

EBC position on the revision of Directive 2011/7/EU on combating late payment in commercial transactions

Established in 1990, the European Builders Confederation (EBC) is the European professional organisation representing national employer associations of construction micro, small and medium-sized enterprises (SMEs) and crafts. EBC is part of the employers' delegation in the European sectoral social dialogue for construction. EBC is a member of SMEunited, the European association of SMEs, and founding partner of Small Business Standards (SBS), the European association representing SMEs in standardisation.

With around 3 million enterprises and a total direct workforce of 16 million, the construction sector is of vital importance to the European economy and society, contributing around 10% to the GDP of the European Union. 99.9% of the European construction sector is composed of micro, small and medium-sized enterprises, active mostly at the local, regional and national level.

1. General remarks

During her State of the Union speech in the European Parliament on September 2022, European Commission President Ursula von der Leyen made the revision of the [Directive 2011/7/EU on combating late payment in commercial transactions](#), simply known as the Late Payment Directive (LPD) one of her priorities. The Commission President underlined that *“we will revise the Late Payment Directive – because it is simply not fair that 1 in 4 bankruptcies are due to invoices not being paid on time. For millions of family businesses, this will be a lifeline in troubled waters.”* She thus made the revision of the LPD one of the pillars of the Commission's *“SME Relief Package”*.

On Friday 20 January, the European Commission launched its Public Consultation on the LPD revision. EBC welcomes the initiation of the work by the Commission on this long-awaited revision and salutes the ambition, as expressed by the Commission President, to swiftly move towards an ambitious reform of the Directive.

The last recast of the LPD was completed over a decade ago, in 2011. Despite the ambition at the time, it is by now widely documented¹ that late payment remains a serious and widespread problem that undermines the European economy. The Covid-19 pandemic has deepened the impact of late payment on SMEs of several sectors, particularly in construction. This can be observed in existential aspects such as a suffocating lack of liquidity, as showcased in the latest European Payment Report 2021 by Intrum². Another study published by the European Commission in 2018 highlights that construction experiences the longest

¹ See list of indicative resources at the end of this position paper.

² Intrum, European Payment Report 2021, 2022

Retrieved from <https://www.intrum.com/media/ggtmzfbt/intrum-epr-2021.pdf>

payment duration of all sectors with 72 days (2016), whereby it is estimated that only about 15% of the payments in the construction sector are made on time³.

EBC has long advocated for the need to change and reinforce the legal framework on late payment, a lasting phenomenon that heavily disrupts the internal market and considerably impacts construction SMEs and crafts across the EU. Indeed, several independent studies have shown that late payment has significant impacts on construction SMEs, as overdue payment or the lack thereof suffocate their liquidity and even lead to bankruptcies and defaults, in an already difficult context of continuous crises phasing the European economy. The most critical impact harms particularly micro and small construction enterprises by blocking their limited time and human resources, hampering investment and raising cash-flow issues that may even lead to business closure.

The importance of prompt payment was also recently showcased by a wide-reaching [study of the Commission's Joint Research Centre \(JRC\)](#)⁴ According to the study's final report, if payments in B2B transactions were carried out systematically at 30 days, the cash flow of businesses would increase by 66%. If payments were carried out regularly at 60 days, the cash flow would increase by 10%. For each day of reduction of payment duration, the cash flow liberated would be around EUR 3.7 million, almost 1% on average over a period of 4 years. The study estimates that long payment times affect the liquidity position of companies which can force companies to cut back on employment and investment. It also identifies that the sectors that would be more positively affected by better payment times are construction and manufacturing. The Member States where these effects are more visible are those more exposed to late payments, such as Belgium, Italy, or Spain.

The current revision presents a once-in-a-decade opportunity to correct a long-standing unfair framework that puts construction SMEs in disadvantage and creates uncertainty and unreliability across the construction value chain and beyond. EBC therefore encourages policy makers to establish a strong and clear framework that will offer a level playing field across business to business (B2B) and public administration to business (PA2B) relations and transactions for all companies and will offer some much-needed relief for our SMEs.

EBC therefore calls for an ambitious revision of the Late Payment Directive based on the principle of zero tolerance regarding long payment terms and late payment.

