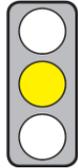


MAIN ISSUES

Objective of the Directive: The EU wishes to combat late payment by businesses and public authorities.

Parties Affected: Enterprises and public contractors.



Pros: (1) The wish to improve payment behaviour in the EU is to be welcomed in general.
(2) The introduction of a flat rate compensation for recovery costs facilitates the reimbursement of administrative costs, even in the case of minor claims.

Cons: (1) Mandatory default requirements restrict the freedom of contract in commercial transactions.
(2) Fining late payment contradicts the principle of compensation, as fines are to serve deterrent purposes exclusively.
(3) Since higher claims do not increase the administrative costs for enforcement, staggered reimbursement payments are not an appropriate measure.

CONTENT

Title

Proposal COM(2009) 126 of 8. April 2009 **for a Directive** of the European Parliament and of the Council **on combating late payment** in commercial transactions

Brief Summary

► Objective and Scope

- The Commission wishes to amend the Directive on combating late payment in commercial transactions (2000/35/EG) in main parts and to add further provisions “to discourage late payment in commercial transactions.” (Recitals 1 and 4)
- The Directive applies to all payment obligations from contracts on the “delivery of goods” or the “provision of services”
 - between businesses and
 - between businesses and public authorities (Art. 1 (1) in conjunction with Art. 2 No. 1).

► Late payment

- If a date or period for payment is fixed in an agreement the debtor is considered to be late for payment upon the expiry of the payment deadline or period without the necessity of a reminder (Art. 3 (1)).
- In the absence of contractual agreements, late payment without the necessity of a reminder starts:
 - 30 days following the receipt of the invoice or request for payment,
 - 30 days following the receipt of goods or services, if the debtor receives the invoice or request for payment earlier,
 - 30 days following the date of acceptance or verification, if an acceptance or verification procedure is provided for by statute or by contract and if the debtor receives the invoice earlier (Art. 3 (1) and 2 and Art. 5 (1) and (2)).

► Legal consequences of late payment

- A creditor is entitled to request from a debtor interest for late payment (Art. 3 (1) and Art. 5 (1)).
 - Unless otherwise agreed by the parties, the statutory interest rate for late payment of the respective Member State is applicable. It must be at least seven percentage points above the interest rate for main refinancing operations of the European Central Bank (“reference rate”). For Member States with a currency other than Euro, the reference rate is set by their respective national central banks. (Art. 2 No. 6 and 7).
 - For the first half of a year the reference rate in force is the reference rate of 1. January, for the second half of the year that of 1. July (Art. 3 (3) and Art. 5 (6)).
- The enforcement of interest for late payment is to be excluded, if
 - the creditor fails to fulfil his or her contractual or legal obligations or
 - if the debtor is not responsible for the delay (Art. 3 (1) and Art. 5 (1)).
- Unless otherwise provided for, the creditor may request compensation for recovery costs in addition to the interest for late payment. This compensation amounts to:
 - a fixed sum of € 40 for a debt of less than € 1,000,
 - a fixed sum of € 70 for a debt of less than € 10,000,
 - 1% of the amount payable for a debt of € 10,000 or more (Art. 4 (1)).
- In addition, a creditor may – upon evidence – request compensation for all remaining recovery costs incurred (Art. 4 (3)).

- ▶ **Additional provision for the late payment by “public authorities”**
 - If a public authority is late in payment, the creditor may request a lump sum compensation to the amount of 5% of the payment due in addition to all remaining claims (Art. 5 (5)).
 - A period for payment fixed in the contract that exceeds 30 days may be justified only in the light of “particular circumstances” (Art. 5 (4)).
 - The maximum duration of statutory or contractual procedures of acceptance or verification may not exceed 30 days, unless the agreement on a longer period is “duly justified” (Art. 5 (3)).
- ▶ **“Grossly unfair” contractual provisions**
 - Contract parties may deviate from statutory rules. This does not apply if such deviation is “considered grossly unfair to the creditor”(Art. 6 (1)).
 - Contractual clauses that fully exclude interest for late payment are always considered grossly unfair (Art. 6 (1)).
 - Otherwise, the circumstances of the individual case, the commercial practice and the question of whether the debtor has any “objective reason” to deviate from the statutory rule are taken into account (Art. 6 (1)).
 - If a contractual provision on the payment date, interest for late payment or recovery costs has been agreed that deviates from statutory rules and is “considered grossly unfair”, it may either not be applied or it may form the basis for a compensation claim (Art. 6 (1)).
 - Member States must provide “adequate and effective means” to “prevent the continued use” of grossly unfair clauses. This includes the right of action for default in the case of “representative organisations”. (Art. 6 (2) and (3))
- ▶ **Term for obtaining an enforceable title**

If a claim is not disputed, Member States must ensure that an enforceable or provisionally enforceable title can be obtained within 90 days following the filing of action or its application (Art. 9 (1)).

