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## WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject:	Late Payment Regulation - Joint position paper by Austria, The Czech Republic, Estonia, Germany, Latvia, Lithuania, Portugal, Slovakia, Slovenia and Sweden

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Austria, The Czech Republic, Estonia, Germany, Latvia, Lithuania, Portugal, Slovakia,  
Slovenia, Sweden

## Proposal for a Regulation on combating late payment in commercial transactions

– Commission Proposal COM (2023) 533 final/2

– Council Document 12976/23 REV 1

– Interinstitutional File 2023/0323(COD)

It is of great importance to our governments to support small and medium-sized enterprises (SMEs). All measures aimed at securing SMEs' liquidity and effectively combating late payment are therefore welcomed. However, the Commission's proposal of 12 September 2023 for a Regulation on combating late payment in commercial transactions would have very **serious consequences for SMEs**. The Regulation would **create an unbalanced regulatory framework** that we reject for the following reasons:

- The proposal is geared solely towards the **interests of potential creditors**. It does not take account of the fact that SMEs can be **both creditors** (when they sell goods or services) **and debtors** (when they purchase goods or services).
- The proposed rules **do not merely combat the possible abuse** of unequal bargaining power to the detriment of SMEs. They are in fact aimed at comprehensive economic regulation, **even in cases in which there is no imbalance of power – for example when two SMEs negotiate a contract**.
- The proposal aims to create a **paradigm shift regarding the enforcement of civil law claims** with a completely new system of **enforcement authorities**. This system would be in competition with the established and **very effective court-based systems** – including national order for payment procedures and the European Order for Payment Procedure – and would **de facto replace them**. This would lead to **more unnecessary bureaucracy** and not less.
- A **regulation is the wrong choice of legal instrument**; it should be a directive. A regulation, with its fully harmonising effect and direct applicability, would **treat the same a very wide range of different business situations** and greatly interfere with the national civil law systems without there being sufficient justification for such interference. It is not necessary to harmonise the enforcement of claims for which the Member States currently use very different systems.

As regards the key aspects of the proposal, we need **solutions that are tailored to the needs of companies**:

## 1. Preserving contractual freedom: no strict capping of payment periods

The Commission proposes a **payment period of 30 days** from the date of receipt of the goods or services that **cannot be extended** by the contracting parties (Article 3 (1)). This has considerable disadvantages: **Companies must enjoy a certain amount of freedom**, including as regards payment periods. In practice, long payment periods can be agreed for many different reasons and they are therefore **not necessarily a sign of unequal bargaining power**. Long and negotiable payment periods are in particular necessary so that companies that buy and resell goods do not have to pay their supplier before the resale, which would require costly interim financing.

**An example:** A plumber buys ten washbasins from his wholesaler, which he is to install for his customers over the next few months. Under the Commission's proposal, he would have to pay the purchase price for all ten washbasins to the wholesaler within 30 days of the purchase, even if he only received payment for three washbasins from his customers during that period. For the other seven washbasins, he would have to advance the purchase price and obtain interim financing. A longer payment period, as is possible today, has advantages for all parties involved: the wholesaler can sell a larger quantity of goods in one transaction, which reduces transaction costs. The plumber saves the costs of interim financing. The customer pays less for his washbasin.

Introducing strict capping of payment periods at the European level would be inadvisable as it would **apply the same rules to very different business situations**.

Moreover, it is **unclear** whether the payment period would also begin to run **if the goods delivered were defective**. According to Article 3 (1), the only condition for the period to commence is that the creditor has received the goods. In contrast, the entitlement to interest for late payment would be subject – as it is the case under the current Late Payment Directive 2011/7/EU – to the creditor having fulfilled its contractual and statutory obligations, i.e. the delivery of *defect-free* goods (Article 5 (2)).

- It must **remain possible for companies to agree long payment periods** where these are not grossly unfair to the creditor.

- In order to **combat the abuse of bargaining power**, the possibility to set long payment periods in Terms and Conditions could be restricted, as these are typically provided by the contracting party that is more powerful.
- It must also remain possible for companies to **refuse payment** if the goods or services ordered are **defective**. The Member States' civil law systems provide balanced solutions for these cases.

## 2. Effective and unbureaucratic enforcement

According to the Commission's proposal, it would, in future, be for **administrative authorities of the Member States** to assess, at a creditor's request, whether the debtor is in violation of the Regulation and, if so, to require the debtor to put an end to the infringement, i.e. to pay (Article 15 (7)). **Enforcement authorities would thus take the place of courts.** Such an enforcement system would place a **considerable burden** on companies. For example, they would have to provide information to such authorities and allow on-site inspections (Article 14 (1)). A decision issued by such an enforcement authority would **not benefit the creditor** either, as the debtor would be able to challenge this decision before the courts. At this point at the latest, the contentious claim and the creditor's identity would have to be disclosed in order for the court to be able to review the authority's decision.

- The enforcement of civil law claims **must remain the responsibility of the courts**, which have **established and very effective procedures** for this – including national order for payment procedures and the **European Order for Payment Procedure** which allows for simple cross-border enforcement of debts.
- The European Union should further develop the legal framework for **judicial cooperation in civil matters** in order to simplify cross-border court proceedings.

## 3. Promoting dispute resolution

In addition to a strict capping of payment periods (Article 3 (1)), the Commission proposes that it shall not be possible for companies to waive their right to obtain interest for late payment (Article 5 (3)). However, agreements on payment schedules, the postponement of payment deadlines (deferral) and the waiver of the right to obtain interest for late payment are **typical elements of court and out-of-court settlements** and mediation agreements. **Companies therefore need flexibility** in order to be able to settle disputes through mutually agreed solutions. In particular, it must be possible for companies in economic difficulty to negotiate flexible payment agreements with their creditors so as to avoid insolvency. It must

therefore **remain possible for companies to waive their right to obtain interest for late payment.**

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