



EUROPEAN PARLIAMENT

2009 - 2014

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*Committee on Industry, Research and Energy*

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**2009/0054(COD)**

19.3.2010

## **OPINION**

of the Committee on Industry, Research and Energy

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council  
on combating late payment in commercial transactions (Recast)  
(COM(2009)0126 – C7-0044/2009 – 2009/0054(COD))

Rapporteur: Francesco De Angelis

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## SHORT JUSTIFICATION

Directive 2000/35/EC, adopted in May 2000 and in force since 8 August 2002, whose purpose is to combat late payment in commercial transactions, has had a limited impact. Disparities between Member States regarding payment discipline remain marked, and delays in payment threaten the survival of businesses, particularly SMEs, especially at a time of economic and financial crisis such as that which Europe and the world are currently experiencing.

Widespread resort to delays in payment, dictated by necessity or more often deliberate, destabilises the internal market and seriously damages international trade. Moreover, in the Member States where this problem is most prevalent, businesses face greater risks of a steady decline in revenue until the point of bankruptcy. The problem is most serious in transactions between the public authorities and businesses, although the desirability of different treatment for transactions between private parties is debatable. The latter too – many of them SMEs – may be exposed to iniquitous contract clauses which they have accepted out of a fear of damaging their relations with a large private customer.

In his opinion, the rapporteur welcomes the Commission proposal. However, he feels that he should propose a few amendments to both the form and the substance which, while upholding the general approach in the Commission proposal, are intended to promote clarity and certainty in the interpretation and transposition of the Directive.

The rapporteur considers that the scope of the provisions concerning public authorities should be extended to public utilities. He also proposes amendments regarding the certainty of periods, the incentive character of the additional penalties applicable to debtors, a reduction in the contractual derogations permitted by the legislation and passive/active information of businesses about their new rights.

The draft opinion is consistent with the working document drafted by the rapporteur of the committee responsible, the Committee on the Internal Market and Consumer Protection, Mrs Barbara Weiler. However, in the opinion of the Committee on Industry, Research and Energy, the rapporteur considers it incumbent upon him to include additional elements to protect businesses, especially SMEs. In particular, he proposes making binding the application of the penalties in the form of compensation for recovery costs and interest in the event of late payment. This would obviate the requirement for individual creditors to have the ability to assert their rights, protecting them against the risk of commercial retaliation by the debtor.

The rapporteur's proposal incorporates a number of ideas received from the shadow rapporteurs during the initial exchange of views on the proposal for a directive. In particular, the rapporteur endorses the need - pointed out by colleagues - to reduce the derogations applicable to the provisions of European legislation.

Lastly, it has not yet been possible to arrive at a widely agreed solution with regard to the lump sum compensation (5%) which the creditor is entitled to receive from public authorities guilty of late payment. The rapporteur reserves the right to consider the matter during the next exchange of views and, possibly, to adopt a position on it by tabling an ad hoc amendment.

## AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive Recital 10 a (new)

*Text proposed by the Commission*

*Amendment*

***(10a) Even if the Union's institutions are not directly bound by this Directive, it should be ensured that those institutions, as a matter of good practice, apply the payment provisions laid down in this Directive.***

*Justification*

*The European Institutions should lead by example by consistently making timely payments.*

### Amendment 2

#### Proposal for a directive Recital 16

*Text proposed by the Commission*

*Amendment*

(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.

