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European Commission

CALL FOR EVIDENCE FOR THE REVISION OF THE LATE PAYMENT DIRECTIVE	
TITLE OF THE INITIATIVE	**Late Payments – Revision of EU rules**" (Directive 2011/7/EU)
LEAD DG – RESPONSIBLE UNIT	GROW Unit A2 "SMEs" (Small and medium-sized enterprises)
LIKELY TYPE OF INITIATIVE	*Directive of the European Parliament and of the Council*
INDICATIVE PLANNING	Q3 2023
ADDITIONAL INFORMATION	https://single-market-economy.ec.europa.eu/smes/sme-strategy/late-payment-directive_en

A. Political context, evaluation, problem definition & subsidiarity check

Political context

On 14 September 2022, in her address on the State of the European Union[1], President Von der Leyen announced the revision of the Late Payment Directive. In her speech, she highlighted that "*it is simply not fair that 1 in 4 bankruptcies are due to invoices not being paid on time. For millions of family businesses, [the revision of the Late Payments Directive] will be a lifeline in troubled waters*"**.**

The Late Payment Directive (Directive 2011/7/EU) lays down a common set of rules aimed at combating late payments in commercial transactions between businesses (B2B) and between public authorities and businesses (G2B) by standardising payment terms, rates of interest and compensation for recovery costs. The Directive's vision, as recalled in its Recital 12, is to promote a "*decisive shift to a culture of prompt payments*" in the EU business environment.

Problem the initiative aims to tackle

Next to a formal evaluation in 2015[2], several aspects of the Directive were assessed in 2016[3], 2017[4], 2018[5], 2019[6], 2021[7] and 2022[8]. These assessments have identified a set of shortcomings in the Directive, which can be grouped as follows:

1) Regulatory gaps and ambiguous rules:

- **Lack of maximum payment terms in B2B transactions**. Contrary to payments by public

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1 https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493

2 *Ex-post Evaluation of the Late Payment Directive* https://publications.europa.eu/en/publication-detail/-/publication/400ecc74-9a54-11e5-b3b7-01aa75ed71a1

3 *Commission Report to the European Parliament and to the Council on the implementation of the Late Payment Directive (and supporting SWD):* COM (2016) 534 final

4 *Conti, M., Elia, L., Ferrara, A. and Ferraresi, M., Governments` Late Payments and Firms` Survival: Evidence from the European Union, JRC Study* https://publications.jrc.ec.europa.eu/repository/handle/JRC121059

5 *Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour* https://publications.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1/language-en/format-PDF/source-103408786

6 *European Parliament Resolution on the implementation of the Late Payment Directive* https://www.europarl.europa.eu/doceo/document/TA-8-2019-0042_EN.html

7 *Opinion of the Fit for Future Platform on the Late Payment Directive* https://ec.europa.eu/info/sites/default/files/final_opinion_2021_sbgr2_06_late_payments.pdf

8 *Commission Study : Building a responsible payment culture – improving the effectiveness of the Late Payment Directive.*https://op.europa.eu/en/publication-detail/-/publication/cb4bc1bd-1467-11ed-8fa0-01aa75ed71a1/language-en/format-PDF/source-search

Ferrara A., Ferraresi M. (2022), Assessing the economic impact of faster payments in B2B commercial transactions. Final Report, JRC Study https://publications.jrc.ec.europa.eu/repository/handle/JRC130205 authorities (G2B), the Directive does not fix a maximum payment term between business (B2B), but only a "reference" of 30 days. This has resulted in excessively long payment terms, imposed on weaker or smaller economic operators by larger companies. By setting up payment terms excessively or unfairly long, debtors can easily circumvent the obligation of paying on time.

- **No clear definition of "unfair" practices or clauses.** Several provisions of the Directive make reference to the concept of "grossly unfair" (for example in the negotiation of payment terms in B2B transactions). However, the Directive does not define this concept, making it extremely difficult for a creditor to prove that a specific contractual clause or practice is grossly unfair. There are also a number of unfair practices in place which have the ultimate effect of circumventing the Directive's obligations; for example, practices banning assignments of receivables, which hamper factoring as well as other novel and digital forms of payment.

- **No clarity concerning flat fee compensation (article 6).** Debtors have interpreted this requirement as applying to individual "contracts" (which can include multiple invoices) rather than to individual invoices. The matter has now been clarified by the ECJ in a recent preliminary ruling (Case-585/20).

