

**Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) — Implementing the Small Business Act'**

COM(2009) 126 final — 2009/0054 (COD)

(2010/C 255/07)

Rapporteur: **Ms BONTEA**

On 1 July 2009, the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the

*Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) —*

*Implementing the Small Business Act*

COM(2009)126 final – 2009/0054 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 17 November 2009. The rapporteur was **Ms Bontea**.

At its 458th plenary session, held on 16 and 17 December 2009 (meeting of 17 December 2009), the European Economic and Social Committee adopted the following opinion by 145 votes to 3 with 2 abstentions.

**1. Conclusions and recommendations**

The Committee believes that the proposal for a directive requires certain improvements, principally:

1.1 The EESC welcomes and supports the implementation of the Small Business Act (SBA) and the proposal for a directive, and considers that the improvement of the legislative framework to combat late payment and reduce payment periods is extremely important and useful.

1.2 While legislative measures are necessary and effective, they are not sufficient to eliminate late payment; a range of complex measures needs to be developed together with increased cooperation at all levels. SMEs and their representative organisations have an important role to play in this process.

1.3 The EESC advocates the need for short, mandatory payment periods for all authorities and public institutions at European, national, regional and local levels. It commends the European Commission for the measures adopted in respect of payments administered directly by the Commission itself and supports the continuation and development of these measures at all levels. With regard to the time needed to transpose the directive, the EESC calls on authorities to implement the principles thereof without delay, in order to provide businesses with effective support during the current times of crisis.

— for public procurement contracts:

— the express establishment of a specific regulation requiring payments to be made within a maximum period of 30 calendar days, while eliminating the exception to this rule or, at least, restricting it to a maximum of 60 calendar days after delivery; the problems faced by authorities in financing their activities can by no means be greater than those of SMEs;

— similarly, the removal – or at least the restriction – of the exception regarding the maximum 30-day duration of a procedure of acceptance.

— for all commercial transactions:

— for late payments, the establishment of an obligation to pay certain interest, compensation and minimum internal costs, unless the contract includes other clauses more favourable to the creditor;

— development of the rules on grossly unfair contractual clauses and unchallenged debts; and

— in the application of freedom of contract, consideration of the principles of fair competition and business ethics, and curbing the abuse of rights.

1.4 Reiterating its earlier proposals <sup>(1)</sup>, the Committee emphasises that in order to fully achieve the aim of the directive, measures are needed to increase SMEs' access to public procurement, so that they can benefit to a greater extent from the rules laid down.

1.5 When transposing the directive and monitoring the measures adopted, it is important that the authorities engage in cooperation and quality social dialogue with the social partners and with organisations of SMEs.

1.6 Excessive payment periods and late payment should be avoided in cases of subcontracted public procurement and in SMEs' relations with large companies, including HVR <sup>(2)</sup>. Where appropriate, the national authorities could monitor or set down payment periods in sectors where the risk of unjustifiably long payment periods is particularly high, without imposing additional obligations and costs on businesses.

1.7 The Committee recommends that the Member States step up cooperation and provide for joint information and support measures aimed at SMEs, with regard to late payment for cross-border transactions.

1.8 At European level, it would be useful to develop a specialist multilingual website, gathering information pertaining to each Member State on the transposition of the directive, legal framework, and applicable procedures for debt recovery – including arbitration and mediation – or other useful information. At national level, there should be support for the widespread dissemination of this information via one-stop shops and SME organisations.

1.9 Measures to speed up payments by public authorities are also useful in the context of tax law (payment of VAT, regularisation of taxes, etc.), as in some countries regrettable practices occur, leading to financial bottlenecks.

1.10 The Committee reiterates its earlier proposal on 'the setting up of an advisory committee open to interested parties, which could operate with ESC support' <sup>(3)</sup>.

