

## **EU Committee of the Federal Council, 21 July 2009**

### **Statement to the European Commission**

concerning

**COM(2009) 126 final** of 8 April 2009: Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast)

The proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions takes adequate account of the principles of subsidiarity and proportionality. The explanation of the need for Community legislation is basically clear and comprehensible, and for this reason the EU Committee of the Federal Council basically supports this proposal.

The aim of the Directive to strengthen small and medium-sized enterprises and to protect them from insolvency is generally welcomed by the EU Committee of the Federal Council, since payment can be responsible for bankruptcies of otherwise viable businesses with the potential to trigger, in the worst case scenario, a chain reaction across the entire supply chain. The EU Committee nevertheless has some comments to make about the following points.

In the opinion of the EU Committee, the title of article 3 should be revised as it is imprecise. It would be better to speak of "Late payment in commercial transactions between undertakings". Paragraph 1(a) should also make it clear that the contractual and legal obligation to be fulfilled by the creditor in claiming interest for late payment without the necessity of a reminder applies only to an obligation with respect to the debtor. We should like to see this point clarified. Furthermore, it is imprecise to talk of "interest" [Zinsen] in paragraph 1 when elsewhere the term "interest for late payment" [Verzugszinsen] is used.

Moreover, for the sake of clarity, the introductory paragraph 1 of articles 3 and 5 should read "sind gemäß Art.3 oder Art.5 Verzugszinsen zu zahlen ...". [Note: the German text currently has just "Zinsen" rather than "Verzugszinsen" – see above.]

The revised article 4 provides for a fixed sum for recovery costs of interest for delayed payment to be paid by the debtor. This fixed sum is apparently due (in addition to the interest on late payment) irrespective of the specific amount owed. We believe that this fixed sum is not easy to justify and in some cases would appear to be unusually high. In addition, the

creditor is entitled to obtain additional compensation for remaining recovery costs incurred through the debtor's late payment unless the latter is not responsible for the delay. Under Austrian law, compensation for recovery costs is linked, in accordance with the general principles of compensation, to fault by the debtor. This should be pointed out in the Directive. Demanding the sums indicated irrespective of fault or specific loss would represent a departure from the current compensation structure in Austria. Although the EU Committee agrees that this would clearly facilitate claims, it does not believe this advantage for the creditor would justify the manifest divergence from Austrian compensation legislation.

The revised article 5 includes special provisions for public authorities, the term "public authorities" being defined in article 2 paragraph 2 of the European Commission proposal with reference to the Public Procurement Directive as "contracting authority" in the meaning of Directive 2004/18/EC. Article 5 now has a time limit for payment by public authorities of 30 days, which may be exceeded only in the light of particular circumstances (although it does not say when this time limit is to commence!). When interest on delayed payment becomes payable, the creditor is also entitled, in addition to the recovery costs, to a lump sum compensation equal to 5% of the amount due. In the opinion of the EU Committee it is important that payments by public authorities be made promptly in order to safeguard the liquidity of undertakings and of SMEs in particular. It is regrettable that public authorities throughout Europe do not have the best reputation when it comes to payment and it is for this reason that the proposal has special provisions for this. The EU Committee nevertheless believes that the payment of 5% compensation in addition to amount due should be rethought. Apart from the budgetary strain and the disadvantage compared with private companies, it should also be borne in mind here that for creditors the risk of insolvency does not usually apply to public authorities. On the other hand, public authorities are not subject to the same financing restraints as private companies and is better able to avoid delayed payment. Apart from that, the EU Committee points out that the possibility of extending the date for payment is not explicitly formulated.

Under Austrian law of obligations, contract clauses are null and void if they infringe the law or are immoral. However, the EU Committee fails to understand how, as provided for in article 6, a clause in a contract is always grossly unfair if interest on delayed payment is excluded.

The EU Committee also finds article 9 questionable. In the former version, an enforceable title could *normally* be obtained for an uncontested claim within 90 days of the lodging of the creditor's action. In the revised version of the Directive an enforceable title should be

obtainable *in all cases* within 90 days. The acquisition of an enforceable title is not always possible within this time limit, however, because circumstances such as incorrect service or orders for amendment can delay the proceedings.

The proposal appears to comply with the principle of subsidiarity. This principle is applicable because the proposal does not come under the exclusive jurisdiction of the Community. The reasons why Member States do not sufficiently comply with the aims of the proposal are plausible and comprehensible. This revised version of the Directive will be of particular benefit to enterprises that are subject to a higher risk of delayed payment through the sale of products and services to enterprises and authorities in other Member States. In the past this risk has often discouraged enterprises from selling products and services in other Member States since it increases uncertainty and the cost of doing business.

The principle of proportionality is complied with since this Directive is an optional instrument that does not oblige economic operators to claim interest for late payment or compensation for recovery costs. Moreover, the proposal does not prevent undertakings from agreeing upon other contractual provisions regarding payment. In addition, Member States may maintain provisions that are more favourable for the creditor than the provisions necessary to comply with the Directive.