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A7-0136/ 001-047

AMENDMENTS 001-047

by the Committee on the Internal Market and Consumer Protection

Report

Barbara Weiler

A7-0136/2010

Combating late payment in commercial transactions (recast version)

Proposal for a directive (COM(2009)0126 – C7-0044/2009 – 2009/0054(COD))

Amendment 1

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) One of the priority actions of the “European Economic Recovery Plan” is the reduction of administrative burdens and the promotion of entrepreneurship by, inter alia, ensuring that **public authorities pay** invoices, including to SMEs, for supplies and services within one month to ease liquidity constraints.

Amendment

(7) One of the priority actions of the “European Economic Recovery Plan” is the reduction of administrative burdens and the promotion of entrepreneurship by, inter alia, ensuring that, **as a matter of principle**, invoices, including to SMEs, for supplies and services **are paid** within one month to ease liquidity constraints.

Justification

Public and private contracting authorities should be required, as a matter of principle, to pay invoices within 30 days. However, derogations from this rule should remain a possibility, as provided for in the directive. In the construction sector, for example, the work performed, and, therefore, the documents substantiating the invoices submitted, can be so complicated that it may take longer than the specified period to check them. The rules on part payments can be used to offset this problem.

Amendment 2

Proposal for a directive

Recital 12

Text proposed by the Commission

(12) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift, ***including making the exclusion of the right to charge interest an unfair contractual clause and providing for a compensation of creditors for the costs incurred***, is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment.

Amendment

(12) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift ***to a culture of prompt payment*** is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment. ***This shift should include fixing the maximum duration of payment periods, providing for the compensation of creditors for the costs incurred, and making the exclusion of the right to charge interest and the right to compensation for recovery costs unfair contractual terms and unfair commercial practices. Special emphasis should be given to SMEs. It is therefore crucial not to propose actions that create red tape and bureaucracy.***

Justification

It is necessary to send a clear message to economic operators that excluding the right to compensation for recovery costs, a right which the proposal seeks to strengthen, is an unfair term which cannot be enforced against creditors and which can give rise to a claim for damages.

Amendement 3

Proposition de directive

Recital 12 a (new)

Texte proposé par la Commission

Amendement

(12a) Accordingly, provision should be made for business-to-business contract payment periods to be limited as a general rule to 60 days. However, there may be

grounds for companies requiring more extensive payment periods, such as where sales take place in a concentrated period of the year whereas purchases have to be made year round. It should therefore remain possible for the parties to the contract to specifically agree on payment periods longer than 60 days, provided however that such extension does not lead to unjustified damages to any of the contracting parties

Amendment 4

Proposal for a directive

Recital 13

Text proposed by the Commission

(13) In the interest of consistency of Community legislation, the definition of “contracting authorities” in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts should apply for the purposes of this Directive.

Amendment

(13) In the interest of consistency of Community legislation, the definition of “contracting authorities” in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts ***and in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors¹*** should apply for the purposes of this Directive. ***However, the definition of “public authority” should not cover public undertakings as defined in Directive 2004/17/EC.***

¹ OJL 134, 30.4.2004, p. 1.

Justification

Including public undertakings as defined in Directive 2004/17/EC in the scope of the directive would give rise to distortions of competition in the sectors concerned. Consistency with the amendment to Article 2(2).

Amendment 5

Proposal for a directive

Recital 15

Text proposed by the Commission

(15) A fair compensation of creditors for the recovery costs incurred through late payment is necessary to ensure that the consequences of late payments are such as to discourage late payment. Recovery costs should also include the recovery of administrative costs and compensation for internal costs incurred due to late payment for which this Directive should determine the possibility of flat-rate **minimum** amount which may be cumulated with interest for late payment. Compensation for the recovery costs should be considered without prejudice to national provisions according to which a national judge may award to the creditor any additional damage regarding the debtor's late payment.