## 2. Introduction

### 2.1 Background and the effects of late payment

#### 2.1.1 In EU-based commercial transactions:

- as a general rule, payments are deferred;

- there are often delays in paying invoices, particularly in public procurement contracts, where they average 67 days <sup>(4)</sup>, compared to 57 days for the private sector;

- a 'late payment culture' has evolved in certain Member States, becoming general practice, with very serious economic and social consequences (causing one in four bankruptcies and the loss of around 450 000 jobs every year), especially in times of crisis (as a result of poor payment practices, businesses will lose out on EUR 270bn in 2009, i.e. 2,4 % of EU GDP, compared to the 1,5 % received from the economic recovery plan) <sup>(5)</sup>;

- late payments are used as a substitute for bank credit; and

- payment periods are unjustifiably long in many cases, often due to a privileged position, and this can have a particularly significant effect on small businesses, craft industries, or even medium-sized companies.

#### 2.1.2 SMEs are vulnerable in negotiations, given their:

- level of competitiveness and market positioning;

- fear of harming relations with clients;

- limited ability to be competitive through the payment periods offered to their clients; and

- limited experience and human and material resources when it comes to initiating legal proceedings to recover debts, with particular difficulties in the case of cross-border transactions.

#### 2.1.3 Late payment

- generates **substantial additional costs** for creditors and complicates their financial management; late payment is detrimental to cash flow, creates significant additional bank charges, curtails investment opportunities and increases uncertainty for many creditors, mainly SMEs; this significantly affects their competitiveness, profitability and viability, particularly at a time of restricted or costly access to finance;

<sup>(1)</sup> OJ C 224, 30.8.2008; OJ C 182, 4.8.2009.

<sup>(2)</sup> High Volume Retail.

<sup>(3)</sup> OJ C 407, 28.12.1998.

<sup>(4)</sup> With wide variations between Member States and a clear north-south divide.

<sup>(5)</sup> Intrum Justitia, 'European Payment Index 2009'.

- **often leads to subsequent delays** in paying suppliers and employees (with significant adverse social effects), as well as taxes, duties and State and social security contributions (detrimental to public revenue collection), and can also hinder companies' access to finance (e.g. the late payment of taxes, duties and social security contributions due to the late payment of invoices restricts access to State aid and programmes financed by the Structural Funds);
- **can lead to bankruptcy** for normally viable companies, which can trigger a whole series of bankruptcies across the supply chain, with significant adverse socio-economic effects;
- **discourages economic operators from participating in public procurement**: this not only distorts competition and undermines the functioning of the internal market, but also reduces the ability of public authorities to ensure the efficient use of public funds and obtain an optimum return on taxpayers' money;
- **can foster corruption** (to speed up the payment of public procurement invoices) or procurement practices that go over budget;
- is **detrimental to intra-Community trade**: the majority of businesses consider that the risk of late payment is very high in intra-Community transactions, thus increasing the cost of and uncertainty surrounding such transactions.

## 2.2 Legal basis

2.2.1 The only EU legislation in this field is Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions <sup>(6)</sup>.

2.2.2 Concerning legal proceedings for the recovery of debts generated by late payments, Regulation (EC) No 44/2001 <sup>(7)</sup>, Regulation (EC) No 805/2004 <sup>(8)</sup>, Regulation (EC) No 1896/2006 <sup>(9)</sup> and Regulation (EC) No 861/2007 <sup>(10)</sup> also apply.

## 2.3 European objectives

2.3.1 The SBA <sup>(11)</sup> highlighted the key importance of SMEs for the competitiveness of the EU economy and stressed the importance for them of access to finance and the need to make better use of the opportunities provided by the Single Market.

2.3.2 The European Economic Recovery Plan <sup>(12)</sup> stressed that sufficient and affordable access to finance was a pre-condition for investment, growth and job creation in the context of the economic slowdown and asked the EU and the Member States to ensure that public authorities pay invoices within one month.

2.3.3 The Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions implements the SBA and aims at improving the cash flow of European business, with a view to facilitating the smooth functioning of the internal market via the elimination of barriers to cross-border commercial transactions.

## 3. General considerations

3.1 The EESC welcomes the implementation of the SBA and the proposal for a directive, and considers that the urgent improvement of the legislative framework to combat late payment is a measure that is extremely important and useful.

