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Delegations will find attached document SWD(2023) 312 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

**Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on combating late payment in commercial transactions**

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Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
The overall objective of this legislative proposal is to ensure the smooth functioning of the EU single market by combating the unlawful misappropriation of liquidity in the EU market. Article 114 of the Treaty on the Functioning of the EU (TFEU) is the appropriate legal basis for this initiative to achieve these objectives. This article is the appropriate legal basis for measures aimed at achieving the objectives set out in Article 26 TFEU (harmonising national provisions).
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
This legislative proposal is a recast of the Late Payment Directive (LPD) (Directive 2000/35/EC), based on Article 95 TEC. The LPD and its revision fall within the joint remit ('shared competence') of the EU and the Member States.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2¹:
- Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
The Call for Evidence was published for feedback from 12 January to 17 March 2023 and received 137 replies. Most responses came from business associations and companies, followed by public authorities, citizens and other organisations. In addition, the Commission launched an online public consultation on 12 January 2023, open for feedback until 17 March 2023, in line with the Commission Better Regulation rules. It contained questions covering a wide range of aspects of the LPD – some of them specifically targeted at companies. 117 replies were received in total. Other than that, a targeted SME panel took place between 26 January and 16 March 2023. In total, 939 SMEs replied to this consultation in the EU Survey webpage. Finally, an extensive number of meetings with stakeholders took place. The overview of consultation activities is presented in annex 2 of the impact assessment. The explanatory memorandum and the impact assessment both contain an assessment allowing an appraisal of the EU added value of the proposed action (see question 2.2 for more details).
2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?
The evaluation of the Late Payment Directive concluded that the added value of having EU rules to combat payment delays was uncontested.
The explanatory memorandum (section 2) and the impact assessment (section 3) provide a justification regarding the conformity with the principle of subsidiarity and address this issue in the context of the options analysed, where appropriate. The problem of late payments is widespread across the EU and affects all Member States. The causes of the problem are common in all EU Member States. Facilitating prompt payment will require all Member States to make rules stricter in a coordinated way. Implementing 27 national solutions would likely result in a lack of uniform rules, fragmentation of the single market and higher cost for

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

companies trading across borders. The EU dimension is justified by the fact that this action affects all commercial transactions in public procurement and between businesses, regardless of their size. It is the very essence of the single market. This action concerns the revision of existing EU legislation, in order to strengthen its provisions; therefore, it can be done only at EU level. Some EU countries have introduced national rules that are more stringent than the LPD and grant better protection to SMEs – for example capping payment terms in B2B transactions at 30 days when the creditor is an SME or setting up enforcement bodies. At the same time, some national legislations have introduced a ban on assigning receivables, thereby prohibiting the restriction on the parties' ability to assign or transfer rights that helps getting finance. To avoid fragmentation of the single market, it is necessary to ensure homogenous implementation and enforcement of the rules. Similarly, co-ordinated action is required to tackle the asymmetry of power and asymmetry of information, as well as means of redress across Member States. Therefore, Member States acting individually could not satisfactorily remove the barriers to ensure prompt payment across the EU. A coherent legal framework for payment terms, payments of interest and compensation and enforcement, can only be achieved at EU level.
2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?
Member States acting individually could not satisfactorily remove the barriers to ensure prompt payment across the EU. A coherent legal framework for payment terms, payments of interest and compensation and enforcement, can only be achieved at EU level.
(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?
The problem of late payments is widespread across the EU and affects all Member States. The causes of the problem are common in all EU Member States.
(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty² or significantly damage the interests of other Member States?
Some EU countries have introduced national rules that are more stringent than the LPD and grant better protection to SMEs – for example capping payment terms in B2B transactions at 30 days when the creditor is an SME or setting up enforcement bodies. At the same time, some national legislations have introduced a ban on assigning receivables, thereby prohibiting the restriction on the parties' ability to assign or transfer rights that helps getting finance. To avoid fragmentation of the single market, it is necessary to ensure homogenous implementation and enforcement of the rules.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
Member States can select enforcement bodies, create alternative dispute resolution mechanisms, ensure digital tools are used by SMEs, adopt legislation to address unfair payment practices (and adopt legislation that sets payment terms below the maximum payment terms defined in the Regulation)
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
Late payments are widespread across all EU countries. In 11 EU Member States, more than 50% of payments were made late in Q4 2021. However, even in the best performing EU Member States, more than 10% of all invoices are paid late. Long payment terms in B2B transactions came up even in countries with prompt payment traditions and drew the attention of regulators, e.g. in the Netherlands and Sweden, where government reviews showed increases in average payment terms. In all EU