(16) ***Experience shows*** that contractual payment periods for commercial transactions are ***often*** significantly longer than 30 days. Therefore, payment periods ***in commercial transactions*** should be as a general rule limited to a maximum of 30 days; ***in cases where longer payment periods are duly justified in accordance with the principle of necessity or with special provisions of national law and where an explicit agreement has been made between the debtor and the creditor, the payment period could be extended to a maximum of 60 days.***

### *Justification*

*The same set of payment provisions should apply for all kinds of commercial transactions to avoid competitive disadvantages either for public or for private companies. Commercial relationships between undertakings and public authorities are in many ways similar to commercial relationships between undertakings. In order to avoid disadvantageous payment periods in particular for small and medium-sized enterprises, interest shall be payable at all events not later than 60 days after the receipt of the invoice.*

### **Amendment 3**

#### **Proposal for a directive**

#### **Article 2 – point 2**

##### *Text proposed by the Commission*

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

##### *Amendment*

(2) ‘public authority’ means any contracting authority as defined by 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 sectors<sup>1</sup>** and by Directive 2004/18/EC, regardless of the subject or value of the contract, and any of the Union's institution mentioned in Article 13 of the Treaty on European Union;

<sup>1</sup>OJ L 134, 30.4.2004, p. 1.

### *Justification*

*In order to avoid the misunderstanding that contracting authorities as defined by Directive 2004/17/EC are no longer included, there should be a reference to Directive 2004/17/EC. As Directives 2004/18/EC and 2004/17/EC apply only to specific subjects of contracts and only above a certain threshold, it should be made clear that the same restrictions do not apply in the case of Directive 2000/35/EG. Late payments concern also EU institutions, not only national authorities. The EU institutions cannot exclude themselves from provisions imposed to other public authorities.*

### **Amendment 4**

**Proposal for a directive**  
**Article 2 – point 3 a (new)**

*Text proposed by the Commission*

*Amendment*

**(3a) ‘sectoral undertaking’ means any undertaking operating in the water, energy or transport services sector within the meaning of Directive 2004/17/EC, regardless of the value of the contract;**

*Justification*

*‘Sectoral undertakings’ have a particularly strong position on the market due to their particular position. They are the only suppliers in the area of water, energy and transport supply infrastructure and are not subject to any real competition. Thus sectoral undertakings can very often set their ‘purchase conditions’ and payment deadlines unilaterally. This powerful position should not be abused. Sectoral undertakings should therefore be treated in the same way as sectoral contracting authorities.*

**Amendment 5**

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

*Text proposed by the Commission*

*Amendment*

(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;

(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*

*In conjunction with amending Articles 3 and 5 to reflect a more uniform, equitable and proportionate set of rules applying to both the public and private sectors, a slight increase in the mandatory statutory interest rate would be a way of encouraging both sectors to engage in better payment practices.*

**Amendment 6**

**Proposal for a directive**  
**Article 3**

*Text proposed by the Commission*

*Amendment*

Interest in case of late payment

Interest in case of late payment **in**

***commercial transactions between undertakings***

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

- (a) the creditor has fulfilled its contractual and legal obligations;
- (b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

2. Where the conditions set out in paragraph 1 are fulfilled, Member States shall ensure the following:

(a) interest for late payment shall become payable from the day following the date or the end of the period for payment fixed in the contract;

(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.

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

- (a) the creditor has fulfilled its contractual and legal obligations;
- (b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

2. Where the conditions set out in paragraph 1 are fulfilled, Member States shall ensure the following:

(a) interest for late payment shall become payable from the day following the date or the end of the period for payment fixed in the contract, ***which shall take into account the time limits provided in point (b) and which shall not exceed 60 days from the date of receipt of the goods or performance of the services to which the contract relates;***

(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 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 ***calendar*** days after ***this latter*** date;  
***(ba) the date of the receipt of the invoice is not subject to a contractual agreement***

*between debtor and creditor.*

*2a. 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 15 days, unless otherwise specified and duly justified in the tender documents or the contract.*

3. 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.

3. 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.

