

# Position Paper

November 2009



## **PROPOSAL FOR A DIRECTIVE ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS (RECAST DIRECTIVE 2000/35/EC)**

## **Introductory remarks**

In recent years, the payment record of both private businesses and the public sector can hardly be described as satisfactory. SMEs are the most frequent victims of late payments, a problem which has been exacerbated by the current economic and financial crisis.

On 8 April 2009, the European Commission tabled a proposal for a recast directive to combat late payment in commercial transactions (the so-called 'late payment directive'), which would substantially modify directive 2000/35/EC.

**EUROCHAMBRES welcomes the Commission proposal to recast the existing directive, which has proved ineffective in reducing late payments, and did not address the business to public authorities relationship. We thus particularly appreciate the Commission's will to shorten payment periods by public authorities to businesses.**

EUROCHAMBRES takes the view that the recast directive should be considered in the framework of the Small Business Act (SBA) and of the measures included in the European Economic Recovery Plan (EERP). Viable companies all over Europe risk being strangled by no access to finance on one side and longer payment delays on the other. The proposed recast directive has the potential to help solve some of the liquidity problems hampering businesses, particularly SMEs.

Overall, the proposal can help businesses recover from the current crisis by better exploiting the opportunities provided by the internal market and can also play a fundamental role in making Europe's economy more competitive and efficient.

**EUROCHAMBRES supports the proposed recast directive, but takes the view that the proposal could be significantly improved, both in terms of content and legal clarity.** This paper contains a number of proposals on how the directive could be improved to the benefit of European businesses.

## **EUROCHAMBRES' detailed remarks**

### ***Article 2 - Definitions***

Para 2 –the term '*public authority*' needs to be clarified and possibly replaced with '*contracting authority*' in correlation with the term used in directive 2004/18/EG.

Para 3 – the term '*undertaking*' is not perfect. It would be preferable to harmonise the term with the definition in other directives.

Para 5 – the following sentence '*statutory interest or interest negotiated and agreed upon between undertakings*' should be clarified. For the sake of clarity, the simple term '*interest agreed upon*' should be used.

### ***Article 3 – Interest in case of late payment***

The title is misleading. Instead, it should read '*Interest in case of late payment in commercial transactions between businesses*'.

Paragraph 1a should be clarified with regard to contractual and legal obligations. According to the proposed directive, the creditor is the one who is entitled to the payment. This should be clearly outlined. According to the agreement, the debt is often due after the principal service of the contractual partner has been delivered. Nevertheless, this is not obligatory and even less so in the case of late payment. This means that if the money debt is payable before the principal service has been delivered, the criteria of Paragraph 1a ('*Has the creditor fulfilled all his legal and contractual obligations*') has to be examined referring to the date of maturity of the debt.

In this respect, it should also be clarified that the contractual and legal obligations the creditor has to fulfill in order to assert interest on late payment without the necessity of a reminder, can only be considered vis-à-vis the relevant debtor. For example, it would be unacceptable were the creditor not allowed to charge interest on late payment because he does not comply with other obligations or contractual agreements with a third party, which have no connection with the relevant contract with the debtor.

SMEs are very often the weaker party in commercial transactions. In the case of late payments, they thus hesitate to claim due interests from the debtor, for fear of losing future contracts and customers. In the current judicial and enforcement framework, the problem is bound to persist and the elements included in the proposed directive do not help to solve this problem.

**Generally, EUROCHAMBRES believes that, for the purposes of this directive, it could be interesting to explore the systems in place in some EU countries, in the framework of which interests can be charged automatically without the necessity of court rulings and without the need for the creditor to make a claim.**

Some of our members have underlined the potential problem of 'late payment dumping', namely problems arising when EU companies conduct business with companies from outside the EU, to whom this directive is not applicable. Some national Chambers believe that this might presents a risk of delocalisation and the EU thus needs to negotiate with its external trade partners to ensure that conditions are balanced.

#### **Article 4 – compensation for recovery costs**

The provisions of articles 3 and 5 are mutually exclusive, thus the sentence in paragraph 1 should read '*...in accordance with articles 3 or 5*'.

Especially for small claims, recovery costs can easily exceed the amount of the main debt. Businesses will often decide against pursuing the recovery of sums of less than €100, as recovery costs may quickly surpass the amount of the expected payment. It is therefore legitimate to compensate recovery costs also – but not only – in these cases. It is important that compensation for amounts that exceed recovery costs is still possible.

The lump sum amounts indicated in the proposed recast directive appear to be both disproportionate and imbalanced, particularly vis-à-vis small debt amounts. For example, a lump sum of €40 would mean 40% for a debt of €100, but only 4% for a debt of €999.

The Commission itself concludes that recovery costs average €20 (SEC (2009) 315, p. 38). **EUROCHAMBRES believes that a compensation amount of €20 would be appropriate for paragraph 1a, namely for a debt of less than €1000. For higher sums, compensation rights in terms of quantifiable amounts, based on verifiable costs, should be proportionate to the debt on an incremental scale.**

Paragraph 3 clarifies that there is also entitlement to adequate compensation of all other remaining recovery costs caused by late payment. The lump sums should therefore be considered as minimum amounts. Moreover, the article does not specify when the debtor is not responsible for an unpaid contract. Can it be considered, for example, that the debtor is not responsible for the debt in case of secondary insolvency? This key aspect needs to be clarified.