As strengthening the legislative framework is key, any correction to the current framework must maintain the existing scope of action by including in the measures the delays affecting B2B and PA2B transactions. It should also strengthen the guarantee rules in favour of subcontractors and provide Member States with stringent general guidelines and principles to solve the specific problems linked to the national context.

³ European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behavior, 2018.

Retrieved from <https://publications.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1>

⁴ Joint Research Centre of the European Commission, Assessing the economic impact of faster payments in B2B commercial transactions, Final report, 2022

Retrieved from <https://op.europa.eu/en/publication-detail/-/publication/fa844000-356a-11ed-9c68-01aa75ed71a1>

2. Specific remarks: How the Late Payment Directive is circumvented in B2B and PA2B relations

The current LPD lays down obligations regarding payment periods in both B2B and PA2B commercial transactions. In general, payment periods should not exceed 30 days. In certain limited cases, public authorities may pay their suppliers within 60 days. In B2B transactions, payment periods longer than 60 days may be negotiated, provided that they are not considered as "*grossly unfair*".

The Directive also sets out provisions on interest and compensation for late payment, corresponding to €40 per invoice, to which the creditor is entitled when payment is made beyond the contractual or statutory payment period.

Despite the above, year after year, we continue to witness severe problems across different Member States both in B2B and PA2B transactions. Several factors are behind the persistence of unacceptable long payment terms and late payment in the construction sector, some examples of which are:

- The sector is very specific concerning its long and interdependent supply chain. A typical construction project often involves a main contractor and various sub-contractors, which again may sub-contract parts of their work, therefore late payment accumulates quickly within the value chain.
- Approximately 95% of the companies in the construction sector are microenterprises (with less than 10 workers). Hence, many business relations are defined by an imbalance of power between enterprises, which often forces micro and small enterprises to accept longer payment terms than they are comfortable with and allows enterprises in a stronger negotiation position to use outstanding invoices as a form of free credit.
- Due to the nature of construction works, disputes over the quality of goods and services are frequent and while contracts usually cover shortcomings and resulting payment delays, intended delays based on disputes display a serious and too common problem.
- Given that public procurement makes up about one third of government expenditures, it represents an important direct source of income for construction enterprises and makes short payment terms and timely payment in public contracts as urgent and essential as in business-to-business relations.

In this vein, a number of practices are being observed by EBC members, systematically used by economic and public actors to delay their payments, to the detriment of SMEs and the entire construction value chain. Here follows a sample of these practices:

- **Abuse of the ambiguous concept of "*grossly unfair*"**

The controversial and ambiguous concept of "*grossly unfair*" legally allows the payment of invoices in B2B relations beyond 60 days (no limit stated) and in PA2B relations within 60 rather than 30 days. This derogation is widely abused to the detriment of SMEs and constitutes a particularly problematic provision within the LPD.

- **Hiding behind the procedure of acceptance or verification**

The LPD allows the procedure of acceptance or verification to take a maximum of 30 calendar days from the date of the receipt of the goods or services, unless otherwise stated in the contract and provided it is not “*grossly unfair*”.

However, the approval period in B2B and PA2B contracts is often used as a tool to purposefully delay their payment obligations a) by using the term “*grossly unfair*” to prolong the approval period from the beginning; b) by requesting enterprises to delay the submission of the invoice although the verification was successfully conducted; c) by requesting enterprises to delay the issue of the document which certifies the end of the verification of the works.

Public authorities are also observed to proceed with abusive rejections of payments if there is any difference between the amount requested by the contractor and the amount initially accepted, which obliges the enterprise to issue a new invoice with a new payment deadline, thus artificially prolonging the overall payment time.

This situation is unfortunately very common, where a problem with the rounding of a few cents or euros results in the rejection of the invoice, which leads the company to issue a new invoice with a new payment deadline. In this case, especially when it is a payment that does not have a final value (final invoice for closing a project), the public authority could but often does not pay the amount it admits in terms of the rounding rules of its software so that the company's cash flow is not penalised.