Amendment

(15) A fair compensation of creditors for the recovery costs incurred through late payment is necessary to ensure that the consequences of late payments are such as to discourage late payment. Recovery costs should also include the recovery of administrative costs and compensation for internal costs incurred due to late payment for which this Directive should determine the possibility of **a** flat-rate amount which may be cumulated with interest for late payment. Compensation for the recovery costs should be considered without prejudice to national provisions according to which a national judge may award to the creditor any additional damage regarding the debtor's late payment.

Amendment 6

Proposal for a directive

Recital 15 a (new)

Text proposed by the Commission

Amendment

(15a) In addition to an entitlement to payment of a fixed sum to cover internal recovery costs, creditors should also be entitled to reimbursement of the other recovery costs they incur as a result of late payment by a debtor, costs which should include, in particular, those incurred by creditors in instructing a lawyer or employing a debt-collecting agency. Creditors should also be able to claim costs incurred in making use of an overdraft facility.

Justification

It must be made clear precisely which costs are to be regarded as recovery costs incurred as a result of late payment by debtors. The above list is not exhaustive.

Amendment 7

Proposal for a directive

Recital 16

Text proposed by the Commission

(16) Surveys show that public authorities often require contractual payment periods for commercial transactions that are significantly longer than 30 days. Therefore, payment periods for procurement contracts awarded by public authorities should be as a general rule limited to a maximum of 30 days.

Amendment

deleted

Amendment 8

Proposal for a directive

Recital 17

Text proposed by the Commission

(17) Late payment is particularly regrettable if it occurs despite the debtor's solvency. Surveys show that public authorities often pay invoices very late after expiration of the applicable payment period. Public authorities may face lighter financing constraints because they may benefit from more secure, predictable and continuous revenue streams than private undertakings. At the same time, they depend less than private undertakings on building stable commercial relationships for the achievement of their aims. Consequently, public authorities may have less incentive to pay on time. In addition, many public authorities can obtain financing at more attractive conditions than private undertakings. Therefore, late payment by public authorities not only leads to unjustified costs for private undertakings, but to inefficiency in general. It is therefore appropriate to introduce *correspondingly higher dissuasive compensation in case of late payment by public authorities.*

Amendment

(17) Late payment is particularly regrettable if it occurs despite the debtor's solvency. Surveys show that public authorities often pay invoices very late after expiration of the applicable payment period. Public authorities may face lighter financing constraints because they may benefit from more secure, predictable and continuous revenue streams than private undertakings. At the same time, they depend less than private undertakings on building stable commercial relationships for the achievement of their aims. Consequently, public authorities may have less incentive to pay on time. In addition, many public authorities can obtain financing at more attractive conditions than private undertakings. Therefore, late payment by public authorities not only leads to unjustified costs for private undertakings, but to inefficiency in general. *This negative impact of late payment by public authorities is to be measured in light of the importance of public procurement in the overall economy of the European Union.* It is

therefore appropriate to introduce *specific rules as regards commercial transactions between undertakings and public authorities, providing in particular for payment periods not exceeding 30 days as a rule for procurement contracts awarded by public authorities.*

Amendment 9

Proposal for a directive Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) The European Union institutions are in a situation comparable to that of the public authorities of Member States with regard to their financing and commercial relationships. The maximum payment periods for public authorities as set out in this Directive accordingly apply to the European Union institutions.

Justification

The amendment should be read in conjunction with Article 2, paragraph 2. The Rapporteur considers that the Directive should apply to the European Union institutions.

Amendment 10

Proposal for a directive Recital 17 b (new)

Text proposed by the Commission

Amendment

(17b) A particular cause for concern in connection with late payment is the situation of health services in a large number of Member States. However, the healthcare sector's problems cannot be solved overnight, because the difficulties experienced by healthcare establishments stem from inherited debt burdens. Healthcare establishments should therefore be afforded greater flexibility in meeting their commitments. Member States should nonetheless make every

effort to ensure that payments in the healthcare sector are made within the contractual payment periods.

