Council of the European Union
General Secretariat

**Interinstitutional files:**
**2023/0323 (COD)**

**Brussels, 03 May 2024**

**WK 6396/2024 INIT**

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| From: | Presidency |
| To: | Delegations |
| Subject: | Presidency flash note for the Working Party on Competitiveness and Growth (Internal Market - Late payment) on 16 May 2024 |

# Late Payment

## 16 May 2024

*Dear delegations,*

We are pleased to invite you for the fourth Working Party (WP) meeting hosted by the Belgian Presidency on the proposal on combating late payment in commercial transactions, scheduled for 16 May 2024 (an all-day session starting at 10:00).

First of all, we thank the delegations that have submitted written comments on our last flash note and on the different options and questions under consideration.

For this WP, we would like to hear your views about the revised text, which you can find on the delegates portal (doc. 9598/24). Attached to this flash note you will find explanations of the proposed compromise text.

In order to work efficiently, we suggest discussing by blocks of articles, namely:

- **Articles 3, 3a, 3b 3c, and 4 :** Payment periods, procedure of acceptance or verification, starting point of the payment period, information to the creditor, and payments to subcontractors in public procurement
- **Articles 5-6 and 8 :** Interest for late payment, rate of the interest for late payment, and compensation for recovery costs
- **Article 9:** Null and void and grossly unfair contractual terms and practices
- **Articles 1-2 ; 7 ; 10-12 and 16-17 :** Subject matter and scope, definitions, payment schedules, retention of title, transparency, recovery procedures for unchallenged claims, alternative dispute resolution, and digital tools, credit management, financial literacy training, and awareness raising initiatives.

We look forward to our upcoming discussions and fruitful collaboration.

Best regards,

The BE late payment team

# EXPLANATORY COMMENTS OF THE BELGIAN PRESIDENCY'S REVISED TEXT OF THE LATE PAYMENT REGULATION

## 1. Preliminary remarks:

### ❖ Recitals

As a preliminary point, delegations should be aware that only the operative part of the text has been revised as part of this proposal for a revised text. No changes have been made to the recitals at this stage.

### ❖ Directive

We have listened to the wishes of the vast majority of delegations and their Ministers and have therefore transformed the Commission's proposal into a directive instead of a regulation. The words "regulation" have therefore been changed to "directive" on each occasion, and the wording has been adapted in line with the editorial requirements of a directive.

## 2. Articles

### ❖ Art. 1 – Subject matter and scope

Article 1 has been slightly amended: firstly, we have added a new paragraph (§-1) to describe the purpose of the directive, and the text has been taken from Directive 2011/7.

We have followed the suggestion of the Council's Legal Service and replaced paragraph 1 with paragraph 2 of Directive 2011/7, reinstating the definition of commercial transactions in Article 2.

Finally, we have adapted paragraph 4 by specifying that the Directive has no impact on the UTP Directive. It appears from the feedback of several Member States that it would be wiser to leave the UTP Directive to regulate payment periods in the specific sector to which this directive relates and not to apply the draft directive in part to the UTP Directive, which would create confusion. The UTP directive contains specific rules concerning unfair practices in the agricultural and food sector compared with the directive on late payment.

### ❖ Art. 2 – Definitions

We have made some minor changes to the definitions. We have deleted the reference to "private deed or any other document issued" from the definition of enforceable title, at the request of certain Member States . Secondly, we have added the definition of "commercial transaction", which was already included in Directive 2011/7. Finally, we have deleted the definitions of debtor and creditor, at the request of several Member States, as these concepts are well known in national law and do not need to be defined.

### ❖ Art. 3 – Payment periods

This Article has been heavily revised.

Firstly, the proposed Article 3 by the Commission encompassed several themes: the duration and starting point of the payment period, the relationship with the UTP Directive, the acceptance and verification procedure, and the possibility for Member States to establish a maximum payment period shorter than the maxima set by the draft regulation. This combination appeared to make the provision very busy, and it seemed pertinent to separate these various themes into distinct Articles.

In substance, with this new Article 3, we are attempting to propose a compromise solution. While we are aware of the objective pursued by the Commission with its proposal for a fixed maximum period with no possible exceptions, we have also taken note of the desire of the Member States to have, on the contrary, greater flexibility in payment periods. This is why we are proposing the following solution:

