
LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

DIRECTIVE 2011/7/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 2011 on combating late payment in commercial transactions

INTRODUCTION – In its Communication of 25 June 2008 entitled ‘ “Think Small First” — A “Small Business Act” for Europe’, the Commission emphasised that small and medium-sized enterprises’ (SMEs) access to finance should be facilitated and that a legal and business environment supportive of timely payments in commercial transactions should be developed.

It should be noted that public authorities have a special responsibility in this regard. The criteria for the definition of SMEs are set out in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium- sized enterprises.

The new Directive 2011/7/EU we are examining responds to the above needs. The Directive will have to be transposed into national law by 16 March 2013 at the latest.

The provisions of the new Directive include, among others:

- Harmonisation of period for payment by public authorities to businesses: Public authorities will have to pay for the goods and services that they

procure within 30 days or, in very exceptional circumstances, within 60 days.

- Contractual freedom in businesses commercial transactions: Enterprises will have to pay their invoices within 60 days, unless they expressly agree otherwise and if it is not grossly unfair.

- Enterprises will automatically be entitled to claim interest for late payment and will also be able to obtain a minimum fixed amount of €40 as a compensation for recovery costs. They can claim compensation for all remaining reasonable recovery costs.

- The statutory Interest rate for late payment will be increased to at least 8 percentage points above the European Central Bank’s reference. Public authorities are not allowed to fix an interest rate for late payment below.

SCOPE OF THE DIRECTIVE - The European Parliament and the Council considered that most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis whereby the supplier gives its client time to pay the invoice, as agreed between parties, as set out in the supplier’s invoice or as laid down by law.

Many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions.

<p>Cajola & Associati Via G. Rossini, 5 20122 Milan – Italy Phone: +390276003305 Fax: +3902780177 E-mail: law@cajola.com Web site : www.cajola.com</p>

Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings.

It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment.

The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult.

The aim of this Directive is therefore to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of SMEs.

This Directive shall apply to all payments made as remuneration for commercial transactions.

Member States may nevertheless exclude debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring.

DEFINITIONS - The following definitions apply for the purposes of the Directive:

(1) 'commercial transactions' means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration;

(2) 'public authority' means any contracting authority, as defined in the Directives 2004/17/EC and 2004/18/EC, regardless of the subject or value of the contract;

(3) 'undertaking' means any organization, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person;

(4) 'late payment' means payment not made within the contractual or statutory period of

payment and where the conditions laid down in the Directive are satisfied;

(5) 'interest for late payment' means statutory interest for late payment or interest at a rate agreed upon between undertakings, subject to the Directive's provisions;

(6) 'statutory interest for late payment' means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points;

(7) 'reference rate' means either of the following:

(a) for a Member State whose currency is the euro, either:

(i) the interest rate applied by the European Central Bank to its most recent main refinancing operations; or

(ii) the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank;

(b) for a Member State whose currency is not the euro, the equivalent rate set by its national central bank;

(8) 'amount due' means the principal sum which should have been paid within the contractual or statutory period of payment, including the applicable taxes, duties, levies or charges specified in the invoice or the equivalent request for payment;

(9) 'retention of title' means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full;

(10) 'enforceable title' means any decision, judgment or order for payment issued by a court or other competent authority, including those that are provisionally enforceable, whether for immediate payment or payment by installments, which permits the creditor to have his claim

against the debtor collected by means of forced execution.

COMMERCIAL TRANSACTIONS -

Member States shall ensure that, in commercial transactions between private undertakings, the creditor is entitled to interest for late payment without the necessity of a reminder, where the following conditions are satisfied:

(a) the creditor has fulfilled its contractual and legal obligations; and

(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

Member States shall ensure that the applicable reference rate:

(a) for the first semester of the year concerned shall be the rate in force on 1 January of that year;

(b) for the second semester of the year concerned shall be the rate in force on 1 July of that year.

Where the above conditions set out are satisfied, Member States shall ensure the following:

(a) that the creditor is entitled to interest for late payment from the day following the date or the end of the period for payment fixed in the contract;

(b) where the date or period for payment is not fixed in the contract, that the creditor is entitled to interest for late payment upon the expiry of any of the following time limits:

(i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment;

(ii) where the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of receipt of the goods or services;

(iii) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;

(iv) where a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days after that date.

Where a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for, Member States shall ensure that the maximum duration of that procedure does not exceed 30 calendar days from the date of receipt of the goods or services, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor within the meaning of the Directive's provisions.

Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor within the meaning of the Directive's provisions.

TRANSACTIONS WITH PUBLIC AUTHORITIES -

Member States shall ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled upon expiry of the period defined in the Directive to statutory interest for late payment, without the necessity of a reminder, where the following conditions are satisfied:

(a) the creditor has fulfilled its contractual and legal obligations; and

(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

Member States shall ensure that the applicable reference rate:

(a) for the first semester of the year concerned shall be the rate in force on 1 January of that year;

(b) for the second semester of the year concerned shall be the rate in force on 1 July of that year.

Member States shall ensure that in commercial transactions where the debtor is a public authority:

(a) the period for payment does not exceed any of the following time limits:

(i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment;

(ii) where the date of receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of the receipt of the goods or services;

(iii) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;

(iv) where a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days after that date;

(b) the date of receipt of the invoice is not subject to a contractual agreement between debtor and creditor.