3.2 The EESC again expresses its support for the swift implementation of the SBA, through actions proposed at Community level, particularly 'the proposed amendment to the Directive on late payments, which should provide stricter obligations and penalties for public authorities in the event of payments exceeding the 30-day limit' <sup>(13)</sup>.

3.3 The EESC's support takes account of the significant, complex negative effects of late payment on businesses (particularly SMEs), employees, and commercial transactions within the Community.

3.4 In addition to combating late payment, it is also very important to reduce payment periods; the title of the directive could be thus amended and its provisions grouped according to the two objectives.

3.5 While legislative measures are necessary and effective, they are not sufficient to combat late payment, given the many and complex causes of this problem, the current situation eight years on from the adoption of Directive 2000/35/EC and local circumstances. The Committee calls on the Member States to become actively involved in identifying and implementing the most appropriate measures to combat late payment, and stresses the importance of cooperation and quality dialogue between the authorities and the social partners and SME organisations. SMEs themselves have an important role to play in this process, and should step up their efforts to inform, improve their internal procedures and take action on debtors.

<sup>(6)</sup> OJ L 200, 8.8.2000.

<sup>(7)</sup> OJ L 12, 16.1.2001.

<sup>(8)</sup> OJ L 143, 30.4.2004.

<sup>(9)</sup> OJ L 399, 30.12.2006.

<sup>(10)</sup> OJ L 199, 31.7.2007.

<sup>(11)</sup> OJ C 182/30, 4.8.2009.

<sup>(12)</sup> COM(2008) 800 final

<sup>(13)</sup> COM(2008) 394 final, OJ C 182, 4.8.2009, p. 30.

3.6 The EESC welcomes the following useful measures:

- regulation of the general obligation to pay public procurement contracts within 30 days, thus establishing standard transparent procedures, which will speed up payments;
- regulation of creditors' right to obtain compensation of at least 5 % of the outstanding amount, in order to deter late payments by public administrations;
- recovery of creditors' internal administrative costs, with a deterrent effect on debtors, additional to the statutory interest;
- removal of the possibility of excluding claims for interest of less than EUR 5, for small transactions;
- improvement of the rules on grossly unfair contractual clauses; Article 6 of the proposed directive makes significant contributions in this area;
- increased transparency with regard to the rights and obligations laid down by the directive; and
- establishment of a monitoring and evaluation scheme, making it possible to inform and more closely involve the European institutions and all interested parties.

3.7 However, the EESC believes that the proposal for a directive requires certain major improvements with regard to its content, to ensure that, in practical terms, it enables many businesses to benefit from reduced and respected payment periods, and that the efficiency of legal remedies with regard to debtors is increased.

#### 4. Specific comments

4.1 *The EESC advocates the need for short, mandatory payment periods for all authorities at European, national, regional and local levels*

4.1.1 In practical terms, positive results will be achieved by establishing, for public procurement, a general obligation to pay within 30 days, and setting a 30-day period for finalising acceptance/verification procedures.

4.1.2 Short, mandatory payment periods should be established and applied by all public authorities and institutions at European, national, regional and local levels.

4.1.3 The Committee commends the European Commission for establishing new, more stringent objectives in respect of payments administered directly by the Commission itself, aimed at reducing pre-financing and initial payment periods, simplifying the general procedures prior to launching projects, and at encouraging simplified control measures. The Committee supports the continuation and development of these measures at all levels. It calls on the national authorities to adopt urgent measures to reduce and ensure compliance with payment periods, and recommends building on existing examples of good practice.