Justification

In many Member States the health service finds it difficult to make payments on time. In many cases, such payment problems are the result of 'past errors' and structural problems. The Member States should endeavour to ensure that the rules laid down in this directive also apply to payments by healthcare establishments. Such establishments should, however, be afforded greater flexibility in making payments.

Amendment 11

Proposal for a directive

Recital 18

Text proposed by the Commission

(18) This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. Where *an agreement* mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, for example through the exclusion of the possibility for the creditor to charge interest for late payment or specifying an interest rate for late payment which is substantially lower than the statutory interest provided for in this Directive, or where the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself, these may be considered to be factors constituting such an abuse. This Directive should not affect national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor.

Amendment

(18) This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. Where *a contract term or practice* mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, for example through the exclusion of the possibility for the creditor to charge interest for late payment or specifying an interest rate for late payment which is substantially lower than the statutory interest provided for in this Directive, or where the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself, these may be considered to be factors constituting such an abuse. *In accordance with the academic Draft Common Frame of Reference, any contract term or practice grossly deviating from good commercial practice, contrary to good faith and fair dealing should be considered unfair.* This Directive should not affect national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor.

Amendment 12

Proposal for a directive

Recital 18 a (new)

Text proposed by the Commission

Amendment

(18a) In the context of enhanced efforts to prevent the abuse of contractual freedom to creditors' detriment, Member States, officially recognised bodies and bodies with a legitimate interest should encourage, with the Commission's support, the drawing-up and publicisation of codes of conduct and the adoption of conflict resolution systems based on mediation and arbitration, which should be voluntary, should offer suitable complaint procedures and should be negotiated at national or Union level and designed to ensure full observance of the rights set out in this Directive.

Justification

It is in all ways desirable that the codes of conduct should include effective complaint procedures that can be invoked against those failing to meet their contractual obligations. Nonetheless, such provisions can only be of limited effectiveness if set up on a voluntary basis, given, furthermore, the absence of binding means of ensuring correct behaviour by the partners concerned (other than on pain of expulsion). It is therefore essential to secure the fullest possible involvement of the representative bodies and to encourage mediation and arbitration with a view to ensuring that the solutions found are the least costly and the most rapid.

Amendment 13

Proposal for a directive

Recital 18 b (new)

Text proposed by the Commission

Amendment

(18b) This Directive sets out specific criteria for assessing the possible unfairness of contract terms, having regard to the particular features of transactions between undertakings, or between undertakings and public authorities, which significantly differ from those of transactions involving

consumers.

Justification

The amendment clarifies that the specific criteria for assessing the possible unfairness of contract terms as set out in this Directive have been developed having regard to the particular features of transactions between undertakings, or between undertakings and public authorities which significantly differ from those of transactions involving consumers.

Amendment 14

**Proposal for a directive
Recital 20 a (new)**

Text proposed by the Commission

Amendment

(20a) In order to facilitate compliance with the provisions of this Directive, Member States should encourage recourse to mediation or other means of alternative dispute resolution.

Justification

The Rapporteur wishes to encourage the usage of mediation and other means of alternative dispute resolution.

Amendment 15

**Proposal for a directive
Recital 22**

Text proposed by the Commission

Amendment

(22) It is necessary to ensure that the recovery procedures for unchallenged claims related to late payment in commercial transactions be completed within a short period of time.

(22) It is necessary to ensure that the recovery procedures for unchallenged claims related to late payment in commercial transactions be completed within a short period of time, ***with the option of pursuing such claims against businesses and public authorities through a widely accessible online procedure, available under the same conditions for all creditors established in the Union, and accesible without delay through the European e-Justice portal as and when it becomes available.***

Amendement 16

Proposition de directive

Recital 22 a (new)

Texte proposé par la Commission

Amendement

(22a) In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States should draw up, for themselves and in the interests of the Union, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.