As for specific definitions, the term '*recovery costs*' is undefined. The directive should clarify whether this term should really have a single definition for all member states

## **Article 5 – Payment by public authorities**

**EUROCHAMBRES welcomes the ‘core’ element of the proposal, namely that the issue of late payments in commercial transactions between businesses and public authorities is directly addressed by fixing a 30 days limit<sup>1</sup>. Overall, we strongly welcome the inclusion of public authorities in the scope of the directive<sup>2</sup>.**

Public agencies often have a particularly poor payment record, particularly in some EU countries, such as Greece, Malta and Italy. Moreover, the public sector has a considerable advantage over private businesses when it comes to recognition and enforcement of their claims. Rather than abusing this advantage, Chambers consider that public authorities at all levels should lead by example in their payment behaviour.

In Paragraph 4, it is not clearly specified what is meant by *‘duly justified in light of particular circumstances such as an objective need to schedule payment over a longer period’*. The paragraph needs clarification and further explanation: it is unclear what can be accepted as a justification for delaying a payment beyond the 30 days limit. Given the poor record referred to above EUROCHAMBRES suspects that public authorities will be tempted to abuse the above ‘flexibility’ provided by this clause at the expense of enterprises, particularly SMEs. **The legal grounds for granting exceptions should be therefore be strictly limited and very well clarified.**

EUROCHAMBRES also takes the view that these open-ended longer periods should be clearly quantified and recommends setting a ‘cap’, or maximum time limit also for such exceptions. These remarks relate to the need to ensure a clear limit for payment periods when exceptional circumstances apply - and is in our view justified in the context of the directive’s overall objectives. **At the same time, we acknowledge that the principle of contractual freedom should be fully maintained and in no way hampered.**

**EUROCHAMBRES welcomes stricter payment conditions for public authorities, to ensure that payments from public administrations to business are made on time. Considering the variety of measures available to ensure more timely payments, we would prefer to see a more coercive interest rate mechanism implemented, rather than a fixed lump sum, as included in the current proposal.**

As in the case of business-to-business relations, and thus for the same problems underlined in the last paragraph of page 3, EUROCHAMBRES believes that, for the purpose of this directive, it could be interesting to explore the systems in place in some EU countries, in the framework of which

---

<sup>1</sup> Some Chambers are of the opinion that, despite the unusual market power of these authorities, mandatory rules for public authorities which cap the length of contractual payment periods are ultimately undesirable, as such rules threaten to erode the freedom to contract.

<sup>2</sup> The proposed directive does not apply to business to consumers relations. However, some of our members underline that this kind of business relationship is often a source of late payment (and related) problems to SMEs. This seems to be the case particularly in certain sectors (e.g. construction, services). Some of our members thus believe that the business to consumer relations should have been addressed by the Commission in the recast directive or should be addressed through an alternative legal act.

interests can be charged automatically without the necessity for court rulings and without the need for the creditor to make a claim.

#### **Article 6 – Grossly unfair contractual clauses**

**EUROCHAMBRES generally welcomes the strengthening of the provisions on grossly unfair contractual clauses through the inclusion of the provision that a clause excluding interest for late payment will always be considered as grossly unfair.**

In paragraph 1, it is unclear whether the term '*clause in a contract*' leads to a change of the content, as the current directive uses the term '*agreement*'. The provision that a clause which excludes interest for late payment shall always be considered as grossly unfair is new. The last sentence in paragraph 1 should thus read '*For the purpose of this subparagraph, a clause which excludes interest for late payment shall always be considered as grossly unfair*'.

It should also be underlined that, while the exclusion of any interest on late payments is regarded as grossly unfair, this cannot mean that clauses fixing considerably lower interest on late payment than foreseen in the directive can be forbidden as long as such arrangements are mutually agreed in advance and in writing by the contracting parties.

The term '*representative organisations*' is now used in Paragraph 3. The former definition in the directive was more accurate. According to this, '*organisations which have a legitimate interest in representing SMEs or which are officially recognised as their representatives*' are allowed to go to court or to authorities.

#### **Article 9 – Recovery procedures for unchallenged claims**

**EUROCHAMBRES is generally supportive of the rule in paragraph 1 which shortens the length of time within which member states must ensure that an enforceable title can be obtained for an unchallenged claim, since it bears the potential to speed up the recovery of outstanding claims.**

Paragraph 4 defines that the provisions of Regulation 1986/2006 remain unaffected. The regulation mentioned is Regulation 1986/2006 by the European Parliament and the European Council of 20th of December 2006 on the access to the second generation Schengen Information System (SIS II) for the member states' authority responsible for issuing motor vehicle registration certificates. The link between this regulation and late payments is not obvious and the provision should be clarified.

*EUROCHAMBRES is the sole European body that serves the interests of every sector and every size of European business and the only one so close to business. EUROCHAMBRES has member organisations in 45 countries representing a network of 1,700 regional and local Chambers with over 19.8 million member companies. Chamber members employ over 120 million employees.*

---

**Further information: Mr. Giovanni Campi, Tel. +32 2 282 08 83, [campi@eurochambres.eu](mailto:campi@eurochambres.eu)**

**Press contact: Ms. Guendalina Cominotti, Tel. +32 2 282 08 66, [cominotti@eurochambres.eu](mailto:cominotti@eurochambres.eu)**

**All of our position papers can be downloaded from [www.eurochambres.eu/content/default.asp?PageID=145](http://www.eurochambres.eu/content/default.asp?PageID=145)**