



CIRCOLARE INFORMATIVA 10/95

Milano, 27 luglio 1995

OGGETTO: Raccomandazione della Commissione delle Comunità Europee sui termini di pagamento nelle transazioni commerciali.

Il Segretario Generale
Prof. A. Carretta

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Trasmettiamo il testo della raccomandazione della Commissione delle Comunità Europee del 12 maggio 1995, relativa ai termini di pagamento nelle transazioni commerciali, pubblicato sulla Gazzetta Ufficiale della Comunità Europea del 10 giugno 1995, accompagnato da una relazione di commento.

La raccomandazione si propone di contrastare il fenomeno dei ritardi nei pagamenti suddetti, attraverso la predisposizione di un contesto normativo adeguato, e di assicurare un equilibrio nei termini di pagamento, specie laddove la forza contrattuale delle parti sia impari.

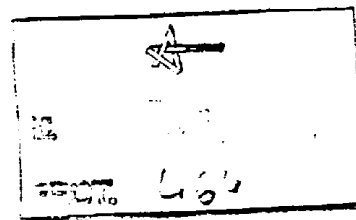
A questo fine la commissione raccomanda, fra l'altro, agli Stati membri della Comunità Europea di migliorare la trasparenza contrattuale, di sviluppare iniziative di formazione ed informazione sull'argomento, di ridurre le distorsioni fiscali connesse ai ritardati pagamenti, di sviluppare tecniche di gestione e riscossione dei crediti, quali il factoring, espressamente citato all'articolo 2, comma 2, punto d), del provvedimento.



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4/7.01
MVL/LB

Brussels, 20th June 1995

FOR INFORMATION: to the members of the Council
 to the members of the Steering Committee
 to the National Associations

Dear Madam, dear Sir,

Ref.: Commission Recommendation of 12th May 1995 on payment periods in commercial transactions (OJ L127 of 10th June 1995)

Please find enclosed (1) the final text of the Recommendation referenced above (you were sent an interim text on the 28th October 1994). The Commission has for the time being abandoned its idea of approving a directive, mainly due to resistance from the Economic and Social Committee (Opinion of 30th June 1993 - OJ C249 of 13th September 1993).

The Recommendation is accompanied by a Notice providing a clarification of the first text (OJ C144 of 10th June 1995). This is also annexed to this circular (2).

In substance the major objective of the Recommendation is:

- firstly to combat late payments by making provision for a legal framework which is sufficiently dissuasive to bad payers, and hence ensuring that contractual payment periods are adhered to (articles 3 and 4).
- secondly to ensure that reasonable payment periods are maintained in transactions where there is an imbalance in the contractual relations between partners (public procurement in particular; article 6)

In order to do so the Commission recommends Member States:

- to reinforce transparency in contractual relations, to improve training and information in businesses, to mitigate the fiscal effects of late payments, to develop debt recovery techniques (factoring) (article 2-§2-d)
- to ensure adequate compensation for late payments (article 3)
- guarantee appropriate redress procedures (article 4)
- eliminate difficulties specific to cross border trade (article 5).

We hope you find this information useful.

Yours faithfully,

Marc BAERT
Secretary General

2 annexes : (1) and (2)

95062001/E

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION RECOMMENDATION

of 12 May 1995

on payment periods in commercial transactions⁽¹⁾

(Text with EEA relevance)

(95/198/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Whereas on 21 April 1993 the European Parliament adopted a Resolution on the Commission's communications to the Council 'Towards a European subcontracting market' and 'SME participation in public procurement contracts in the Community' ⁽²⁾, calling on the Commission to make specific proposals on late payments;

Whereas on 30 June 1993 the Economic and Social Committee adopted an Opinion ⁽³⁾ on the 'Commission staff working paper on the problem of the time taken to make payments in commercial transactions' ⁽⁴⁾;

Whereas in its White Paper on Growth, Competitiveness and Employment ⁽⁵⁾ the Commission announced an initiative concerning payment periods;

Whereas on 25 May 1994 the Commission adopted a Communication on the implementation of an integrated programme in favour of SMEs and the craft sector ⁽⁶⁾;

Whereas the European Parliament in its Resolution on the Integrated Programme emphasized that the Commission should forward proposals to deal with the problem of late payment ⁽⁷⁾;

Whereas heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of the length of payment periods in commercial transactions; whereas overdue payments are a danger to the financial balance and even the survival of businesses;

Whereas there has been a deterioration in payment practices in the majority of the countries of the Community in recent years; whereas this deterioration has not been caused by economic factors alone, but also reflects a structural trend in business relations; whereas the intensification of trade and competition in the internal market could well bring about a general lengthening of payment periods in the Community;

Whereas the differences between the payment rules and practices in the Member States constitute an obstacle to the proper functioning of the internal market;

Whereas, without undermining contractual freedom as regards the determination of payment periods, it is advisable to promote greater transparency of the time limits applicable between contracting parties and to encourage adherence to the agreed deadlines;

⁽¹⁾ The explanatory note of this recommendation is published as a Communication in OJ No C 144, 10. 6. 1995, p. 3.