Changes Compared to the Status Quo

- ▶ To date, EU law does not provide creditors with an entitlement to flat rate compensation for recovery costs.
- ▶ To date, EU law does not entitle creditors to request from public authorities who are late in payment a flat rate compensation of 5% of the amount due for payment in addition to the remaining claims.
- ▶ To date, there is no EU rule determining a maximum period for payment terms and the procedures for acceptance and verification.
- ▶ Until now, the contractual exclusion of interest for late payment has not been considered grossly unfair under EU law.
- ▶ To date, public authorities or courts of the Member States have had to provide an enforceable or provisionally enforceable title on claims for money within 90 days only “as a rule”.

Statement on Subsidiarity

The Commission assumes that the Directive’s objective to combat late payment in the internal market cannot be sufficiently achieved by Member States if they act individually.

Political Background

In its Communication “Think small first – A small Business Act for Europe” [Communication COM(2008) 394 of 25. June 2008; cp. [CEP Policy Brief](#) in German only], the Commission already promoted a legal and economic environment that would lead to an improved payment behaviour in business. In its Communication on a “European economic recovery plan” [COM(2008) 800], the Commission presents a legislative project that aims to oblige public authorities to settle invoices within 30 days in order to avoid liquidity bottlenecks in enterprises. For the facilitated enforcement of due payments, the EU has already adopted several legal acts. They include in particular the Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [(EC) No. 44/2001], the Regulation creating a European enforcement order for uncontested claims [(EC) No. 805/2004], the Regulation creating a European order for payment procedure [(EC) No. 1896/2006; cp. [CEP Policy Brief](#) in German only] as well as the Regulation establishing a European small claims procedure [(EC) No. 861/2007; cp. [CEP Policy Brief](#) in German only].

Status of Legislation

8.4.09 Adoption by Commission
 Open Adoption by the European Parliament and the Council, publication in in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General: DG Enterprise and Industry
 Committees of the European Parliament: still open
 Committees of the German Bundestag: still open

Decision Mode in the Council: Qualified majority (rejection at 91 of 345 votes; Germany: 29 votes)

Formalities

Legislative competence: Art. 95 TEC (Internal Market)
 Form of legislative competence: Concurrent legislative competence
 Legislative procedure: Art. 251 TEC (Codecision)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Mandatory statutory rules restricting the freedom of contract in commercial transactions between enterprises are – irrespective of their legal validity – **generally questionable from an ordoliberal viewpoint**, all the more so as consumers potentially in need of protection are not affected. Accordingly, the contract parties should be free to decide for themselves the provisions regarding the period of payment terms. **Therefore, the judicial review of contract clauses, that aims to avoid any “grossly unfair” consequences for the creditor as provided for in the Directive Proposal, is mistaken.** The same is true for the provided prohibition to waive interest for late payment. However, there is room for statutory provisions where contract parties do not stipulate provisions regarding the consequences of late payment.

Thus, for instance, the provided option to revert to a flat rate compensation rule for recovery costs in the absence of any contractual provision is appropriate. As for marginal claims, the recovery costs can easily exceed the value of the principal claim. However, staggering flat rate compensation is not justified, since recovery costs do not depend upon the amount of debit. Besides, the amount of the provided fixed sums (€ 40 or € 70) and the provided percentage for amounts of more than € 10,000 are not comprehensible, as the Commission itself assumes that the average amount of recovery costs is € 20 [SEC(2009) 315, p. 37]. Therefore, a consistent, average-oriented flat rate sum should be reimbursed, unless the creditor submits concrete evidence of costs exceeding said average.

Mandatory special rules for public authorities which determine an additional compensation of 5% and a maximum period for payment terms of the procedures for acceptance and verification **are not justified**, since public authorities which participate in commercial transactions can also refer to the freedom of contract. Business partners of public authorities are free to reject a public order, or to include the costs incurred by late payment into their offer price. 30-days payment terms which are not mandatory and flat rate compensation are, however, reasonable, since they set standards for good payment behaviour which – though not binding – force public authorities which intend to deviate from them to explain why.

Impact on Efficiency and Individual Freedom of Choice

Whether the Directive Proposal enhances the efficiency of private trading is rather doubtful. Where late payment is due to liquidity bottlenecks of the debtor, increased follow-up costs do not lead to more punctual payments. And, where creditors choose not to take action against defaulting payers for fear of damaging their business relationships, they are not going to do so either if their non-mandatory claims are slightly extended. The Commission itself refers to studies according to which the loss of a customer is the main motivation for legal action [SEC(2009) 315, p. 10].

