



EX-POST EVALUATION OF LATE PAYMENT DIRECTIVE

ENTR/172/PP/2012/FC – LOT 4

EXECUTIVE SUMMARY

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ABSTRACT

This is the final report of the evaluation of the Late Payment Directive 2011/7/EU. The study considers the following evaluation dimensions: relevance, effectiveness, efficiency, coherence and complementarity, and EU added value.

The Directive continues to be relevant and it is generally considered efficient with significant value added for industry stakeholders. Indeed, almost 80% of companies have experienced late payments in the last three years. The Directive does not impose any significant costs to businesses or public authorities.

However, there is little evidence that the Directive has had an impact on payment behaviour and the practice of late payment to date. Furthermore, exercise of the rights conferred by the Directive is not widespread due to fear of damaging good business relationships. Rather than legislation, business culture, economic conditions and power imbalances in the market are the driving factors of payment behaviour.

Nevertheless, the Directive has been successful in bringing the issue of late payments to the forefront of the political agenda in Europe. Several Member States have implemented soft measures, which have been effective in supporting the objectives of the Directive.

Facilitating an exchange of best practices among Member States could enhance diffusion of such practices across the EU. In addition, further guidance on a number of provisions of the Directive would provide clarity, which would facilitate application and enforcement. Finally, harmonised measurement of the incidence and length of late payments across Member States would permit monitoring of progress in achieving the goals of the Directive.

EXECUTIVE SUMMARY

This document contains the final report of the **Evaluation of Late Payment Directive 2011/7/EU**. The study evaluates whether the main aim of the Directive to combat late payment in commercial transactions (in order to ensure the proper functioning of the Internal Market, thereby fostering the competitiveness of undertakings) has been achieved, or whether there are still obstacles that cause problems with cross-border transactions and barriers that impede the development and improving of the Single Market.

The study needs to take into account the fact that the Directive has only recently come into force, which means that some effects and impacts have not yet materialised. Thus, it focuses on the first results of the implementation of the Directive and it assesses whether it is achieving, or is on the right track to achieve, its objectives.

The study considers the following evaluation dimensions: **relevance, effectiveness, efficiency, coherence** and **complementarity** and **EU added value**. The study focuses on all sectors of the economy, but special attention is paid to the construction, public health and food sectors.

Context

Almost three out of four (78%) companies in Europe have experienced late payments in the last three years with SMEs likely to be disproportionately affected by this phenomenon. Indeed, late payment can lead to insolvency and job losses, and it can negatively affect public procurement and cross-border trade.

The drivers of late payment behaviour are multi-faceted with the most significant aspects being business culture/norms, external economic conditions (e.g. the crisis) and power imbalances in the market.

State of Play

In addition to the Late Payment Directive, which sets out minimum EU-level measures, a number of Member States have introduced stricter provisions and promoted complementary initiatives at national level to combat late payment. Among these, prompt payment codes and specific sector initiatives are seen as particularly promising.

At the same time, thirteen infringement procedures were launched so far by the Commission against Member States in the context of the Late Payment Directive.

Effectiveness

Almost two thirds of companies are aware of the (general) rules regulating late payments and 86% of companies know about their right to claim compensation and/or interest. SMEs and younger firms are less likely to be aware of the rules regulating late payment.

Awareness of the rules, on its own, does not prevent companies from experiencing late payments. Indeed, four out of five companies that experienced a late payment in the last three years were aware of the possibility to claim compensation and/or interest. However, firms that are

aware of the rules related to late payment are less likely to have experienced a deterioration of average payment delays over the last three years compared to companies that are not aware of the rules.

Despite relatively high awareness levels, usage of the provisions of the Directive is not widespread. 60% of respondents indicated that they never exercise their rights to claim interest and/or compensation fees for recovery costs. SMEs are much less likely to exercise their rights under the Directive than larger companies.

At the same time, in countries with a shorter average payment duration, companies are more likely to always exercise their rights. Thus, in this sense, the Directive seems to be a more effective instrument for companies in countries where the problem of late payment is less severe.