⁽²⁾ JO No C 130, 31. 5. 1993, p. 71.

⁽³⁾ JO No C 249, 13. 9. 1993, p. 21.

⁽⁴⁾ SEC(92) 2214 final of 18 November 1992.

⁽⁵⁾ White Paper on Growth, Competitiveness and Employment, p. 14.

⁽⁶⁾ COM(94) 207 final of 3 June 1994.

⁽⁷⁾ Resolution A4-0022/94, PV 28 II, 14 October 1994.

Whereas better information and training for businesses, in particular small and medium-sized ones, in the matter of payment periods would help improve business practices in this area;

Whereas the penalty system for overdue payments in the Member States must be such as both to discourage late payment and fully compensate the creditors for the various costs incurred;

Whereas a penalty system can be dissuasive only if it is accompanied by redress procedures which are rapid, effective and inexpensive for the creditor;

Whereas it is necessary to take supplementary measures in order to improve adherence to payment periods in cross-border transactions;

Whereas public authorities and public-law enterprises handle a considerable volume of payments to businesses; whereas strict payment discipline on the part of these authorities would have a spill-over effect on the economy as a whole; whereas current practices must be improved if public procurement contracts really are to be opened up to businesses, particularly small and medium-sized ones,

HEREBY RECOMMENDS:

Article 1

Objectives

Member States are requested to take the necessary legal and practical steps to ensure adherence to contractual payment periods in commercial transactions and to improve payment periods for public procurement contracts.

In particular, they are requested to take the most appropriate steps, to supplement their legal and administrative systems, in order to:

- reinforce transparency in contractual relations, improve training and information in businesses and mitigate the fiscal effects of late payments,
- ensure adequate compensation for late payments,
- guarantee appropriate redress procedures,
- eliminate difficulties specific to cross-border trade,
- improve payment for public procurement contracts.

Article 2

Transparency, information and training, VAT

1. Greater transparency of the payment periods applicable in commercial transactions, should be encouraged. To this end, the Member States are requested to:

- (a) take the appropriate steps to encourage clear indication, in commercial contracts, of the period applicable and the date at which the payment falls due, by, for example, a statement on the invoice. Where there is no written contract or where the payment period has

not been clearly indicated on the invoice, they shall provide for a simple and clear rule which determines both the payment period and the payment deadline legally applicable to the contract;

- (b) encourage indication, on commercial documents, of any discounts and charges applicable to early or late payment;
- (c) encourage indication in commercial contracts of a period, following the receipt of goods or services, during which the recipient may raise any objections regarding the quality or quantity received. The legislation should contain a subsidiary rule which applies in the absence of any provision in the contract;
- (d) stipulate that notices of public procurement contracts or bills of quantities should contain precise details of the payment periods and deadlines practised by the awarding authorities.

2. Member States are requested to encourage public and private initiatives, including those of professional organizations, designed to improve the information and training offered to businesses, particularly small and medium-sized ones, in the management of payment periods. Such schemes may involve, in particular:

- (a) providing advice and legal assistance in the drafting of commercial documents and contracts;
- (b) providing information and training on the most suitable payment rules and practices for particular sectors, regions and countries, and on internal and external debt-recovery procedures;
- (c) developing practical means of cash-flow management, in particular computing facilities, and promotion electronic data interchange (EDI) within SMEs;
- (d) recourse to debt-recovery techniques such as factoring.

3. In view of the specific needs of SMEs and in particular the effects on their liquidity, which are liable to arise from late payments, the Member States are requested to provide that they enjoy the most favourable payment periods under Council Directive 77/388/EEC (Sixth Directive on VAT) ⁽¹⁾. This concerns the possibility of:

- (a) deferring payment of VAT until the corresponding invoice has been settled, for small businesses at least;
- (b) permitting small businesses to submit their VAT returns after longer periods.

Article 3

Compensation for late payment

Conditions should be created whereby the creditor can be suitably compensated for damages incurred through late payment by the debtor. To this end, Member States are requested to:

⁽¹⁾ OJ No L 145, 13. 7. 1977, p. 1.