Member States may extend the time limits referred to in point (a) of paragraph 3 up to a maximum of 60 calendar days for:

Any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject, as a public undertaking, to the transparency requirements laid down in Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings;

(b) public entities providing healthcare which are duly recognised for that purpose.

If a Member State decides to extend the time limits in accordance with this paragraph, it shall send a report on such extension to the Commission by 16 March 2018.

On that basis, the Commission shall submit a report to the European Parliament and the Council indicating which Member States have extended the time limits in accordance with this paragraph and taking into account the impact on the functioning of the internal market, in particular on SMEs. That report shall be accompanied by any appropriate proposals.

Member States shall ensure that the maximum duration of a procedure of acceptance or verification does not exceed 30 calendar days from the date of receipt of the goods or services, unless otherwise expressly agreed in the contract and any tender documents and provided it is not grossly unfair to the creditor within the meaning of the Directive's provisions.

Member States shall ensure that the period for payment fixed in the contract does not exceed the time limits provided for in the Directive, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and that it in any event does not exceed 60 calendar days.

PAYMENT SCHEDULES - This Directive shall be without prejudice to the ability of parties to agree, subject to the relevant provisions of applicable national law, on payment schedules providing for installments.

In such cases, where any of the installments is not paid by the agreed date, interest and compensation provided for in this Directive shall be calculated solely on the basis of overdue amounts.

COMPENSATION FOR RECOVERY COSTS – Member States shall ensure that, where interest for late payment becomes payable in commercial transactions in accordance with the provisions of the Directive, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40.

Member States shall ensure that such fixed sum is payable without the necessity of a reminder and as compensation for the creditor's own recovery costs.

The creditor shall, in addition to the fixed sum, be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor's late payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency.

UNFAIR CONTRACTUAL TERMS AND PRACTICES – This important provision sets forth that Member States shall provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor.

In determining whether a contractual term or a practice is grossly unfair to the creditor, within the above meaning, all circumstances of the case shall be considered, including:

- (a) any gross deviation from good commercial practice, contrary to good faith and fair dealing;
- (b) the nature of the product or the service; and
- (c) whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment, from the payment period as

referred to in the provisions of the Directive or from the fixed sum as referred therein.

A contractual term or a practice which excludes interest for late payment shall be considered as grossly unfair.

Likewise, a contractual term or a practice which excludes compensation for recovery costs shall be presumed to be grossly unfair.

Member States shall ensure that, in the interests of creditors and competitors, adequate and effective means exist to prevent the continued use of contractual terms and practices which are grossly unfair.

The means referred to shall include provisions whereby organizations officially recognized as representing undertakings, or organizations with a legitimate interest in representing undertakings may take action according to the applicable national law before the courts or before competent administrative bodies on the grounds that contractual terms or practices are grossly unfair, so that they can apply appropriate and effective means to prevent their continued use.

TRANSPARENCY AND AWARENESS RAISING – Member States shall ensure transparency regarding the rights and obligations stemming from the Directive, including by making publicly available the applicable rate of statutory interest for late payment.

The Commission shall make publicly available on the Internet details of the current statutory rates of interest which apply in all the Member States in the event of late payment in commercial transactions.

Member States shall, where appropriate, use professional publications, promotion campaigns or any other functional means to increase awareness of the remedies for late payment among undertakings.

Member States may encourage the establishment of prompt payment codes which

set out clearly defined payment time limits and a proper process for dealing with any payments that are in dispute, or any other initiatives that tackle the crucial issue of late payment and contribute to developing a culture of prompt payment which supports the objective of the Directive.

RETENTION OF TITLE – Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods.

Member States may adopt or retain provisions dealing with down payments already made by the debtor.

RECOVERY PROCEDURES FOR UNCHALLENGED CLAIMS – Member States shall ensure that an enforceable title can be obtained, including through an expedited procedure and irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed.

Member States shall carry out this duty in accordance with their respective national laws, regulations and administrative provisions.

National laws, regulations and administrative provisions shall apply the same conditions for all creditors who are established in the Union.

When calculating the above period referred to, the following shall not be taken into account:

- (a) periods for service of documents;
- (b) any delays caused by the creditor, such as periods devoted to correcting applications.

Interesting to note that this provision shall be without prejudice to the provisions of Regulation (EC) No 1896/2006.

TRANSPOSITION – Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 8 and 10 by 16 March 2013.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication.

They shall also include a statement that references in existing laws, regulations and administrative provisions to the repealed Directive shall be construed as references to this Directive.

The methods of making such reference and the formulation of such statement shall be laid down by Member States.

Member States may maintain or bring into force provisions which are more favorable to the creditor than the provisions necessary to comply with this Directive.

In transposing the Directive, Member States shall decide whether to exclude contracts concluded before 16 March 2013.

REPEAL – Directive 2000/35/EC is repealed with effect from 16 March 2013, without prejudice to the obligations of the Member States relating to the time limit for its transposition into national law and its application.

However, it shall remain applicable to contracts concluded before that date to which the new Directive does not apply.

Article contributed by Riccardo G. Cajola