## **Amendment 7**

### **Proposal for a directive**

#### **Article 4 – paragraph 1 – introductory part**

##### *Text proposed by the Commission*

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:

##### *Amendment*

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***, any of the following ***minimum*** amounts:

##### *Justification*

*It is realistic to take the view that a contractual provision which deviates from the proposed provisions in Articles 3 and 5 would detract from the contractual guarantees which protect creditors. The rapporteur considers it fundamental that Member States should ensure that the procedure is automatically to be implemented, so that the individual creditor need not fear any retaliation from the customer.*



## Amendment 8

### Proposal for a directive

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

*Text proposed by the Commission*

*Amendment*

***The amounts set out in the first subparagraph shall be subject to biennial review.***

*Justification*

*It is necessary to update the compensation amounts, although the amounts proposed do not cover the real legal costs and therefore do not facilitate access to justice. When setting costs reference should be made to a biennial incremental mechanism.*

## Amendment 9

### Proposal for a directive

#### Article 5

*Text proposed by the Commission*

*Amendment*

Payment by public authorities

Payment by public authorities ***and sectoral undertakings***

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:

- (a) the creditor has fulfilled its contractual and legal obligations;
- (b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

2. Where the conditions set out in paragraph 1 are fulfilled, Member States shall ensure the following:

- (a) interest for late payment shall become payable from the day following the date or the end of the period for payment fixed in the contract;
- (b) if the date or period for payment is not fixed in the contract, interest for late

1. Member States shall ensure that, in commercial transactions, 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:

- (a) the creditor has fulfilled its contractual and legal obligations;
- (b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

4. Where the conditions set out in paragraph 1 are fulfilled, Member States shall ensure the following:

- (a) interest for late payment shall become payable from the day following the date or the end of the period for payment fixed in the contract;
- (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.

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.

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.*

*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.*

6. Member States shall ensure that the applicable reference rate in commercial transactions leading to the delivery of

payment shall become payable automatically within 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) 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 **calendar** days after *this latter* date;

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

3. Member States shall ensure that the maximum duration of a procedure of acceptance or verification referred to in paragraph 4(b)(iii) shall not exceed **15 days**, unless otherwise specified and duly justified in the tender documents and the contract.

2. Member States shall ensure that the period for payment fixed in the contract shall not exceed the time limits provided for in paragraph 4(b), unless it is specifically agreed between the debtor and the creditor and is duly justified *in accordance with the principle of necessity, and in any event never exceeds 60 days.*

6. Member States shall ensure that the applicable reference rate in commercial transactions leading to the delivery of

goods or the provision of services for remuneration to public authorities:  
(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.

goods or the provision of services for remuneration to public authorities:  
(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.

## **Amendment 10**

### **Proposal for a directive**

#### **Article 6 – title**

*Text proposed by the Commission*

Grossly unfair contractual clauses

*Amendment*

Grossly unfair contractual clauses ***and commercial practices***

#### *Justification*

*To avoid abuse or unfair clauses in contracts and business relations the scope in this article should be extended to include commercial practices as this is equally a significant and grave problem for SMEs, for instance when larger companies unilaterally change payment periods retrospectively.*

## **Amendment 11**

### **Proposal for a directive**

#### **Article 6 – paragraph 1 – subparagraph 1**

*Text proposed by the Commission*

1. Member States shall provide that a 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

*Amendment*

1. Member States shall provide that a clause in a contract ***and/or a commercial practice*** relating to the date for payment, the rate of interest for late payment or recovery costs, ***or such a clause in informal agreements and in retrospective changes to the contract***, 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, ***as well as the size of the***

4(1) or Article 5(2)(b).

**undertakings.** Account shall also be taken of whether the debtor has any objective reason to deviate from the statutory rate of interest or from Article 4(1) or Article 5(2)(b).