Amendment 17

Proposal for a directive

Article 2 – point 2

Text proposed by the Commission

Amendment

(2) "public authority" means any contracting authority, as defined by Directive 2004/18/EC;

(2) "public authority" means any contracting authority, as defined ***in Article 1(9) of Directive 2004/18/EC, and in Article 2(1)a of Directive 2004/17/EC regardless of the subject or value of the contract, as well as any of the institutions, bodies, offices and agencies of the European Union;***

Amendment 18

Proposal for a directive

Article 2 – point 4

Text proposed by the Commission

Amendment

(4) "late payment" means failure to pay within the period of payment specified in Article 3(2) or Article 5(2);

(4) "late payment" means failure to pay within the period of payment specified in ***the contract or, in the absence of such specification, that*** specified in Article 3(2)(b) or Article 5(2)(b);

Justification

This amendment is important since it should be permitted for a contract to specify a payment deadline shorter than those laid down in Articles 3(2) and 5(2), and if so the debtor should be appropriately penalised for not meeting it.

Amendment 19

**Proposal for a directive
Article 2 – point 5**

Text proposed by the Commission

(5) “interest for late payment” means statutory interest or interest negotiated and agreed upon between undertakings;

Amendment

(5) “interest for late payments” means statutory interest or interest negotiated and agreed upon between undertakings ***which shall not be lower than statutory interest;***

Amendment 20

**Proposal for a directive
Article 2 – point 6**

Text proposed by the Commission

6. “statutory interest” means simple interest for late payment at a rate which is the sum of the reference rate, plus at least ***seven*** percentage points;

Amendment

6. “statutory interest” means simple interest for late payment at a rate which is the sum of the reference rate, plus at least ***nine*** percentage points;

Justification

A more uniform set of rules applying to all sectors and involving a slight increase in the statutory interest rate rather than a fixed lump sum compensation for late payment would ensure that all debtors are treated fairly and subject to proportionate but dissuasive penalties. This amendment is contingent upon the deletion of Article 5(5) of the Commission’s proposal.

Amendment 21

**Proposal for a directive
Article 2 – point 9 a (new)**

Text proposed by the Commission

Amendment

(9a) “checkable invoice” means a clearly drawn up final invoice which keeps to the agreed order of items and uses the descriptions contained in the contract. The quantity calculations, drawings and

other supporting documents required to prove the nature and scope of the work performed must be enclosed with the invoice;

Justification

If it is to start a payment period running and trigger a requirement to pay, an invoice must be checkable. It must therefore, for example, list the items in respect of which payment is being requested, indicate to which items the cost of work performed is being charged, and be accompanied by appropriate supporting documents. If it is to be regarded as comprehensive and properly drawn up, the invoice must be consistent with the provisions of the contract agreed between the parties.

Amendment 22

**Proposal for a directive
Article 3 – title**

Text proposed by the Commission

Amendment

Interest in case of late payment

Transactions between undertakings

Justification

For the sake of clarity, the title should indicate that article 3 only concerns late payments between undertakings.

Amendment 23

**Proposal for a directive
Article 3 - paragraph 2 - point b**

Text proposed by the Commission

Amendment

(b) if the date or period for payment is not fixed in the contract, interest for late payment shall become payable automatically within any of the following time limits:

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

(ii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services;

(iii) if a procedure of acceptance or verification, by which the conformity of

(b) if the date or period for payment is not fixed in the contract, interest for late payment shall become payable automatically within any of the following time limits:

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

(ii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 ***calendar*** days after the receipt of the goods or services;

(iii) if 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 days after *that* date.

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;
(ba) the date of the receipt of the invoice shall not be subject to a contractual agreement between debtor and creditor.

Amendment 24

Proposal for a directive Article 3 – paragraphs 2a and 2b (new)

Text proposed by the Commission

Amendment

2a. Member States shall ensure that the maximum duration of the procedure of acceptance or verification referred to in paragraph 2(b)(iii) shall not exceed 30 days.