- **“Pay-if-paid” and “Pay-when-paid” clauses**

“*Pay-if-paid*” clauses are too often included in B2B relations which require payment from the customer as a condition precedent to the contractor's duty to pay a subcontractor or supplier. These can be coupled by “*pay-when-paid*” clauses in B2B relations which govern the timing of a main contractor's payment obligation to the subcontractor, usually by indicating that the subcontractor will be paid within some fixed time period after the contractor itself is paid.

- **Discounts for prompt payment**

Discounts for prompt payment in B2B relations, which are arbitrary discounts for paying before the payment deadline or even just on time, are also still very much present on the EU market. Construction SMEs are as a result forced to be paid less in order to be paid on time, in complete violation of the spirit of the LPD. Construction SMEs are therefore forced to accept delayed payment in order to obtain full payment. This is oftentimes observed in France, notably in public works contracts within the framework of private social housing organisations.

3. Proposals from EBC and its construction SMEs and crafts

Several studies from the latest years, including the Commission's [Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour](#) (2018), the JRC's Report on [Assessing the economic impact of faster payments in B2B commercial transactions](#) (2022), as well as the detailed Analytical Reports by the European Construction Sector Observatory (ECSO) on the [Indicators on late payment in the construction sector](#) and the [Late payment in the construction](#)

[sector](#) (2020), but also the feedback from EBC members, show that there has only been frail progress in reducing payment terms and late payment in commercial transactions since the recast of the LPD.

Therefore, **EBC believes it is necessary to establish stricter legal measures to further improve payment behaviour of enterprises as well as public authorities** and proposes the following actions:

- **Define an obligatory maximum period of payment not exceeding 30 calendar days for all commercial transactions**

One of the biggest problems of the current Directive is the absence of setting the maximum payment terms for transactions between B2B. As became visible since the last revision of the LPD, long payment terms remain a huge problem, especially for SMEs. Large enterprises and public authorities are indeed offered a legal way to delay payment, circumventing sanctions as well as obligations in terms of interest rates.

Therefore, **EBC believes it is necessary to clearly limit the maximum period of payment to 30 calendar days for all transactions between undertakings and transactions between undertakings and public authorities without the possibility of derogations**. This would also make obsolete the very controversial term “*grossly unfair*” and should lead to its abolition, as it currently figures or is used with the effect of a derogation to the Directive to justify very long payment terms.

The fixation of payment deadlines by contractual agreement is to be explored, as long as the rules for the protection of creditors in the event of unfair conduct are strengthened through stringent prescriptions. In this respect, in the event of an imbalance between the positions of the debtor and the creditor where the latter is in the weak contractual position caused by a commercial dependence, provision could be made for the simple presumption of abuse of economic dependence of the creditor if the time limit exceeded the legal period of 30 days and the burden of proof to the contrary attributed to the debtor.

- **Apply mandatory interest and compensation charges from the first day of late payment**

The LPD entitles a creditor to interest for late payment without the necessity of a reminder. However, in practice interest rates are either not paid or too low. The former because creditors often fear to damage the business relations and the latter due to the unbalanced power relation, allowing the debtor to dictate terms. The result is that interest rates do not appear to have any influence on the payment behaviour of the debtor.

Therefore, EBC believes that it is necessary to make the application of interest a legal obligation as from the first day of late payment. This would make it easier for enterprises to claim interest, especially in the frame of mediation or arbitration.

In addition to this, **EBC calls for the application of the statutory interest for late payment in business-to-business relations as is the case in contracts with public authorities, to ensure that large companies cannot use their dominant position to fix interest rates at an unjustifiably low level**.

The introduction of a fixed sum-compensation for recovery costs set out by the Directive had limited impact and is rarely used by companies. Provisions on the minimum €40 compensation fee for each invoice

should also be enforced more strictly, accompanied with controls by competent and independent authorities, in the spirit of the relevant jurisprudence of the Court of Justice of the European Union⁵. Additionally, **the possibility that the minimum amount is set higher than €40 to reflect the effort required in recovering late payment and be proportional to the size of the late payments should be envisaged**, considering that a higher compensation fee could encourage businesses, especially SMEs, to claim their rights.