- The deadline for B2B and B2G transactions is 30 days, unless otherwise stipulated in the contract. This rule remains identical to that currently applicable on the basis of Directive 2011/7.
- However, in B2B, the parties are free to contract for up to 60 days, but no longer. That's the maximum. Here, the payment period that can be set contractually is extended to 60 days, compared with a strict 30-day period in the Commission's proposal. It is important to have a fixed maximum period to avoid abuse, while leaving room for a degree of contractual freedom for the parties.
- In B2G, Member States may authorise the parties to a contract to extend the payment period to a maximum of 60 days, provided that this is justified by the nature or particular characteristics of the contract. On this point, no changes have been made to the rule currently applicable on the basis of Directive 2011/7, apart from the fact that the obligation contained in the current Article 4(6) of Directive 2011/7 to provide for this possibility has been transformed into an option for the Member States.
- It is also important to take account of practical realities. Some sectors, because of the specific nature of their products or services, require longer payment terms. This is why it is provided that, in B2B, Member States may determine sectors for which longer payment periods are necessary (such as seasonal products, etc.) and, in that event, should set the maximum payment period. The Member States are best placed to provide for such derogations. This measure also caters to the need for flexibility expressed by the Member States. However, these derogations must be justified by the particular nature of the goods or services that are the subject of such derogations.
- In B2G, the two sectors already mentioned in Directive 2011/7 for which Member States could provide for a longer period, but not exceeding 60 days, have been reinstated. We have also reinstated the paragraph of Directive 2011/7 which stated that in such cases, the Member State must send a report to the Commission.
- We have retained paragraph 4 of the Commission's proposal, which specifies that Member States can always set shorter deadlines.

### ❖ Art. 3a – Procedure of acceptance or verification

To make the text clearer and more readable, we have added a new Article 3a for the verification procedure. The exceptional nature of the acceptance and verification procedure, as provided for by the Commission, has been removed and the possibility of providing for such a procedure has been reinstated. Member States must ensure that they do not exceed 30 days, as provided for in Directive 2011/7. We have nevertheless provided that Member States may extend this period where this is strictly necessary due to the specific nature of the goods or services. This option was introduced in response to comments from Member States that, in certain situations such as the IT sector, complex works or others, a 30-day period is not always sufficient.

❖ **Art. 3b – Starting point of the payment period**

To make the text clearer and more readable, we have added a new Article 3b to determine the starting point for the payment period referred to in Article 3. We have also clarified, at the request of several Member States, that the period starts to run on the day following the latest of the following events: receipt of the invoice or equivalent document, receipt of the goods or services, or, where applicable, the end of the verification period. This means that, for example, if the creditor has sent the invoice immediately after the contract has been concluded, the payment period will not start to run until the debtor has received the goods. If the invoice is sent after delivery, the period begins to run once the invoice has been received. And if there is a verification procedure, the time limit begins to run once this procedure has been completed. However, if the invoice is sent by the creditor after the verification period, the period starts to run from the day after the receipt of the invoice.

This particularity deviates from the regulation proposal, which stipulates that the payment period begins from the trigger date.

❖ **Art. 3c – Information to the creditor**

We have also added a new Article 3c, which reproduces paragraph 5 of Article 5 of the Commission proposal, under which the debtor must send the necessary information to the creditor so that the latter can issue the invoice. We have supplemented this measure to make it clearer. We felt it would be more appropriate to place this measure after Article 3, which deals with payment periods, as it concerns the issue of the invoice and therefore the start of the payment period, rather than late payment interest.

The clarification made to this measure concerns the moment at which the information needed to issue the invoice must be communicated to the creditor, i.e. at the latest when the goods or services are received. This measure is useful in that it prevents stalling tactics aimed at delaying invoicing and thus artificially extending the payment deadline.

❖ **Art. 4 – Payments to subcontractors in public procurement**

We have replaced the Commission's paragraph 2 (information to the enforcement authority) with a new text, which states that the obligation referred to in paragraph 1 does not entail a deferral of the obligation to pay on the part of the public authority.

This clarifies that the obligation referred to in paragraph 1 is not intended to prevent payment to the main contractor, but is a minor obligation whose main purpose is to make the relationship between the main contractor and the sub-contractor more transparent, and at the same time to exert gentle pressure to encourage a culture of prompt payment.

❖ **Art. 5 – Interest for late payment**

First of all, we deleted the word "automatically" from paragraph 2 of the Commission's proposal because it was confusing and unclear for several Member States. The reference to "without the creditor

needing to send a reminder" is considered sufficient to convey the idea that interest for late payment is due "ipso jure". The creditor does not have to make an explicit request.

We have reworded paragraph 3 to make it clear that the creditor's *right* to interest for late payment cannot be excluded or limited. However, this wording does not prevent him from freely deciding whether or not to exercise this right in order, for example, to keep a good relationship with his co-contractor, or in the context of an amicable settlement.

Finally, we have slightly amended paragraph 6 concerning the starting point for calculating interest to specify that interest begins to accrue on the day following the latest of the events mentioned in this paragraph. The principle of retroactive interest in the event of late payment has been maintained in order to strengthen the incentives for prompt payment.



- **Art. 6 – Rate of the interest for late payment**

We have just added "at least" before the "8 percentage points" in response to a request from a Member State to allow them to set a higher interest rate in national law. This wording is identical to that currently used in Directive 2011/7.

- **Art. 7 – Payment schedules**

At the request of several Member States, we have taken the text of Directive 2011/7 for paragraph 1 and have just adjusted a grammatical point in paragraph 2, as suggested by France.