2b. Member States shall ensure that the period for payment fixed in the contract shall not exceed 60 days, unless it is specifically agreed between the debtor and the creditor and it does not lead to unjustified damages to any of the contracting parties.

Amendment 25

Proposal for a directive Article 4 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. Member States shall ensure that, when interest for late payment becomes payable in commercial transactions in accordance with Articles 3 and 5 ***and unless otherwise specified in the contract***, the creditor is entitled to obtain from the debtor ***any of the following amounts***:

1. Member States shall ensure that, when interest for late payment becomes payable in commercial transactions in accordance with Articles 3 and 5, the creditor is ***automatically*** entitled to obtain from the debtor, ***i.e. without the individual creditor's having to take any action, as a minimum, a fixed sum of EUR 40.***

Justification

Article 6 of the proposal for a directive states that ‘a clause which excludes interest for late payment shall always be considered as grossly unfair’. A contractual provision which deviates from the provisions proposed in Article 3 would detract from the contractual guarantees which protect creditors. It is important to guarantee that the procedure is automatic, in order to avoid any retaliation from the customer. The compensatory amounts owed for recovery costs should be expressed in minimum amounts.

Amendement 26

Proposition de directive

Article 4 – paragraph 1 - point b

Texte proposé par la Commission

Amendement

(b) for a debt of EUR 1 000 or more, but less than EUR 10 000, a fixed sum of EUR 70; ***deleted***

Amendement 27

Proposition de directive

Article 4 – paragraph 1 - point c

Texte proposé par la Commission

Amendement

(c) for a debt of EUR 10 000 or more, a sum equivalent to 1% of the amount for which interest for late payment becomes payable. ***deleted***

Amendment 28

Proposal for a directive

Article 4 – paragraph 1 - point c

Text proposed by the Commission

Amendment

(c) for a debt of EUR 10 000 or more, a sum equivalent to 1% of the amount for which interest for late payment becomes payable. ***deleted***

Justification

An open-ended 1% compensation rate payable on late payments of EUR 10,000 or more could

involve significant and disproportionate costs for larger value transactions and may not reflect actual costs. The Rapporteur is of the view that there should be a fixed upper ceiling for the compensation of recovery costs.

Amendment 29

Proposal for a directive

Article 4 – paragraph 1 - subparagraph 1a (new)

Text proposed by the Commission

Amendment

Member States shall ensure that in the case of multiple claims against the same debtor, the compensation for recovery costs referred to in paragraph 1 shall be payable only on the sum of the debts and not on the individual claims.

Justification

It would not be fair, nor consistent with current practice, to compensate the same suppliers' and purchasers' recovery costs for individual claims, but it should lead to reimbursement of costs referred to in paragraph 1 corresponding to the sum of all these cumulative claims for late payment. This is particularly relevant in the healthcare sector, when hospitals cannot pay a supplier of various types of medicines for individual supplies because of late payment on the part of health insurers.

Amendment 30

Proposal for a directive

Article 4 – paragraph 3

Text proposed by the Commission

Amendment

3. ***Unless the debtor is not responsible*** for the delay, the creditor shall, in addition to the amounts set out in paragraph 1, be entitled to obtain reasonable compensation from the debtor for all remaining recovery costs incurred through the latter's late payment.

3. ***Except where the debtor is exempted from responsibility*** for the delay, the creditor shall, in addition to the amounts set out in paragraph 1, be entitled to obtain reasonable compensation from the debtor for all remaining recovery costs incurred through the latter's late payment. ***The other costs include in particular the costs incurred by the creditor arising from late payment as a result of instructing a lawyer, employing a debt-collecting agency or making use of an overdraft facility.***

Justification

It must be made clear what cost items are included among the other costs arising from late payment by the debtor.

Amendment 31

Proposal for a directive

Article 5 – Title

Text proposed by the Commission

Amendment

Payment by public authorities

Transactions between undertakings and public authorities.