- (a) recognize the right of creditors to interest on arrears as soon as the contractual or statutory period has been exceeded;

Article 5

Cross-border trade

- (b) set a rate of interest for late payments, otherwise applicable in the absence of specific provisions in the contract, at a level which is sufficiently dissuasive for bad payers;

The difficulties which are specific to cross-border trade in respect of payment should be eliminated. To this end, Member States are requested to:

- (c) recognize, in addition to the right to interest on arrears, a right to other compensation for damage incurred by the creditor through late payment. This compensation should cover, in particular, the legal and administrative costs of recovery.

- (a) encourage better information and training in businesses on the management of payment periods in cross-border trade;

- (b) facilitate recovery procedures for cross-border debts which are not in dispute. In particular, it should be made easier to obtain a writ of execution for such debts;

- (c) take all necessary measures to facilitate and speed up the resolution of law suits and the execution of judgments in the case of late cross-border payments.

Article 4

Redress procedures

Steps should be taken to ensure that creditors to whom payment is overdue have access to rapid, efficient and inexpensive redress procedures enabling them to obtain payment and compensation for damages. To this end, Member States are requested to:

- (a) encourage the introduction of procedures to settle claims without recourse to legal proceedings, with a view to the rapid, efficient and inexpensive settlement of payment disputes;

- (b) improve the effectiveness of simplified legal procedures for the settlement of claims in respect of limited sums. These procedures should provide for simple, low-cost methods for taking legal action. The thresholds for the application of these procedures should be set at a level which covers a considerable number of business transactions. There should be efficient conditions for enforcing rulings made under these simplified procedures;

- (c) improve the effectiveness of accelerated recovery procedures. These procedures should allow, with fewer formalities and shorter time limits, the granting of a writ of execution when a debt is not contested. These procedures should take place quickly, with a minimum of formalities and financial cost to the creditor, and, apply irrespective of the size of the claim.

Article 6

Public procurement contracts

Steps must be taken to ensure that public authorities and public-law enterprises — the latter as defined in Council Directive 93/38/EEC⁽¹⁾ — are disciplined in the matter of payment. To this end, Member States are requested to:

- (a) take steps to ensure that all the authorities concerned are aware of the consequences of late payment on the financial well-being of economic operators;

- (b) adhere to a period of 60 days for payments for public procurement contracts, without prejudice to any, shorter times currently in effect. Member States are requested to examine the extent to which they can reduce the time it takes for public authorities to pay companies, and the extent to which they can simplify the relevant existing rules;

- (c) establish precise administrative procedures, including time limits, to ensure that public payments are made as rapidly as possible. In particular, time limits should be fixed for the completion of pre-payment administrative formalities, such as public works reception procedures;

- (d) carry out regular checks on the payment periods of all authorities at all levels, the results to be made available in an official publication;

⁽¹⁾ OJ No L 199, 9. 8. 1993, p. 84.

- (e) provide for payment — at the same time as the face value of the invoice is paid — of interest on invoices not paid by the date specified in the contract. Appropriate checks should be made to ensure that the public authorities adhere to this principle;
- (f) make provision for sub-contractors to be paid within reasonable time limits under public procurement contracts.

Article 7

Report

To enable the Commission to evaluate what progress has been made, Member States are requested to forward a

report to the Commission on action taken in respect of the various elements of this Recommendation before 31 December 1997.

Article 8

Addressees

This Recommendation is addressed to the Member States.

Done at Brussels, 12 May 1995.

For the Commission

Christos PAPOUTSIS

Member of the Commission

Communication on the Commission recommendation of 12 May 1995 on payment periods in commercial transactions (*)

(95/C 144/03)

(Text with EEA relevance)

I. INTRODUCTION

Small and medium-sized enterprises (SMEs) are central to growth and employment in the European Union today. Their role in this regard is acknowledged by government authorities and social and economic partners alike, at both national and European level.

The Commission's White Paper on Growth, Competitiveness and Employment emphasizes that both the Member States and the Community are responsible for creating an environment conducive to the creation and development of SMEs. In particular, it is important to identify and reduce the legal, administrative, fiscal, financial and other constraints barring the way to such an environment. Payment periods constitute one of the priority areas in which the White Paper recommends improvements.

Concern about payment periods in commercial transactions (1) is not a new phenomenon in the business community, but the current trend towards an increase in the number and seriousness of delays is causing considerable disquiet in many Member States of the European Union.