#### *Justification*

*To ensure this legislation fully protects SMEs from abusive or unfair behaviour in relation to payment it is paramount to include commercial practices. If commercial practices, including retrospective changes to a contract's payment conditions, the legislation as proposed by the Commission will not sufficiently hinder creditors from being used as 'banks', i.e. unilateral changes making the payment period longer to increase debtors' liquidity, to the detriment of creditor's. Change of reference to articles to make the amendments consistent with amendments merging article 3 and 5. This is to ensure that, when determining whether a clause in a contract is vexatious, account is taken not only of good commercial practices and the nature of the product or service but of the size of the undertaking involved as well.*

#### **Amendment 12**

##### **Proposal for a directive**

##### **Article 6 – paragraph 1 - subparagraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***For the purposes of the first subparagraph a clause which exceeds the period provided for in Article 5(2)(b) shall always be considered as grossly unfair, taking also into account the criteria laid down in Article 5(4).***

#### **Amendment 13**

##### **Proposal for a directive**

##### **Article 6 – paragraph 1 - subparagraph 2 b (new)**

*Text proposed by the Commission*

*Amendment*

***Any clause adding extra financial burden on the creditor as a prerequisite for claiming legal compensation due to late payments shall be considered as grossly unfair.***

## Amendment 14

### 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 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 use. ***This provision shall be without prejudice to the confidentiality clause binding representative organisations to their member entities.***

*Justification*

*Representative organisations should also be enabled to act according to the national law if the clauses concerned are used episodically or intermittently.*

## Amendment 15

### 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 of subcontractors.***

*Justification*

*This provision would introduce traceability and transparency in the payments made by public authorities. The measure is appropriate in particular to guarantee that the benefits of improved payment periods are passed on in practice to possible subcontracting and/or outsourcing sectors downstream of the main contractors.*

## Amendment 16

### Proposal for a directive Article 11 – paragraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***1a. For the purposes of the implementation of this Directive, Member States shall organise information campaigns to make undertakings, particularly small and medium-sized enterprises (SMEs), more aware of their rights.***

***Member States shall consider the possibility of arranging for publication of information on 'good' and 'bad' debtors and disseminating good practices to promote punctuality of payment.***

#### *Justification*

*As indicated in the Commission's impact assessment, undertakings do not demand interest partly because they are not aware of their rights. In addition to providing information, practical measures can be taken to promote punctuality of payment.*

## PROCEDURE

<b>Title</b>	Combating late payment in commercial transactions (recast version)
<b>References</b>	COM(2009)0126 – C7-0044/2009 – 2009/0054(COD)
<b>Committee responsible</b>	IMCO
<b>Opinion by</b> Date announced in plenary	ITRE 14.9.2009
<b>Rapporteur</b> Date appointed	Francesco De Angelis 9.11.2009
<b>Discussed in committee</b>	2.12.2009                      4.2.2010
<b>Date adopted</b>	18.3.2010
<b>Result of final vote</b>	+:                      46 -:                      0 0:                      1
<b>Members present for the final vote</b>	Jean-Pierre Audy, Zigmantas Balčytis, Zoltán Balczó, Bendt Bendtsen, Jan Březina, Reinhard Bütikofer, Maria Da Graça Carvalho, Giles Chichester, Pilar del Castillo Vera, Ioan Enciu, Adam Gierek, Norbert Glante, Fiona Hall, Jacky Hénin, Romana Jordan Cizelj, Sajjad Karim, Arturs Krišjānis Kariņš, Judith A. Merkies, Angelika Niebler, Jaroslav Paška, Herbert Reul, Teresa Riera Madurell, Michèle Rivasi, Paul Rübig, Francisco Sosa Wagner, Britta Thomsen, Patrizia Toia, Evžen Tošenovský, Ioannis A. Tsoukalas, Claude Turmes, Marita Ulvskog, Vladimir Urutchev, Adina-Ioana Vălean, Kathleen Van Brempt, Alejo Vidal-Quadras, Henri Weber
<b>Substitute(s) present for the final vote</b>	Rachida Dati, Francesco De Angelis, Andrzej Grzyb, Jolanta Emilia Hibner, Oriol Junqueras Vies, Ivailo Kalfin, Marian-Jean Marinescu, Vladko Todorov Panayotov, Silvia-Adriana Țicău, Hermann Winkler
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Britta Reimers