DIRECTIVE 2000/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 June 2000 on combating late payment in commercial transactions

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3], in the light of the joint text approved by the Conciliation Committee on 4 May 2000,

Whereas:

(1) In its resolution on the integrated programme in favour of SMEs and the craft sector [4], the European Parliament urged the Commission to submit proposals to deal with the problem of late payment.

(2) On 12 May 1995 the Commission adopted a recommendation on payment periods in commercial transactions [5].

(3) In its resolution on the Commission recommendation on payment periods in commercial transactions [6], the European Parliament called on the Commission to consider transforming its recommendation into a proposal for a Council directive to be submitted as soon as possible.

(4) On 29 May 1997 the Economic and Social Committee adopted an opinion on the Commission's Green Paper on Public procurement in the European Union: Exploring the way forward [7].

(5) On 4 June 1997 the Commission published an action plan for the single market, which underlined that late payment represents an increasingly serious obstacle for the success of the single market.

(6) On 17 July 1997 the Commission published a report on late payments in commercial transactions [8], summarising the results of an evaluation of the effects of the Commission's recommendation of 12 May 1995.

(7) Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses.

(8) In some Member States contractual payment periods differ significantly from the Community average.

(9) The differences between payment rules and practices in the Member States constitute an obstacle to the proper functioning of the internal market.

(10) This has the effect of considerably limiting commercial transactions between Member States. This is in contradiction with Article 14 of the Treaty as entrepreneurs 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.

(11) The most recent statistics indicate that there has been, at best, no improvement in late payments in many Member States since the adoption of the recommendation of 12 May 1995.

(12) The objective of combating late payments in the internal market cannot be sufficiently achieved by the Member States acting individually and can, therefore, be better achieved by the Community. This Directive does not go beyond what is necessary to achieve that objective. This Directive complies therefore, in its entirety, with the requirements of the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty.

(13) This Directive should be limited to payments made as remuneration for commercial transactions and does not regulate transactions with consumers, interest in connection with other payments, e.g. payments under the laws on cheques and bills of exchange, payments made as compensation for damages including payments from insurance companies.

(14) The fact that the liberal professions are covered by this Directive does not mean that Member States have to treat them as undertakings or merchants for purposes not covered by this Directive.

[1] OJ C 168, 3.6.1998, p. 13, andOJ C 374, 3.12.1998, p. 4.
[2] OJ C 407, 28.12.1998, p. 50.
[3] Opinion of the European Parliament of 17 September 1998 (OJ C 313, 12.10.1998, p. 142), Council Common Position of 29 July 1999 (OJ C 284, 6.10.1999, p. 1) and decision of the European Parliament of 16 December 1999 (not yet published in the Official Journal). Decision of the European Parliament of 15 June 2000 and Decision of the Council of 18 May 2000.
[4] OJ C 323, 21.11.1994, p. 19.
[5] OJ L 127, 10.6.1995, p. 19.
[6] OJ C 211, 22.7.1996, p. 43.
[7] OJ C 287, 22.9.1997, p. 92.
[8] OJ C 216, 17.7.1997, p. 10.

(15) This Directive only defines the term 'enforceable title' but does not regulate the various procedures of forced execution of such a title and the conditions under which forced execution of such a title can be stopped or suspended.

(16) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low interest rates on late payments and/or slow procedures for redress. A decisive shift, including compensation of creditors for the costs incurred, is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment.

(17) The reasonable compensation for the recovery costs has to be considered without prejudice to national provisions according to which a national judge can award to the creditor any additional damage caused by the debtor's late payment, taking also into account that such incurred costs may be already compensated for by the interest for late payment.

(18) This Directive takes into account the issue of long contractual payment periods and, in particular, the existence of certain categories of contracts where a longer payment period in combination with a restriction of freedom of contract or a higher interest rate can be justified.

(19) This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. Where an agreement mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, or where the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself, these may be considered to be factors constituting such an abuse. This Directive does not affect national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor.

(20) 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 conformity with the principle of non-discrimination contained in Article 12 of the Treaty, those procedures should be available to all creditors who are established in the Community.

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

(22) 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, having regard to the fact that the latter handle a considerable volume of payments to business. It should therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

(23) Article 5 of this Directive requires that the recovery procedure for unchallenged claims be completed within a short period of time in conformity with national legislation, but does not require Member States to adopt a specific procedure or to amend their existing legal procedures in a specific way,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

This Directive shall apply to all payments made as remuneration for commercial transactions.

Article 2

Definitions

For the purposes of this Directive:

1. 'commercial transactions' means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration,

   'public authority' means any contracting authority or entity, as defined by the Public Procurement Directives (92/50/EEC [1], 93/36/EEC [2], 93/37/EEC [3] and 93/38/EEC [4]),

   'undertaking' means any organisation acting in the course of its independent economic or professional activity, even where it is carried on by a single person;

2. 'late payment' means exceeding the contractual or statutory period of payment;

3. 'retention of title' means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full;

4. 'interest rate applied by the European Central Bank to its main refinancing operations' means the interest rate applied to such operations in the case of fixed-rate tenders. In the event that a main refinancing operation was conducted according to a variable-rate tender procedure, this interest rate refers to the marginal interest rate which resulted from that tender. This applies both in the case of single-rate and variable-rate auctions;

[1] OJ L 209, 24.7.1992, p. 1.
[2] OJ L 199, 9.8.1993, p. 1.
[3] OJ L 199, 9.8.1993, p. 54.
[4] OJ L 199, 9.8.1993, p. 84.