- **Define an obligatory maximum duration of 30 calendar days to ascertain the conformity of services or goods**

Payment in the construction sector is less straightforward than in other sectors, because the conformity of the works undertaken needs to be ascertained before invoicing can take place. The LPD allows the procedure of acceptance or verification to take a maximum of 30 calendar days from the date of the receipt of the goods or services, unless otherwise stated in the contract and provided it is not grossly unfair. However, both, enterprises and public authorities appear to increasingly use the approval period as a tool to purposefully delay their payment obligations. The result is that construction SMEs have to wait extremely long for the payment of their services without the possibility to take legal action, with scenarios where verification lasts 30 days or more leading to an additional 30-60 days of delay for the payment.

Hence, **EBC asks for a maximum duration of 30 days to ascertain the conformity of services or goods and to delete the possibility to agree upon a longer period or any other form of derogation**, because enterprises and public authorities can use this to purposefully prolong the verification period and with it, their payment period. These 30 days should start from the day of the finished service or received good.

- **Provide a clear definition of what is considered unfair contractual terms**

The current LPD lacks a clear definition and examples of “*unfair contractual terms and practices*” that render very difficult for the creditor to prove that a specific contractual clause or business practice is significantly unfair. As already stated, the imbalance of power affects negotiations between the parties and can result in unfair practices such as long payment terms. In addition, small companies are reluctant to initiate legal action to mitigate or invalidate a contractual term considered unfair, or to challenge payment terms non-compliant with the national legislation.

Therefore, **EBC proposes to define examples of unfair contractual terms and practices in the planned revision of LPD**. This could bring awareness to companies on what is unfair contractual terms and payment and help them choose more reliable business partners.

⁵ On 1 December 2022, the Court of Justice of the European Union, in delivering a ruling in the case of *DOMUS-Software-AG vs. Marc Braschoß Immobilien GmbH* (Case C-370/21), clarified that where a single contract provides for periodic delivery of goods or provision of services each requiring payment within a specific period, the fixed minimum sum of compensation for recovery costs due to creditors under the LPD is due for each late payment and not due once for all late payments within the single contract. In light of the above considerations and in accordance with the scope of the Late Payment Directive, the EU Court held that where two undertakings enter into a single contract which provides for periodic deliveries of goods or provision of services, each requiring payment within a specified period, then Article 6 of the Late Payment Directive is to be interpreted as imposing an obligation on debtors to pay a minimum fixed sum of €40 by way of compensation for recovery costs to the creditor for each late payment.

- **Ensure subcontractors can directly claim payment from the contracting authority as foreseen in the Public Procurement Directive**

A construction project usually involves a large amount of enterprises and rather long supply chains, often significantly delaying payment, especially at the end of the value chain. Hence, Directive 2014/24/EU on Public Procurement explicitly allows subcontractors to claim due payment directly from the contracting authority to reduce the risk of late payments by main contractors to their SME suppliers. This has been applied in Croatia and France, and should be considered as a feasible solution throughout the EU with potential to yield desirable results.

However, this tool is rarely used by public authorities although it can play an important role in better protecting the subcontractor, who knows that he can obtain, with reasonable certainty, the total amount agreed with a limited maximum delay. Moreover, this encourages the main contractor to pay on time, knowing that the contracting authority will easily be able to refer to him in case the subcontractor declares late payment.

Therefore, **EBC believes the provision should be applied in all situations in which the payment of the main contractor exceeds the maximum payment period of 30 calendar days, given the main contractor verified the proper execution of the works.** Similar legislation is already in place in [France](#). EBC calls for the streamlining of those provisions in the revised LPD, to ensure coherence and their wider application.

Although these measures do not relate directly to the LPD, their use would undoubtedly contribute to the desired outcome of increasing payment discipline.

