55 000. Apart from maintaining these jobs, 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.

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, prompter 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.

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 proposal does not contain specific measures for SMEs, but applies to all businesses. The proposals will however benefit SMEs most, as they suffer most from late payment. The proposal 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 time limit for paying and the consequences of paying late.

⁴⁶ Fédération Nationale de l'Information d'Entreprises et de la Gestion de Créances, Lyon, September 1997.

⁴⁷ Fifth Report of the European Observatory for SMEs, European Network for SME Research, November 1997, ch.7: "Failures and bankruptcies".

CONSULTATION

6. *List the organizations 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 transactions⁴⁸. More than 130 written comments were received from national and European professional organizations and from some Member States. A public hearing was also organized on 7 and 8 July 1993, where some 30 organizations 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 organized 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.

⁴⁸ SEC(92) 2214 final, 18.11.1992.

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