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Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast) (Text with EEA relevance)

DIRECTIVE 2011/7/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 February 2011

on combating late payment in commercial transactions

(recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) A number of substantive changes are to be made to Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions[(3)]. It is desirable, for reasons of clarity and rationalisation, that the provisions in question be recast.

(2) 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.

(3) 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. 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.

(4) Judicial claims related to late payment are already facilitated by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and

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enforcement of judgments in civil and commercial matters[(4)], Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims[(5)], Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure[(6)] and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure[(7)]. However, in order to discourage late payment in commercial transactions, it is necessary to lay down complementary provisions.

(5) Undertakings should be able to trade throughout the internal market under conditions which ensure that transborder operations do not entail greater risks than domestic sales. Distortions of competition would ensue if substantially different rules applied to domestic and transborder operations.

(6) 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[(8)].

(7) One of the priority actions of the Commission Communication of 26 November 2008 entitled ‘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 1 month to ease liquidity constraints.

(8) The scope of this Directive should be limited to payments made as remuneration for commercial transactions. This Directive should not regulate transactions with consumers, interest in connection with other payments, for instance payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance companies. Furthermore, Member States should be able to exclude debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.

(9) This Directive should regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings. It should therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

(10) The fact that the liberal professions are covered by this Directive should not oblige Member States to treat them as undertakings or merchants for purposes outside the scope of this Directive.

(11) The delivery of goods and the provision of services for remuneration to which this Directive applies should also include the design and execution of public works and building and civil engineering works.

(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, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment. Such a shift should also include the introduction of specific provisions on payment periods and on the compensation of creditors for the costs incurred, and, inter alia, that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair.

(13) Accordingly, provision should be made for business-to-business contractual payment periods to be limited, as a general rule, to 60 calendar days. However, there may be circumstances in which undertakings require more extensive payment periods, for example when undertakings wish to grant trade credit to their customers. It should therefore remain possible for the parties to expressly agree on payment periods longer than 60 calendar days, provided, however, that such extension is not grossly unfair to the creditor.

(14) In the interest of consistency of Union legislation, the definition of 'contracting authorities' 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 sectors[(9)] and 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[(10)] should apply for the purposes of this Directive.

(15) Statutory interest due for late payment should be calculated on a daily basis as simple interest, in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits[(11)].

(16) This Directive should not oblige a creditor to claim interest for late payment. In the event of late payment, this Directive should allow a creditor to resort to charging interest for late payment without giving any prior notice of non-performance or other similar notice reminding the debtor of his obligation to pay.

(17) A debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations.

(18) Invoices trigger requests for payment and are important documents in the chain of transactions for the supply of goods and services, inter alia, for determining payment deadlines. For the purposes of this Directive, Member States should promote systems that give legal certainty as regards the exact date of receipt of invoices by the debtors, including in the field of e-invoicing where the receipt of invoices could generate electronic evidence and which is partly governed by the provisions on invoicing

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contained in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[(12)].

(19) Fair compensation of creditors for the recovery costs incurred due to late payment is necessary 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 a fixed minimum sum which may be cumulated with interest for late payment. Compensation in the form of a fixed sum should aim at limiting the administrative and internal costs linked to the recovery. Compensation for the recovery costs should be determined without prejudice to national provisions according to which a national court may award compensation to the creditor for any additional damage regarding the debtor's late payment.

(20) 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. Such costs should include, in particular, those incurred by creditors in instructing a lawyer or employing a debt collection agency.

(21) This Directive should be without prejudice to the right of Member States to provide for fixed sums for compensation of recovery costs which are higher and therefore more favourable to the creditor, or to increase those sums, inter alia, in order to keep pace with inflation.

(22) This Directive should not prevent payments by instalments or staggered payments. However, each instalment or payment should be paid on the agreed terms and should be subject to the rules for late payment set out in this Directive.

(23) As a general rule, public authorities benefit from more secure, predictable and continuous revenue streams than undertakings. In addition, many public authorities can obtain financing at more attractive conditions than undertakings. At the same time, public authorities depend less than undertakings on building stable commercial relationships for the achievement of their aims. Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, 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 in any event not exceeding 60 calendar days.

(24) However, account should be taken of the specific situation of public authorities carrying out economic activities of an industrial or commercial nature by offering goods or services on the market as a public undertaking. For that purpose, Member States should be allowed, under certain conditions, to extend the statutory payment period up to a maximum of 60 calendar days.

(25) A particular cause for concern in connection with late payment is the situation of health services in a large number of Member States. Healthcare systems, as a fundamental part of Europe's social infrastructure, are often obliged to reconcile individual needs

with the available finances, as the population of Europe ages, as expectations rise, and as medicine advances. All systems have to deal with the challenge of prioritising healthcare in a way that balances the needs of individual patients with the financial resources available. Member States should therefore be able to grant public entities providing healthcare a certain amount of flexibility in meeting their commitments. For that purpose, Member States should be allowed, under certain conditions, to extend the statutory payment period up to a maximum of 60 calendar days. Member States should, nonetheless, make every effort to ensure that payments in the healthcare sector are made within the statutory payment periods.