- **Art. 8 – Compensation for recovery costs**

To make the Article clearer, we have deleted the word "automatically", based on the same reasoning that justified the deletion of this term from Article 5 of the proposal. We have also added the word "minimum", which is also present in Directive 2011/7, to allow Member States to set a higher flat fee if they so wish. We have reworded paragraph 3 to make it clear that the creditor's *right* to obtain compensation cannot be excluded or limited. This wording does not, however, prevent him from freely deciding whether or not to enforce his right.

- **Art. 9 – Null and void and grossly unfair contractual terms and practices**

This Article has been reworded and proposes a mixed system between the scheme set out in Directive 2011/7 and the Commission's proposal.

To begin with, the Article lists the clauses and practices that are null and void. This is the same list as in the Commission's proposal, to which we have added setting the date of receipt of the invoice. This element is not new to the proposal: it concerns Article 5(4), as proposed by the Commission, the placement of which in Article 9 was considered more appropriate than in Article 5, which concerns interest for late payment.

These clauses and practices are purely and simply prohibited. There is no possible interpretation of these clauses; they are prohibited in all cases.

A new paragraph was then added, which states that contractual terms or practices which are not listed in paragraph 1, but which are grossly unfair, are prohibited. It is important to provide legal certainty and to make provision for the case where a clause that is not on the blacklist of null and void clauses, but which is grossly unfair to the creditor, can be set aside. This is why we are also proposing to define the concept of an unfair contractual term or practice.

This definition is inspired by definitions of unfair terms found in other European instruments. These include the definitions found in Directive 93/13/EEC on unfair terms in consumer contracts and in the final compromise text in view of an agreement on the proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), in order to maintain a degree of consistency between the various European instruments in this area. Another source of inspiration is recital 28 of Directive 2011/7.

It should be pointed out in this respect that the definition inserted relates to the concept of "unfair contractual term or practice" and not to the concept of "grossly unfair contractual term or practice". The concept of "grossly" mainly concerns the scope of the review carried out by the judge. It is therefore proposed to define the concept of "unfair contractual term or practice", on the understanding that the measure reinstated in the new paragraph 1a of the proposed revised text only allows the court to set aside or penalise terms and practices that are "manifestly" unfair, which implies marginal review by the court and consequently less interference in contractual freedom.

We would also like to remind you of the criteria set out in Directive 2011/7 that can be used to determine whether a term or practice is grossly unfair, to which we add the criterion of imbalance of bargaining power, which is a key criterion in B2B relationships.

In paragraphs 1b and 1c, we set out the consequences if a blacklisted clause/practice or a grossly unfair clause/practice is nevertheless included in the contract: the grossly unfair clause is unenforceable and may give rise to a claim for damages, the grossly unfair practice may give rise to a claim for damages, and the blacklisted clause or practice may give rise to a claim for damages, on top of being null and void.

The substance of paragraphs 2 and 3 of the Commission proposal remains unchanged.

- **Art. 10 – Retention of title**

At the request of the Member States, the text of Directive 2011/7 has been reproduced.

- **Art. 11 – Transparency**

No substantive changes.

- **Art. 12 – Recovery procedures for unchallenged claims**

At the request of the Member States, the text has been aligned with that of Directive 2011/7.

Article 10(2) of Directive 2011/7 has not, however, been included insofar as it repeats a general principle of non-discrimination enshrined in Article 18 of the TFEU. Such repetition therefore adds no value.

- **Art. 13-15 – Enforcement authorities**

At the request of the majority of Member States and their Ministers, the provisions on these authorities were simply removed from the text.

- **Art. 16 – Alternative dispute resolution**

Many Member States mentioned ADR as a useful and important solution for improving the effectiveness of the late payment regulation, and asked during the Working Party meetings for clarification of the obligation included in this provision of the proposal. In order to respond to requests for clarification and to propose an alternative measure likely to meet the need for better application of the rules in this proposal, it has been decided to propose an obligation on Member States to ensure that companies have access to ADR in the context of late payment disputes. In paragraph 1a, we indicate that Member States shall also encourage the voluntary use of these mechanisms.

- **Art. 17 – Digital tools, credit management, financial literacy training, and awareness raising initiatives**

In this Article, we have added two paragraphs, which already exist in Directive 2011/7 under Article 8, aimed at promoting the use of professional publications, promotion campaigns and other means to improve awareness of the problem of late payment, as well as encouraging the establishment of (possibly sectoral) codes of prompt payment or other initiatives aimed at combating late payment and improving the culture of prompt payment.

- **Art. 18 – Report**

No changes.

- **Art. 18a – Transposition**

As this is a directive, we have added an Article on its transposition into national law. This Article is taken entirely from Directive 2011/7.

- **Art. 19 – Repeal**

No changes.

- **Art. 20 – Entry into force**

We have deleted the last two paragraphs, which are not appropriate for a directive.

❖ **Art. 20a – Addressees**

This provision is added insofar as the instrument is transformed into a directive.