The second report of the European observatory for SMEs confirms the deterioration of payment discipline in several Member States (2). Payment periods, defined as the time between the delivery of and payment for goods or services, rose to an average of 66 days in businesses in the European Union in 1993. More than a quarter of businesses have to wait more than 90 days to be paid and 8 % wait more than 120 days.

Among the Member States, the average payment period is longest in Italy (90 days) and has become longer in six of the other countries, particularly in Germany (from 34 to 43 days), Belgium (45 to 57) and France (57 to 70).

These longer payment periods are the result not just of changes in contractual periods (the time within which the payment is due under the contract) but also of longer delays in making payments, i.e. beyond the date legally applicable). According to a recent study (3), the average delay in payment in the United Kingdom amounts to 23 days, i.e. almost twice the European average of 13 days, while average delays in Italy and France amount to 20 and 19 days respectively.

It is true that late payment is not a new phenomenon, in particular because of disputes over the seller's performance of the contract, and because economic recessions have had an adverse effect on payment periods. However, the problem of payment periods and late payment cannot be reduced to a purely economic phenomenon. The structural nature of this problem is due to the fact that some businesses are currently resorting to late payment systematically as a normal feature of cash-flow management. The study cited shows that, across Europe as a whole, over one-third (36,3 %) of delays in domestic payments are intentional, with the figure rising in the United Kingdom to as much as 53,5 %. For cross-border payments, the figures jump to 43 % at European level and 60,7 % in the United Kingdom. This constitutes a decline in business ethics which involves grave dangers for the development of SMEs and the smooth working of the internal market (see III below).

The main aim of this recommendation is twofold:

- firstly, to combat late payment by providing for a legal framework which will serve as a sufficient deterrent to bad payers and hence ensure that contractual payment periods are adhered to,
- secondly, to ensure that reasonable payment periods are maintained in transactions where the Contracting Parties are not on equal footing (in particular public procurement contracts).

(*) OJ No L 127, 10. 6. 1995.

(1) This recommendation covers purchases by businesses and public authorities but not by individuals.

(2) The conclusions on payment periods in the report are based on a survey by Grant Thornton International (1994). The European observatory for SMEs, second annual report 1994, European network for SME research.

(3) European late payment survey (1994) by intrum justitia.

II. BACKGROUND

Over the past few years, the Commission has entered into far-reaching and comprehensive consultation on the situation as regards payment periods in the various Member States of the European Union and on measures which might be deemed suitable at EU level. This consultation has been based, in particular, on a working paper which provides an economic analysis of the impact of payment periods, sets out the legal framework in the Member States and explores the various options for initiatives at European Union level⁽¹⁾.

More than 130 written opinions were received from national and European professional organizations and from some Member States. The Commission also organized a public hearing on payment periods in Brussels on 7 and 8 July 1993, at which some 30 organizations outlined their positions.

The European Parliament commented on the working paper in its resolution of 21 April 1993 on sub-contracting and public procurement contracts⁽²⁾. The Economic and Social Committee delivered an opinion on 30 June 1993⁽³⁾.

A Commission initiative was announced in the White Paper on Growth, Competitiveness and Employment⁽⁴⁾, and in the Strategic Programme on the Internal Market⁽⁵⁾.

The integrated programme for SMEs⁽⁶⁾, which the Commission adopted on 25 May 1994, attaches particular importance to the EU's efforts to improve the legal environment of businesses. A recommendation on payment periods was announced in this connection. In its resolution on the integrated programme the European Parliament emphasized that the Commission should forward proposals to deal with the problem of late payment⁽⁷⁾.

In its communication on the final report of the Round Table of leading representatives of the banking sector,

⁽¹⁾ SEC(92) 2214 final, 28. 11. 1992.

⁽²⁾ Resolution A3 — 0123/93, PV 07 II, 21. 4. 1993.

⁽³⁾ OJ No C 249, 13. 9. 1993.

⁽⁴⁾ White Paper on Growth, Competitiveness and Employment, p. 14.

⁽⁵⁾ COM(93) 256 final, 22. 12. 1993.

⁽⁶⁾ COM(94) 207 final, 3. 6. 1993.

⁽⁷⁾ Resolution A4 — 0022/94, PV 28 II, 24. 10. 1994.

which was adopted on 28 October 1994, the Commission confirmed its undertaking to address a recommendation to the Member States on this matter⁽¹¹⁾.