- **No clarity concerning verification procedures,** especially their duration. The rules on verification procedures also need to take into consideration the case law in the recent ECJ ruling in Case C-585/20.

- **Lack of "tools" for monitoring and enforcing compliance.** The Directive lacks rules that support (i) the monitoring of compliance (for example, collection of data on average payment periods or average payment terms in both B2B and G2B transactions), (ii) enforcement of the rules and (iii) transparency about payment performance. .

- **Lack of suitable means of redress**. The Directive does not provide small creditors with adequate tools to take action against their debtors. In fact, the only measure envisaged in the Directive, i.e. legal action, can be too costly and time-consuming, and could cause serious damage to business relations between the parties.

2) **Asymmetry of bargaining power between large and smaller operators**. Due to size or position in the supply chain, smaller businesses are more vulnerable to the risk of being paid late. In fact often smaller companies have imposed on them payment terms that are longer than they are comfortable with, out of fear of losing a contract or a commercial partner (a fear factor). Also, as payment delays are passed down from clients to suppliers, smaller suppliers at the end of supply chains are paid late due to this "domino effect".

3) **Pervasive culture of bad payment because prompt payment is not incentivised or rewarded**. Delaying payments is an intentional practice, since it is a form of financing at zero cost and no administrative hassle. This situation persists in times of economic stability and deteriorates in times of economic downturn, when access to financing is more difficult. Lack of effective synergies with other relevant policies (e.g. public procurement, regional and structural funds) prevents public (and EU) money from supporting fair payment in commercial transactions. The Directive lacks rules and tools to make prompt payments the "norm" in commercial transactions and to marginalise bad payment behaviour. This requirement is particularly relevant now, since the National Recovery and Resilience Plans in the Member States will be implemented primarily through public procurement.

Basis for EU action

Legal basis

The legal basis for the current Directive is Article 114 of the Treaty on the Functioning of the EU (TFEU). The revision of the current legal text will therefore follow the same legal basis.

Article 114 TFEU is the appropriate legal basis for measures aimed at achieving the objectives set out in Article 26 TFEU (aligning laws in the single market). Also, the Directive is a recast of the first Late Payment Directive (Directive 2000/35/EC), based on Article 95 TEC. The current Directive and its revision fall within the joint remit ('shared competence') of the EU and its member governments.

Practical need for EU action

The Directive affects every single commercial transaction to acquire goods and services carried out between businesses and between public authorities and businesses (public procurement). Every year, it is estimated that 18 to 40 billion invoices are exchanged in the EU, more than 500 every second[9]. According to the assessments indicated above, fewer than 40% of these invoices are paid on time. The subject matter of this Directive has therefore an EU-wide dimension, since payments in commercial transactions are the very essence of a single *market*.

Some EU countries have introduced national rules that are more stringent than the current Directive and grant better protection to SMEs – for example capping payment terms in B2B transactions at 60 days when the creditor is a SME, or setting up enforcing bodies. At the same time, some national legislations have introduced a ban on assigning receivables or a limit on the execution of executive payment orders when the debtor is a public authority. To avoid a fragmentation of the single market, it is necessary therefore to ensure homogenous implementation and enforcement of the rules.

Evidence collected indicates that late payments are the second most critical barrier for growth and for the twin transition towards sustainable and digital business models[10] (the biggest barrier is administrative burdens). Payment delays lead to redundancies, hamper employment, and affect growth and cross-border trade.

B. Objectives and policy options

The objective of the revision is to promote a culture of prompt payment, based on 3 pillars:

1. **Embedding into law what prompt payment behaviour looks like by combating late payments "proactively**". Laying down measures to prevent creditors (especially smaller operators) from incurring late payment. Options under this objective could include:
   - capping payment terms in B2B transactions;
   - introducing stronger deterrents (automatic payment of interest, increasing the rate of interest, clarifying the rules on flat fee compensation);
   - clarifying the rules on verification procedures;
   - defining unfair practices and clauses;
   - requiring contracting authorities to ensure that the main contractors pay their subcontractors on time.

2. **Facilitating timely payments, by promoting the use of modern digital payment tools and building up an "SME-friendly" business environment, supportive of timely payments.** Options under this objective could cover:
   - improving the framework conditions for the uptake of modern digital payment tools;
   - facilitating availability and access to credit management training and financial literacy (digital as well) for SMEs;
   - laying down common minimum criteria for prompt payment schemes;
   - setting up an EU Observatory of Payments;
   - rewarding prompt payment in public procurement procedures.