² https://europa.eu/european-union/about-eu/eu-in-brief_en

Member States, the average payment time is higher than the average payment term agreed.
(e) Is the problem widespread across the EU or limited to a few Member States?
The problem is widespread across the EU.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
The problems in late payment are present in all MS.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU? Most authorities support the revision as confirmed in the results of the consultation activities (e.g. public consultation and feedback on the call for evidence). According to the results of the public consultation, there is a strong support of a relative majority of Member States' authorities for the capping of payment with a preference for 30 days (8 replies out of 18). Some Member States' authorities (5 replies out of 18) prefer to not change the current provisions. This is reflected by the feedback received for the call for evidence. A large majority supported the proposal to improve the provision of training on credit management and financial literacy while the views are mixed concerning the European Observatory of payments. The views of authorities are more divergent as to the legal form of the instrument, with most authorities in favour of maintaining a Directive.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
Value added of EU action for this initiative is strong because it seeks to address a widespread, EU-wide problem, which affects not only intra-Member State transactions, but also cross-border transactions in the single market.
(a) Are there clear benefits from EU level action?
Value added of EU action for this initiative is significant because it seeks to address a widespread, EU-wide problem, which affects not only intra-Member State transactions, but also cross-border transactions in the single market. Payments allow the single market to function. Late payment may affect any commercial transaction in the EU. This initiative concerns the revision of an already existing EU legislation (Directive 2011/7/EU) therefore, it can be done only at EU level. Implementing 27 solutions to lay down rules on national level would risk fragmenting the single market and bring additional familiarisation and compliance costs for companies trading across borders in the EU.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
A coordinated action at EU level including Member States is required to: define provisions on interest and compensation fees (articles 3,4, and 6) so that they can be transposed in a uniform manner into national legislations, establish clearer payment terms for B2B, as well as enforcement and monitoring provisions, that apply cross border; ensure that there are synergies with the public procurement framework, and especially taking into account that the National Recovery and Resilience Plans in the Member States are implemented primarily through public procurement.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
The Regulation replaces the current LPD Directive. While some national legislation might need to be

adapted, there will be no need for transposition and therefore there is less replacement of national rules.
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?
EU-level action brings additional benefits compared to national, regional and local action, as many B2B transactions are cross borders and common rules across the EU would therefore be simpler for businesses to understand. EU-level action reduces the need for a business to familiarise themselves with payment regulation in each individual Member State. As the Regulation will replace an existing Directive, Member States have already ceded some competence under the baseline scenario. Where relevant, certain specific provisions could explicitly allow Member States to adopt more stringent provisions, where this is carefully calibrated so as to allow national authorities exercise their remaining competence.
(e) Will there be improved legal clarity for those having to implement the legislation?
Yes. There will be one set of rules applicable, present in the Regulation.
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?
The measures proposed impose only the cost on businesses that is necessary to achieve the objectives and leave room for discretion to Member States in how enforcement bodies are designated. The measures proposed are well targeted as they focus on the needs of their direct users (e.g. companies, in particular SMEs) to prevent late payments from occurring and making timely payments actually happen. The summary of costs, benefits and impacts on stakeholders of the preferred combination of policy options is presented in Annex 3 of the impact assessment. The assessment of all policy options in terms of proportionality is provided in section 7.2 and more specifically in section 8 for the preferred policy option.
3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?
In line with the principle of proportionality, the planned initiative will not go beyond what is necessary to achieve its objectives by revising the current rules applicable to all commercial transactions in public procurement and between businesses, which could not be achieved by Member States on their own.
(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
This initiative seeks to address a widespread, EU-wide problem, which affects not only intra-Member State transactions, but also cross-border transactions in the single market. This initiative concerns the revision of an already existing EU legislation (Directive 2011/7/EU) therefore, it can be done only at EU level. Implementing 27 solutions to lay down rules on national level would risk fragmenting the single market and bring additional familiarisation and compliance costs for companies trading across borders in the EU.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?
The instrument chosen is a regulation, which will replace the current Late Payment Directive. A regulation will repeal and replace the current directive, the provisions of the future act would be drafted in such a way that they are directly applicable. Such provisions would be directly applicable in all Member States since its entry into force. While national law would need to adjust to the EU regulation, there would be no need for a transposition. A regulation would be binding and the same rules would apply in all Member States. This could happen in particular as regards measures such as the setting of maximum payment terms, the duration of the verification procedures or the rate of late payment interests and the amount of the flat fee compensation.
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
As a minimum harmonisation instrument, the regulation would also lay down obligations and definitions concerning the designation of national enforcement bodies, national mediation systems, credit management and financial literacy training and unfair contractual practices and provisions, but it would be for the Member States to complement them as these provisions might not be directly applicable.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The initiative creates some costs for public authorities as well as businesses. These costs are fully assessed in the accompanying impact assessment (a summary of these costs is provided in annex 3 of the impact assessment). Most costs affecting businesses are one-off, such as updating standard invoices, while recurring costs are mainly borne by debtors that currently pay late. It is important to note that debtors can avoid most of these costs by paying on time. Public authorities would face some costs to designate and run the enforcement and mediation bodies foreseen in this initiative. The initiative imposes only the cost on businesses and public authorities that is necessary to achieve the objectives. Overall, the benefits are judged to significantly outweigh the associated costs, even under conservative assumptions for resulting benefits.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
It will be for Member States to better decide how to implement the obligations concerning the designation of national enforcement bodies, national mediation systems, credit management and financial literacy training and unfair contractual practices and provisions, in accordance with their individual circumstances/ national laws.