4.1.4 However, the EESC considers that Article 5 of the proposal, regarding payment of public procurement contracts, does not fully meet the Commission's positive requirements and aims, and makes the following proposals:

- In order to be clearer and more logical for the recipients of the directive, and to meet the proposed objective whereby 'payment periods for procurement contracts [...] should be as a general rule limited to a maximum of 30 days' <sup>(14)</sup>, Article 5 should establish an express requirement that public procurement contracts be paid within 30 calendar days, and should then establish the maximum duration of a procedure of acceptance and provide for measures applicable in the event of non-compliance with these rules, while stating that these measures can be cumulated.
- The EESC is concerned that the exception stipulated under Article 5(4), enabling longer payment periods to be negotiated in justified circumstances, will be incorrectly applied by public authorities, as no provision is made for objective, precise criteria for assessing whether it is justified, or what justification is acceptable, as the authorities act as both the judge and the interested party, while the difficulties they face in funding their activities can by no means be greater than those faced by SMEs. The Committee therefore proposes deleting this exception, or at least restricting it, so that payment periods in such cases are limited to a maximum of 60 calendar days after delivery.
- Similarly, the EESC calls for the removal or, at least, the restriction of the exception regarding the maximum 30-day duration of a procedure of acceptance, laid down in Article 5.3.

4.1.5 The application of the freedom of contract principle presents certain particularities that should be taken into account:

- The directive does not include provisions on curbing the abuse of rights in the application of the freedom of contract principle; as regards exercising this right, the Committee proposes that the principles of fair competition and business ethics be taken into consideration. The EESC has previously commented on this: 'in the interests of healthy competition, and to combat unfair commercial practices,

<sup>(14)</sup> Recital 16 of the proposed directive.

the Member States should be called upon to enact competition law provisions banning any oppressive provisions that permit abnormally long payment periods exceeding the average sales cycle (i.e. more than 60 days) without legitimate reason' <sup>(15)</sup>.

- In public procurement contracts, it is only the businesses that are required to give performance guarantees, while similar guarantees are not given by the authorities with regard to paying on time; this imbalanced situation should be rectified.
- The principle of freedom of contract cannot be fully applied to payment and acceptance terms in public procurement contracts, as businesses do not have proper negotiating power with regard to authorities.
- The principle of freedom of contract should be applied with a view to establishing clauses that are more favourable to the creditor, and not by establishing clauses that go against the general rules. The Committee therefore proposes that the phrase 'unless otherwise specified' (Article 5(3)) be replaced by 'unless other provisions exist that are more favourable to the creditor'; this proposal also applies to Article 4(1) on compensation for recovery costs.

#### 4.2 *Establishment of a legal obligation on debtors to pay interest, compensation and minimum internal costs*

4.2.1 In Finland and Sweden, interest on late payments can be automatically recovered without the need for any ruling by the courts. This should become standard practice. The EESC proposes that the payment of interest, compensation and minimum internal costs be made a legal obligation, applying the principle of freedom of contract by stipulating that clauses or sums more favourable to the creditor may be negotiated. As a result, SMEs will be able to exercise this right without significant effort or reluctance due to their precarious position.

#### 4.3 *Relations with associations*

4.3.1 Employers' and SME organisations should be consulted and involved in transposing the directive and implementing/monitoring the measures adopted to reduce and ensure compliance with payment periods. They should be supported in developing direct online services aimed at informing, consulting and assisting their members with regard to late payment and abusive clauses.

4.3.2 The EESC proposes including an express reference to 'organisations of employers and of SMEs' in Article 6.3 on means to prevent grossly unfair clauses, and points out that the existing reference solely to 'organisations' could cause transposition problems.

4.3.3 Organisations of employers and, particularly, of SMEs could also contribute significantly to the drafting of the report provided for in Article 10 of the directive; their point of view should be included.

#### 4.4 *The EESC advocates the need for effective, efficient means of legal action against debtors*

4.4.1 The EESC stresses the importance of enforcing simple, rapid, and efficient debt recovery procedures accessible to businesses, particularly SMEs, and agrees that an enforceable title should be obtained for unchallenged claims within a maximum period of 90 days (Article 9). Enhanced procedures are needed to determine grossly unfair contractual clauses.

### 5. **Other comments and proposals**

5.1 The Committee advocates enhancing the rules on grossly unfair contractual clauses (Article 6) and proposes developing them by defining criteria for the qualification thereof, and adding to the list of clauses always considered grossly unfair clauses excluding compensation for recovery costs, as well as retention of title and payment performance guarantee clauses.