(26) In order not to jeopardise the achievement of the objective of this Directive, Member States should ensure that in commercial transactions the maximum duration of a procedure of acceptance or verification does not exceed, as a general rule, 30 calendar days. Nevertheless, it should be possible for a verification procedure to exceed 30 calendar days, for example in the case of particularly complex contracts, when expressly agreed in the contract and in any tender documents and if it is not grossly unfair to the creditor.

(27) The Union institutions are in a situation comparable to that of the public authorities of Member States with regard to their financing and commercial relationships. Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities[(13)] specifies that the validation, authorisation and payment of expenditure by Union institutions must be completed within the time limits laid down in its implementing rules. Those implementing rules are currently set out in Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[(14)], and specify the circumstances in which creditors which are paid late are entitled to receive default interest. In the context of the ongoing review of those Regulations, it should be ensured that the maximum time limits for payment by the Union institutions are aligned with statutory periods applicable to public authorities in accordance with this Directive.

(28) This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. As a result, where a term in a contract 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 not justified on the grounds of the terms granted to the debtor, or it mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, it may be regarded as constituting such an abuse. For that purpose, and in accordance with the academic ‘Draft Common Frame of Reference’, any contractual term or practice which grossly deviates from good commercial practice and is contrary to good faith and fair dealing should be regarded as unfair to the creditor. In particular, the outright exclusion of the right to charge interest should always be considered as grossly unfair, whereas the exclusion of the right to compensation for recovery costs should be presumed to be grossly 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.

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(29) In the context of enhanced efforts to prevent the abuse of freedom of contract to the detriment of creditors, organisations officially recognised as representing undertakings and organisations with a legitimate interest in representing undertakings should be able to take action before national courts or administrative bodies in order to prevent the continued use of contract terms or practices which are grossly unfair to the creditor.

(30) In order to contribute to the achievement of the objective of this Directive, Member States should foster the spread of good practices, including by encouraging the publication of a list of prompt payers.

(31) It is desirable to ensure that creditors are in a position to exercise a retention of title clause on a non-discriminatory basis throughout the Union, if the retention of title clause is valid under the applicable national provisions designated by private international law.

(32) This Directive only defines the term ‘enforceable title’ but should not regulate the various procedures for forced execution of such a title or the conditions under which forced execution of such a title can be stopped or suspended.

(33) The consequences of late payment can be dissuasive only if they are accompanied by procedures for redress which are rapid and effective for the creditor. In accordance with the principle of non-discrimination set out in Article 18 of the Treaty on the Functioning of the European Union, those procedures should be available to all creditors who are established in the Union.

(34) 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. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[(15)] already sets a framework for systems of mediation at Union level, especially for cross-border disputes, without preventing its application to internal mediation systems. Member States should also encourage interested parties to draw up voluntary codes of conduct aimed, in particular, at contributing to the implementation of this Directive.

(35) 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, including through an expedited procedure and irrespective of the amount of the debt.

(36) Since the objective of this Directive, namely combating late payment in the internal market, cannot be sufficiently achieved by the Member States and can, therefore, by reason of its scale and effect, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(37) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2000/35/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.

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(38) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of Directive 2000/35/EC.

(39) In accordance with point 34 of the Interinstitutional Agreement on better law-making[(16)], Member States are encouraged to draw up, for themselves and in the interest of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and their transposition measures, and to make those tables public,

HAVE ADOPTED THIS DIRECTIVE:

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(**1**) OJ C 255, 22.9.2010, p. 42.

(**2**) Position of the European Parliament of 20 October 2010 (not yet published in the Official Journal) and decision of the Council of 24 January 2011.

(**3**) OJ L 200, 8.8.2000, p. 35.

(**4**) OJ L 12, 16.1.2001, p. 1.

(**5**) OJ L 143, 30.4.2004, p. 15.

(**6**) OJ L 399, 30.12.2006, p. 1.

(**7**) OJ L 199, 31.7.2007, p. 1.

(**8**) OJ L 124, 20.5.2003, p. 36.

(**9**) OJ L 134, 30.4.2004, p. 1.

(**10**) OJ L 134, 30.4.2004, p. 114.

(**11**) OJ L 124, 8.6.1971, p. 1.

(**12**) OJ L 347, 11.12.2006, p. 1.

(**13**) OJ L 248, 16.9.2002, p. 1.

(**14**) OJ L 357, 31.12.2002, p. 1.

(**15**) OJ L 136, 24.5.2008, p. 3.

(**16**) OJ C 321, 31.12.2003, p. 1.