Amendment 32

Proposal for a directive

Article 5 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. Member States shall ensure that, in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities, the creditor is entitled, without the necessity of a reminder, to interest for late payment equal to statutory interest if the following conditions are satisfied:

1. Member States shall ensure that, in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities ***or for the purposes of achieving the objectives of public authorities***, the creditor is entitled, without the necessity of a reminder, to interest for late payment equal to statutory interest if the following conditions are satisfied:

Justification

This amendment should be viewed in the light of Article 2(1). Many of the services purchased by public authorities are not provided to the authorities themselves, but to third parties pertaining to different social groups, on whose behalf the public authorities enter into contracts for the provision of goods or services. The contracting of such goods or services to meet the needs of a given group forms part of the objectives of the public authorities' activities, even though those authorities are not the final recipient of the goods or services concerned.

Amendment 33

Proposal for a directive
Article 5 – paragraph 2 – point b

Text proposed by the Commission

- (b) if the date or period for payment is not fixed in the contract, interest for late payment shall become payable ***automatically within*** any of the following time limits:
- (i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment;
- (ii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services;
- (iii) if 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 days after that date.

Amendment

- (b) if the date or period for payment is not fixed in the contract, interest for late payment shall ***automatically*** become payable ***at the latest upon expiry of*** any of the following time limits:
- (i) 30 ***calendar*** days following the date of receipt by the debtor of the ***checkable*** invoice or an equivalent request for payment;
- (ii) if the debtor receives the ***checkable*** invoice or the equivalent request for payment earlier than the goods or the services, 30 ***calendar*** days after the receipt of the goods or services;
- (iii) if 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 ***checkable*** 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.
- (iiia) if the date of the receipt of the invoice or the equivalent request for payment is not determined, 30 days after the date of receipt of the goods of services.***
- (ba) the date of receipt of the invoice is not subject to a contractual agreement between debtor and creditor.***

Justification

In order to trigger a requirement to pay, the invoice must be checkable. A final invoice must be checkable to determine whether it is complete, has been properly drawn up and is final in order to trigger a requirement to pay. As a matter of principle, a final invoice which fails to meet these criteria may not trigger a requirement to pay.

Amendment 34

Proposal for a directive
Article 5 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. For public health institutions and public medico-social institutions, the time limits referred to in points (i), (ii) and (iii) of Article 5(2)(b) shall be 60 days.

Justification

Les établissements publics de santé ainsi que les établissements médico-sociaux publics (ex. foyers pour handicapés) doivent bénéficier d'un délai de paiement de 60 jours en raison de la spécificité de leur mode de financement au niveau national (remboursement via le système de sécurité sociale). Il ne s'agit pas d'exclure ces établissements du champ de la Directive, ni de créer une dérogation pour une catégorie de payeurs par principe, mais bien de prendre en compte la spécificité de leur système de financement qui ne leur permet pas, indépendamment de leur volonté, de respecter le délai de paiement de 30 jours.

Amendment 35

Proposal for a directive
Article 5 – paragraph 3

Text proposed by the Commission

Amendment

3. Member States shall ensure that the maximum duration of a procedure of acceptance or verification referred to in paragraph 2(b)(iii) shall not exceed 30 days, **unless otherwise specified and duly justified in the tender documents and the contract.**

3. Member States shall ensure that the maximum duration of a procedure of acceptance or verification referred to in paragraph 2(b)(iii) shall not exceed 30 days **from the date of the receipt of the goods or services.**

Justification

The derogation from the 30-day period for verification is open to an indefinite number of interpretations and should therefore be deleted. Moreover, as there is often no level playing field between public purchasers and private suppliers, it leaves a gateway for public authorities to introduce different periods for the verification procedure. Furthermore the proposed amendment specifies the starting date for counting the 30 day-period: the date of the receipt of the goods or services.