5.2 The EESC reiterates its position on the situation of individuals to whom, from a strictly legal standpoint, the directive as it stands does not apply, but who are subject to similar conditions in their relations with certain businesses and the public administration. The EESC 'calls upon the Commission to plan studies on these issues so as to establish whether certain aspects of consumer relations should be included in the directive or whether specific provisions should be drawn up' <sup>(15)</sup>.

5.3 The Committee proposes defining the notion of 'unchallenged claims' (Article 9). The existence of an invoice signed by the beneficiary or of a document confirming receipt ought to render challenges inadmissible.

5.4 The EESC also draws attention to the following aspects:

- The provision (Article 1(2)(b)) excluding contracts concluded prior to 8 August 2002 from the scope of the new directive should be deleted, bringing it into line with Article 11(4) which establishes the date of transposition.

<sup>(15)</sup> OJ C 407/50, 28.12.1998.

- The definition of interest (Article 2(5)) should also allow for interest to be negotiated with public authorities.
- To avoid transposition problems, the three categories of public procurement contracts need to be listed in full – supply, services and works – or a general reference should be made to ‘public procurement contracts’ (as Articles 5.1, 5.2 and 5.6 do not mention works contracts).
- Replacing ‘date of receipt by the debtor of the invoice’ by ‘date on which the invoice was sent to the debtor’ (Articles 3.2(b) and 5.2(b)) would simplify the burden of proof and reduce costs resulting from the sending of invoices by post or the use of electronic invoices.
- The notion of ‘debt’ in Article 4.1 should be defined in order to make it clear whether this refers only to the value of the product or also includes VAT or other costs (e.g. transport).
- Article 5.5, on the right to compensation equal to 5 % of the amount due, should make it clear whether compensation of over 5 % is possible, in the event that relevant evidence exists.

5.5 The imposition of unjustifiably long payment terms and late payments should be avoided in the case of:

- public procurement subcontracting (the same payment rules should apply to subcontractors as for public authorities);
- HVR supplies. The EESC proposes establishing a voluntary code of conduct accompanied by written contracts to give SMEs a ‘minimum set of guarantees when accessing HVR’ <sup>(16)</sup>, which would prevent HVR and/or large suppliers from exerting pressure.

5.6 The report provided for in Article 10 should be drawn up and transmitted on a yearly basis, at least for the first three years after the directive comes into force, in order to continually assess the results and facilitate the exchange of good practice.

5.7 The Committee advocates promoting and developing existing good practices in combating late payment and reducing payment periods:

- European Commission:
  - measures to reduce from 30 to 20 days the initial pre-financing payment period of non-reimbursable funding and EU contracts (this amounts to EUR 9.5 billion); in respect of payments administered centrally, the aim is to reduce the payment period from 45 to 30 days (in the case of grants);
  - increased use of flat rates and lump-sum payments for non-reimbursable funding and commercial contracts administered centrally;
  - simplified general procedures prior to launching projects, which could help speed up payments; measures are proposed to allow the Commission to publish calls for tender covering two years and to use standardised calls for tender; and
  - promoting the simplification of monitoring measures where possible.
- In the UK: the authorities have committed to paying invoices within ten days.
- In Ireland, Belgium, Poland, Portugal and the Czech Republic: governments have pledged to reduce late payments, particularly by public authorities.
- In Belgium: the federal government has set up a special new ‘bridging loan’ via a federal investment fund to finance late payments by all public authorities, not just at federal level.
- In Spain: For 2009, the Instituto de Crédito Oficial (ICO) has set up a EUR 10bn liquidity facility for preferential loans in order to meet the liquidity requirements of SMEs and self-employed people. These funds are subject to co-financing rules so that, for example, 50 % are covered by ICO and 50 % by credit institutes. Moreover, ‘the local authorities’ advance payment facility’ guarantees the recovery of invoices issued by businesses and self-employed people for work and services rendered to local authorities.

Brussels, 17 December 2009

*The President*  
of the European Economic and Social Committee  
Mario SEPI

<sup>(16)</sup> OJ C 175/57, 28.7.2009.