3. **Strengthening prevention and enforcement so that prompt payments become a norm across all industrial sectors. Laying down effective remedies against late payments when they occur ("reactive" approach).** Options under this objective could include:
   - making more widespread use of mediation schemes to deal with payments disputes faster, while protecting business relationships;
   - EU governments to designate national authorities to deal with complaints and initiate official enforcement action;

[9] https://blog.summitto.com/posts/number_of_invoices/

[10] https://europa.eu/eurobarometer/surveys/detail/2244

- introducing administrative penalties;

In addition to a reflection of the policy measures to be taken, the Commission will pay special attention to the choice of instruments to deliver the objectives indicated above (hard law, including the use of a Regulation instead of a revised Directive, or soft law, such as codes of practices, guidelines, etc...).

C. Likely impacts

A thorough analysis will be made of the economic, environmental and social impacts of this initiative. The cost and benefits will be analysed in detail and wherever possible also quantified. The potential for simplification and (administrative) burden reduction for companies and SMEs in particular will be analysed.

Faster payments reduce financing costs and increase cash flow. Each day of reduction of payment delays saves €158 million in financing costs[11] for EU companies and increases their aggregated cash flow by 0.9%[12]. Companies report reduced cash flow as a central element in their investment and job creation strategies and – when severe – irregular cash flow endangers the viability of the company itself.

Prompt payment has also a direct impact on employment. The 2017 JRC study indicated above concluded that timely payments by the public sector increase employment by 0.7% for those sectors that are highly dependent on contracts with the public administration. This means 900,000 more jobs in those sectors.

Payment delays affect the ability of companies to invest in green and sustainable solutions. According to the European Payment Report 2022[13], almost 70% of business consider payment delays as a barrier to their green transition.

D. Better Regulation instruments

Impact assessment

An impact assessment will be conducted to support the preparation of this initiative and to inform the Commission’s proposal. It will be based on the extensive evidence collected over the years (see section “Problems the initiative aims to tackle”), covering the 27 EU countries States over a period from January 2014 until June 2022.

Fresher data, when available, will be taken into consideration. This evidence will be complemented by targeted stakeholder consultations (e.g. an SME panel) and a public consultation. The Commission also plans to carry out a targeted study for specific data collection to strengthen the evidence supporting the options. The likely timing of the impact assessment process is Q4 2022 until Q2 2023.

Consultation strategy

Stakeholders have already been consulted in a targeted way through their participation in the Fit for Future Platform where they contributed to an opinion on the Late Payment Directive[14]. Nonetheless, the Commission will consult as widely as possible and ensure that this initiative is based on substantive evidence. In addition to this call for evidence, consultations activities will include:

- A public consultation that will last 8 weeks, made available on the “Have your say” in all official languages of the EU and also promoted on the DG GROW website. Replies will be accepted in any of the EU official languages. The results of the consultation will be presented in a factual summary report and published on the same page.

- An SME panel[15].

[11] See footnote 2

[12] See footnote 8.

[13] Intrum, European Payment Report 2022 https://www.intrum.com/publications/european-payment-report/european-payment-report-2022/

[14] *Opinion of the Fit for Future Platform on the Late Payment Directive* https://ec.europa.eu/info/sites/default/files/final_opinion_2021_sbgr2_06_late_payments.pdf

[15] Gathering information directly from SMEs via the Enterprise Europe Network, managed by DG GROW (see Better Regulation toolbox Tool #23).

- Separate targeted consultations (during meetings and via surveys) with private and public stakeholders. Consultations could also take place in the context of the targeted study for the impact assessment. In line with the European Commission's Better Regulation policy to develop initiatives informed by the best available knowledge, we also invite the following groups to submit relevant published and pre-print scientific research, analyses and data: scientific researchers and academic organisations and civil associations with expertise in the areas of entrepreneurship, behavioural economics, entrepreneurial well-being, credit information, credit management and alternative dispute resolution in B2B commercial matters. We are particularly interested in submissions that summarise the current state of knowledge in these fields. A summary of all consultations carried out will be published on the DG GROW website.
Why we are consulting?
The consultation will give stakeholders a chance to share their views, concerning the way the initiative contributes to improving payment performance and building a fairer payment culture in the business environment.
Target audience
All stakeholders are welcome to contribute to this consultation. The relevant stakeholders include businesses, SMEs, industrial/business associations, academia, civil society associations, public authorities and representatives of local and regional authorities.