Amendment 36

Proposal for a directive
Article 5 – paragraph 4

Text proposed by the Commission

Amendment

4. Member States shall ensure that the period for payment fixed in the contract shall not exceed the time limits provided for in paragraph 2(b), unless it is specifically agreed between the debtor and the creditor and is duly justified in the light of particular circumstances ***such as an objective need to schedule payment over a longer period.***

4. Member States shall ensure that the period for payment fixed in the contract shall not exceed the time limits provided for in paragraph 2(b), unless it is specifically agreed between the debtor and the creditor and is ***objectively*** justified in the light of ***the particular nature or features of the contract and in any event should never exceed 60 days.***

Justification

Both undertakings and public authorities should be able to derogate from the 30-day deadline only under exceptional duly justified circumstances. It is important to set a maximum period for payment in order to limit this deviation and to avoid abuse.

Amendment 37

Proposal for a directive
Article 5 – paragraph 5

Text proposed by the Commission

Amendment

5. Member States shall ensure that when interest for late payment becomes payable, the creditor is entitled to a lump sum compensation equal to 5% of the amount due. This compensation shall be additional to the interest for late payment.

deleted

Justification

It would be an anomaly for penalties to take the form of payments to creditors, since the beneficiaries would be the individuals concerned and not a public authority. Creditors' compensation should take the form of interest.

Amendment 38

Proposal for a directive
Article 6 – title and paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

Grossly unfair contractual clauses

Unfair contract terms and practices

1. Member States shall provide that a

1. Member States shall provide that ***a term***

clause in a contract relating to the date for payment, the rate of interest for late payment or recovery costs shall *either* be unenforceable *or* shall give rise to a claim for damages if it is *grossly* unfair to the creditor. In determining whether a *clause* is *grossly* unfair to the creditor, all circumstances of the case shall be considered, including good commercial practice *and* the nature of the product or the service. *Account shall also be taken of* whether the debtor has any objective reason to deviate from the statutory rate of interest or from Article 3(2)(b), Article 4(1) or Article 5(2)(b).

in a contract *or a practice* relating to the date *or period* for payment, the rate of interest for late payment or *compensation for* recovery costs shall be unenforceable *and* shall give rise to a claim for damages if it is unfair to the creditor.

In determining whether a *term or practice* is unfair to the creditor, *within the meaning of subparagraph 1*, 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 or from Article 3(2)(b), Article 4(1) or Article 5(2)(b).

(The deletion of the word "grossly [unfair]", the introduction of the word "term" and the introduction of the word "practice" apply throughout the text. Adopting this amendment will necessitate corresponding changes throughout.)

Justification

It is understood that the translation for "term" is "cláusula" in Spanish, "clausola" in Italian and "clause" in French. This is consistent, for example, with Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

Amendment 39

Proposal for a directive Article 6 – paragraph 1 – subparagraph 2

Text proposed by the Commission

For the purpose of *the first subparagraph*, a *clause* which excludes interest for late payment shall always be considered as *grossly* unfair.

Amendment

1a. For the purpose of *paragraph 1*, a *term or a practice* which excludes interest for late payment *or compensation for recovery costs, or both*, shall always be considered as unfair.

Justification

It is necessary to send a clear message to economic operators that excluding the right to compensation for recovery costs, a right which the proposal seeks to strengthen, is an unfair term which cannot be enforced against creditors and which can give rise to a claim for damages.

Amendment 40

Proposal for a directive Article 6 – paragraph 3

Text proposed by the Commission

3. The means referred to in paragraph 2 shall include provisions whereby *representative* organisations may take action according to the national law concerned before the courts or before competent administrative bodies on the grounds that *clauses* are *grossly* unfair, so that they can apply appropriate and effective means to prevent their *continued* use.

Amendment

3. The means referred to in paragraph 2 shall include provisions whereby organisations *officially recognised as, or having a legitimate interest in, representing enterprises* may take action according to the national law concerned before the courts or before competent administrative bodies on the grounds that *terms or commercial practices, including in the case of an individual contract* are unfair, so that they can apply appropriate and effective means to prevent their use.