- **Enforce better legislation on late payment and enforce administrative sanction**

A central problem with late payment is that as long as enforcement remains weak, companies imposing unfair practices tend to see no need to change their behaviour. The effectiveness of enforcement measures also depends on the level (EU, national, regional) at which the enforcement takes place and other influencing factors, such as the national payment culture, the structure of the market and the persistence of imbalances of power. Hence, **EBC considers better enforcement key and supports concrete measures, such as proportionate administrative sanctions, to increase compliance with the legislation.**

The experience of France, which introduced the Hamon Law in 2014 enabling the administration to directly sanction bad payers, shows that tight controls and better enforcement through penalties is possible. The around 230 sanctions in France per year⁶ moreover show the importance to strengthen enforcement of late payment legislation. A specifically positive aspect of administrative sanctions is that public authorities directly impose them in the case of a payment legislation breach, which allows enterprises to avoid direct action against the debtor. Given that administrative sanctions are enforced by public authorities, they overcome imbalances of power and avoid the need for businesses to take action against their client.

⁶ European Commission, Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behavior, 2018.
Retrieved from <https://publications.europa.eu/en/publication-detail/-/publication/c8b7391b-9b80-11e8-a408-01aa75ed71a1>

EBC therefore calls for stronger provisions on enforcement of the LPD at European level. To that end, the possibility of converting the Directive into a Regulation could be envisaged, as this could have a beneficial effect especially on PA2B transaction, with enforcement guaranteed by the European Commission.

- **Allow SMEs to offset tax and social security debts against any outstanding amounts owe to SMEs due to late payment by Public Authorities**

With reference to the case where the debtor is a public entity, the principle of the "*general compensation of the credits with the tax, social security and welfare debts*" should be granted. Indeed, construction enterprises have many financial burdens to carry even if payment arrives late, such as VAT on the works undertaken or services delivered. In order to decrease burdens for SMEs, **EBC proposes that Member States exempt enterprises from paying taxes on the works undertaken or services delivered, until payment is received.**

A good example for this is Poland, which introduced a new law based on a proposal by the Ministry of Entrepreneurship and Technology that includes the principle that small entrepreneurs⁷ pay VAT on the works undertaken or services delivered only after having received the respective payment.

- **Set-up and enable mediation and arbitration measures at the regional and local level**

Companies and especially SMEs are usually afraid of damaging their business relations or losing a future contract if they use legal remedies. The option of mediation could help, at least to a certain extent, to maintain a dialogue between the client and the supplier, find a solution together and continue business relations. Additionally, critical issues such as the inefficiency or slow-pace of justice in the procedures for establishing and recovering debts often become key factors in aggravating the scale of the late payment problem.

Therefore, **EBC believes that mediation and adjudication measures can play a role in solving payment disputes.** However, it is important to establish certain fair and common conditions:

- The mediation or arbitration measures should be in the hands of Member States to avoid possible conflicts of interests of e.g., business associations.
- Mediation or arbitration measures should be established at the regional and local level, in accordance with the principle of subsidiarity, in order to encourage in particular micro and small enterprises to make use of them.
- The respective facilities should have specially trained staff with knowledge about construction works, in order to ensure that also disputes (whether purposefully or for valid reasons) over the quality of goods and services are properly addressed.
- The option of anonymous proceedings thereof should also be provided, when possible, in order to protect business relations of SMEs.

If built and structured around these conditions, such low-cost fora for the resolution of disputes could bring a real added-value to construction SMEs facing late payment situations, by limiting their

⁷ Small enterprises refer to those enterprises that did not exceed the equivalent of EUR 1.2 million in revenues in the previous tax year

consumption of time and resources. However, under no circumstances should the option of arbitration and mediation mechanisms be seen as a substitute to a strong legislative framework with zero tolerance for late payment.

- **Reinforce the transparency on payment practices**

Companies registered in the EU could get access to a *European debt register* (in the form of simple registration) to check the solvency and payment behaviour of potential and existing business partners. The “*name and shame*” factor and public access to information can be an incentive for companies to improve their payment practices. This would not only incentivise better behaviour through transparency of payment practices but would also structurally improve the overall behaviour of market actors with beneficial impacts on the internal market.

In situations when an SME is not paid on time, within the due date set by the contract, the possibility to report economic actors who do not respect the due dates would appear to be an effective tool to mitigate such a behaviour in the future. A fear of being recorded on the database could prevent late payment from occurring and companies could make an effort to pay their suppliers on time.