The main reason for failing to exercise their rights under the Directive is the fear, among creditor firms, of damaging good business relationships. Lack of efficient remedy procedures is another barrier preventing companies from exercising their rights to compensation and interest.

Payment duration has decreased to a small extent in recent years in both Public-authority-to-business and Business-to-business transactions but very significant differences remain across countries. Member States with above average payment duration in Public-authority-to-business transactions also tend to have above average payment durations in Business-to-business transactions.

While it is difficult to isolate the reasons for this progress, there is little evidence that the Directive has had an impact on payment behaviour and the practice of late payment.

For Business-to-business transactions, average payment duration in the European Union has indeed decreased from 56 days in 2011 to 47 days in 2014. In terms of average payment delays, there has only been a small decrease in Business-to-business transactions (from 20.5 days in 2011 to 19.3 days in 2014). At the same time, there continues to be significant cross country variation in both average payment duration and delays.

Ninety percent of companies apply payment terms of 60 days or less as required by the Directive. In addition, more than two thirds (70%) of companies indicate that their payment terms do not exceed 30 days. Country and sector affiliation are more important drivers of payment terms than other company characteristics or awareness of the rules around late payment. Companies in manufacturing and construction have payment terms that are on average more than 10 days longer than companies in other sectors.

As for Public-authority-to-business transactions, average payment duration in the EU has decreased (from 65 days in 2011 to 58 days in 2014), but it stays well beyond the terms set out by the Directive and 10 Member States actually experienced an increase in payment delays from public authorities. At the same time, companies that work primarily with public authorities are less likely to have seen a deterioration in payment delays over the past three years than those that have primarily other businesses as their customers.

Country and sector effects are more important drivers of payment terms than any other company characteristics or awareness of the rules around late payment.

Rather than legislation, national business culture, economic conditions and power imbalances are the driving factors for payment behaviour.

There is not yet evidence on the effectiveness of the Directive in terms of reducing uncertainty in cross-border transactions.

Relevance

Despite differences in payment behaviour across countries, industry stakeholders across all sectors agree that late payment remains a highly relevant issue.

In 2009, the results of the Impact Assessment recommended a legislative solution in the form of a recast of the former late payment Directive (2000/35), with stricter provisions, to tackle the ongoing issue of late payment in commercial transactions.

This study shows that, in order to improve the relevance of the current Directive as a tool to combat late payment, a number of aspects could be clarified within the legislation itself.

First, the definition of what constitutes *grossly unfair* is seen as ambiguous with too much scope for interpretation.

Second, there is a lack of clarity regarding when the calculation of a payment term starts.

There are also concerns regarding recovery procedures which vary across Member States.

Finally, given the multi-faceted nature of the problem, there can be no one size fits all legislative solution and the Late Payment Directive can only be one measure among many in the fight against late payment.

Efficiency

There are no administrative or reporting burdens resulting directly from the Directive. Indeed, the only direct cost to businesses as a result of the Directive relates to a one-off requirement for businesses having to familiarise themselves with the legislation.

There are also no regulatory costs stemming from the transposition of the Directive. All costs to public authorities as a result of the Directive are one-off and, on the whole, they are considered marginal by the authorities themselves.

Set against these negligible costs, the Directive has the potential to deliver significant benefits, estimated at up to EUR 158 million for each one-day reduction in payment delays.

Coherence and complementarity

There is no evidence of contradictions between the Directive and any other EU relevant actions for combating late payment

There are a number of EU actions that complement the objectives of the Directive such as the European Small Claims Procedure.

However, in the context of cross-border transactions, there could be some overlap between the Directive (Article 10) and the European Payment Order Procedure.

EU Added Value

There is a general consensus among industry and national authorities that the Directive generates significant added value. National authorities and industry suggest that the impacts of the Directive would have been unlikely to be achieved by Member States individually.

Despite a few national derogations, the added value lies in the fact that - to the extent possible - there is now greater uniformity in payment terms across the Single Market.

While the average payment duration in Public-authority-to-business transactions still exceeds the limits set out by the Directive, EU added value lies in ensuring the problem of late payment is high on the political agenda, sending a message to creditors that the problem is being addressed.