Though tighter default liability for public authorities is questionable in ordoliberal terms, it might help to improve payment behaviour. Late payment by public authorities is a severe problem in many Member States. Although they often set generous terms for the payment of invoices, public authorities very rarely pay punctually compared to private enterprises. In Portugal, the average delay period of public authorities is 80.4 days, in Greece 62 days. In Germany, they pay relatively fast with an average delay of “only” 15 days [SEC(2009) 315, p. 60]. Very often budget restrictions, lack of personnel or slow release procedures are responsible for delayed payment. Threatening flat rate compensation could prompt public authorities to improve their processes in order to ensure punctual payment.

Impact on Growth and Employment

Insignificant.

Impact on Europe as a Business Location

Insignificant.

Legal Assessment

Legal Competence

The EU rightly refers to its competence laid down in Art. 95 TEC. Different legal consequences for late payment throughout the EU reduces the legal certainty for enterprises considering participating in EU-wide calls for tender for public delivery or service orders, or which process cross-border transactions. Art. 95 TEC does not contain any barriers which would prohibit the adoption of special rules for public authorities participating in commercial transactions.

Subsidiarity

EU-wide legal certainty cannot be achieved by single Member States acting individually.

Proportionality

The 30-days payment term for public authorities, including procedures for acceptance and verification, is reasonable. Where inefficient administrative procedures, together with a lack of personnel in public authorities, lead to late payment, the use of payment terms can create incentives to solve such problems. However, their prescribed design is questionable.

Also **to be rejected is the proposed mandatory flat rate compensation of 5% of the amount due in the case of late payment of public authorities.** As this sum is incurred in addition to the other claims, it does not serve the purpose of damage compensation but only of deterrent. Yet compensation has neither punitive nor preventive nature. The Commission itself has rejected punitive compensation as a matter of principle in another context [Green Paper COM(2008) 794, p. 8; cp. [CEP Policy Brief](#)].

The non-mandatory character of the provisions proposed, in particular the prohibition of a contractual waiver of interest for late payment, represents on the one hand a restriction of freedom of contract and is therefore questionable under ordoliberal aspects, but on the other hand it is in line with existing mandatory provisions which protect a party in the case of economic imbalance and does not constitute any infringement against the principle of proportionality.

Neither are there any concerns about the flat rate compensation of recovery costs in principle. However, **the flat rate must be oriented towards the actual damage** and may not exceed it. Therefore, the fixed sum of € 40, € 70 or 1% of the amount payable is to be rejected, as it leads to compensation amounts which are way higher than the incurred recovery costs. As for the rest, the debtor should, in order to lower his or her compensation liability, always be entitled to give proof of the real damage of the creditor being lower than the flat rate.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Late payment is governed by §§ 280 (2), 286 to 290 of the German Civil Code (BGB). The interest reference rate applied in Germany is one percentage point below the interest reference rate prescribed by EU law (§ 247 BGB). To compensate for this difference, the statutory interest rate was fixed at eight (instead of seven) percentage points above the reference rate (§ 288 BGB).

According to German law, the costs for the first reminder must not be borne by the debtor. The question of which amount allows for a flat rate compensation for out of court reminders is judged differently by German courts. A flat rate of € 15, however, is unduly high (German Federal Court of Justice, BGH NJW-RR 2000, 719). The proposed flat rates would change both. In Germany, debtors are entitled to give proof of the actual costs being lower, which is not excluded by the Directive.

Special rules for late payment of public authorities are not contradictory to German law in principle. However, sanctions serving punishment and determent are contradictory to the concept of compensation. According to the German Federal Court of Justice, it is therefore "intolerable to impose substantial payments in a civil judgement which do not serve the purpose of compensation." (BGHZ 118, 344 => Thiemo gibt es dieses Zitat auf engl. habe jetzt wörtlich übersetzt?)

Alternative Policy Options

All proposed provisions on late payment should be non-mandatory as a general rule. Staggered compensation sums for recovery costs should be replaced by a standard sum.

Possible Future EU Actions

Currently not apparent.

Conclusion

From an ordoliberal perspective, the Directive is questionable where mandatory provisions are introduced: This applies to both the prohibition of "grossly unfair clauses" in commercial transactions and also to the flat rate compensation for late payment by public authorities. Besides, the latter is contradictory to the principle of compensation due to the punitive nature of the payments for delay. A flat rate compensation for recovery costs facilitates the reimbursement of administrative costs also in the case of minor claims. Since higher claims normally do not increase the efforts for their enforcement, staggered reimbursement amounts are not appropriate.