Justification

This amendment, inspired by the wording of Directive 2000/35, attempts to clarify the concept of "organisations". In contrast to Directive 2000/35 however, it seeks to open up this possibility beyond organisations representing SMEs, for example to organisations in a particular industrial sector.

The amendment also clarifies that representative organisations are not prevented from taking action according to the national law concerned by the mere fact that the allegedly unfair terms

are included in an individual contract, as opposed to standard terms and conditions.

Amendment 41

Proposal for a directive Article 7 – title

Text proposed by the Commission

Transparency

Amendment

Transparency **and awareness raising**

Justification

The amendment needs to be read in conjunction with changes made to Article 7 .

Amendment 42

Proposal for a directive Article 7

Text proposed by the Commission

Member States shall ensure full transparency about the rights and obligations stemming from this Directive, in particular by publishing the applicable statutory interest rate.

Amendment

Member States shall ensure full transparency about the rights and obligations stemming from this Directive, in particular by publishing the applicable statutory interest rate **and the procedure relating to payments by public authorities, as a specific guarantee to any possible chain for subcontractors.**

Amendment 43

Proposal for a directive Article 7 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The Commission shall publish in the Official Journal and on the Internet details of the current statutory rates of interest applying in all the Member States in the event of late payment in commercial transactions.

Justification

This will ensure greater clarity and easier access for courts and creditors to details of the statutory interest rates applying in the individual Member States. This is of particular importance in connection with cross-border transactions.

Amendment 44

Proposal for a directive

Article 7 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. 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 businesses.

Justification

The empirical evidence provided by the Commission in its impact assessment shows that businesses are sometimes not aware of the remedies against late payment. The Rapporteur thinks that the implementation of the directive should be accompanied by awareness-raising targeted at undertakings and in particular SMEs, informing them about their rights.

Amendment 45

Proposal for a directive

Article 7 – paragraph 1 c and 1 d (new)

Text proposed by the Commission

Amendment

1c. 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 aims of this Directive.

1d. Member States shall make efforts to encourage the publication of a list of prompt payers to foster the spread of good

practice.

Justification

The Rapporteur pointed out in her working document that late payment can be only combated with a wide-range of complementary measures. These measures should include the use of positive naming of payers and the spread of best practices to promote timely payment, including instruments such as prompt payment codes.

Amendment 46

Proposal for a directive
Article 7 a (new)

Text proposed by the Commission

Amendment

Article 7a

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 the amounts due to be paid by instalments over a period of time. In such cases, where any of the instalments is not paid at the agreed date, interest, compensation and other penalties provided for in this Directive shall be calculated solely on the basis of overdue amounts.

Justification

Staggered payment arrangements may contribute to ensure liquidity of businesses and SMEs in particular. In this connection, the Rapporteur considers it appropriate to clarify: (1) that parties to a commercial transaction remain entirely free to agree, subject to the application of the relevant provisions of national law, on arrangements of this kind; and (2) in the event of late payment of one instalment, interest, compensation and other penalties should be calculated solely on the basis of overdue amounts.

Amendment 47

Proposal for a directive
Article 9 – paragraphs 1 and 2

Text proposed by the Commission

1. Member States shall ensure that an enforceable title can be obtained, irrespective of the amount of the debt, 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.

2. National legislation, regulations *and* administrative provisions shall apply the same conditions for all creditors who are established in the *Community*.

Amendment

1. Member States shall ensure that an enforceable title can be obtained, ***through an expedited procedure and*** irrespective of the amount of the debt, 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. ***This duty shall be carried out by Member States in conformity with their respective national legislation, regulations and administrative provisions. In this respect, creditors shall be given the possibility to have recourse to a widely accessible online procedure.***

2. National legislation, regulations, administrative provisions shall apply ***and the online procedure referred to in paragraph 1 shall be available under*** the same conditions for all creditors who are established in the *Union*.