Related to this, public authorities also highlighted the added value of the Directive in monitoring improvements in payment duration. A common measurement methodology would enhance this value added. Finally, though it does not solve the problem on its own, the Directive can provide an anchor point for the introduction of effective accompanying measures at national or sectorial level and for an exchange of good practices between Member States.

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RECOMMENDATIONS

Based on the above, the study team proposes the following set of recommendations for the European Commission.

The study has identified a number of specific areas where there could be room for improvement without changing the fundamental characteristics of the current legislation. We differentiate between two types of recommendations: changes related directly to the Directive itself and accompanying measures.

Recommendations related to the Directive itself

1. **Clarifying certain aspects of the Directive.** This includes in particular the following: “grossly unfair” and the calculation of contractual terms. Across various Member States stakeholders found that the definition of what constitutes grossly unfair was ambiguous and left too much scope for interpretation. Similarly, there is lack of clarity of the Directive on when the calculation of a payment term starts. There are different practices across different sectors and across the EU. In some instances, the payment term is calculated from the issue of an invoice, whereas in other cases payment term start from the receipt of goods. These aspects could be clarified either in a revised text of the Directive or alternatively, though a guidance document published by the European Commission explaining how these elements should be interpreted.
2. **Assessment of the implementation of Article 10 in all Member States.** The Directive states that that Member States shall ensure that an enforceable title can be obtained within 90 calendar days of the lodging of the creditor’s action or application to a court, provided that the debt is not disputed. However, the procedures available to companies vary across Member States due to different requirements i.e. eligible sums of claim, need for lawyer, and type of procedure (i.e. online).
3. **Changes to the way the interest rate is claimed.** At present, it is up to the creditor to decide whether to claim interest for late payment and this means that even businesses who are aware of the rights introduced by the Directive often do not exercise these rights, due to the fear of damaging business relationships. Automatic interest on late payment would remove the requirement for the creditor to take the initiative in exercising their right and provide an additional incentive for the debtor to pay promptly.
4. **Increasing the minimum 40 EUR compensation fee.** The EUR 40 compensation fee is seen as not proportional to the sums owed and the costs implied by late payment. The minimum fee should be higher to reflect the effort required in chasing and recovering late payment. A higher compensation fee could encourage businesses to claim their rights in the short term and contribute to changing payment culture in the long term.

External aspects

1. **Raising awareness of the impact of late payment.** The introduction of the Late Payment Directive was accompanied by an EU-wide awareness campaign surrounding late payment rules. This study has shown that the main determinant of late payment is not related to awareness of the rules but to country specific effects (e.g. business culture). Rather than focusing on rules and legislation, a future awareness campaign should focus on the impact of late payment on businesses, with the aim of making late payment a “socially unacceptable” practice in all Member States.
2. **Fostering the development and implementation of prompt payment policies in all Member States.** The study has shown that prompt payment policies/codes in the public and private sectors are an effective way to shorten payment duration. The Commission should take active steps to support all Member States in developing such schemes as accompanying measures to the Late Payment Directive. This would entail developing the “business case” for the creation of prompt payment policies, drawing on the experiences of countries that have implemented such schemes (see also the recommendation below) and engaging with sectorial associations and Member States authorities to promote the implementation of prompt payment schemes.
3. **Facilitating the exchange of best practices through peer review workshops.** Since the Directive has introduced the possibility for Member States to introduce voluntary measures, other Member States would welcome more information regarding the effectiveness of these measures. “Peer review” type workshops involving public authorities and experts from all EU Member States could be organised in specific Member States which are taking (or intend to take) an active approach to tackling late payment. In this way, policy officers from different departments could share their experiences with Member States lacking a coordinated approach.
4. **Providing access to effective remedies.** In the presence of lengthy juridical procedures an effective system of alternative dispute resolution should be provided at the national level. Of importance is the European Small Claims Procedure which provides a fast and efficient way of recovering debt, but is not often used by companies. One of the reasons for this seems to be the relatively low sum.
5. **Monitoring progress** - The Directive is silent regarding how to measure late payment. Such harmonised measurement would facilitate the provision of up to date statistical data and it would allow cross-country comparison over time.