III. JUSTIFICATION FOR COMMUNITY ACTION

The Commission's consultations in 1993 confirmed that payment periods are an important part of the legal and financial environment of SMEs. Longer periods carry the danger of increasing businesses' cash-flow requirements, jeopardizing their financial equilibrium and leading to heavy administrative costs. Furthermore, payment periods are of some importance to the proper functioning of the internal market, particularly since differences between Member States are perceived as an obstacle to the proper functioning of the internal market and the expansion of intra-Community trade, and in particular to the involvement of SMEs in this trade. It is therefore vital, both for the competitiveness of businesses and for the success of the internal market, that reasonable payment periods should be maintained in the European Union.

SMEs are reluctant to engage in cross-border trade knowing that they will have to cope with longer payment periods, and share the widely-held belief that it is far more difficult to recover debts abroad than in the home country. A recent study⁽¹²⁾ shows that payment periods and delays in payment are often longer for exports than for domestic transactions.

An effective opening-up of public procurement contracts, with greater SME involvement, is hampered by the particularly long payment periods practised by some public authorities and bodies. Business organizations also feel that stiffer competition in the European Union could lead to a snowball effect as regards payment periods and thus ultimately to a worsening of payment discipline which would undermine the financial health of businesses.

There are, it is true, many causes for late payment. Some obstacles, e.g. a debtor's financial problems or complaints regarding the quality or quantity of goods or services, are difficult to avoid. However, steps can be taken to prevent late payment due to a debtor's reluctance to pay or poor management of credit. At European level, inef-

⁽¹¹⁾ COM(94) 435 final, 28. 10. 1994.

⁽¹²⁾ European late payment survey (1994) by intrum justitia.

efficient management and intentional delays account for more than 56 % of late payments for domestic transactions and 64 % of late payments in respect of exports ⁽¹⁾.

A large number of the measures which can be taken to combat delays are of a practical nature. Training and information initiatives, for example, can be used to improve credit management within SMEs. However, such measures are not sufficient to combat intentional delays, which result from the fact that inter-enterprise credit is less costly for the debtor than a bank loan. Legal measures are indispensable in order to rectify this state of affairs and ensure compliance with contractual deadlines.

It is not acceptable to argue that experience in some Member States shows that legal measures cannot help to redress the imbalance in strength between the parties concerned. The fundamental question is whether these measures were sufficiently dissuasive for bad payers. In the Scandinavian countries, which have introduced a coherent set of such measures, adherence to contractual payment periods is best. Moreover, experience in these countries has shown that introducing such measures does not lead to longer contractual payment periods and raises no obstacles to expanding trade.

As the inquiries conducted by the Commission have shown, the inertia of some Member States in respect of bad payers is such that the proper functioning of the internal market is hampered (in particular by penalizing businesses in other Member States), and major differences between national measures have the same effect. The lack of convergence in the Member States' legal, regulatory and administrative provisions as regards payment periods is, in other words, an obstacle to the proper functioning of the internal market. As a result, measures need to be taken to facilitate cross-border trade by establishing common minimum guarantees for all operators in the Community, thereby helping to make the most of the potential benefits of the single market.

IV. COMMENTS ON THE ARTICLES

Article 1 — Objectives

The Commission proposes to proceed by adopting a recommendation, which is the least legally binding way of achieving the desired objective. The recommendation

sets out principles and methods for improving payment periods, and requests the Member States to take the most appropriate measures in accordance with their own legal systems.

From the outset, the Commission looked at both legal and practical measures and reached the conclusion that only a combination of the two would help to improve the situation as regards payments in the Community.

Practically speaking, the consultations confirmed the importance of business training and information schemes, particularly as regards legal matters and the techniques of financial management in SMEs.

As far as the legal framework governing payment periods is concerned, improvements could be made along the following three lines:

— *Greater transparency of contractual relations*

Transparent terms of payment in commercial documents, whereby each partner knows exactly when payment is due and what the consequences of a delay in payment will be, help to prevent late payment. This is particularly important in cross-border transactions, where there is a dearth of 'customary practice' on which to draw.

— *Better-balanced contractual relations*

Many of the organizations consulted place a high premium on the contractual freedom to determine payment periods, but stress that — in the absence of any system for evening out the imbalance between partners — this freedom remains largely theoretical. Imbalances occur, in particular, in relations between large and small businesses, between prime and sub-contractors and between public authorities and private businesses.

— *Stronger dissuasion for bad payers*

The consultations highlighted the fact that businesses attach great importance to adherence to contracts; they consider that the existing legal framework is not sufficiently dissuasive for bad payers and may even, in most of the Member States, work to the latter's financial benefit.

⁽¹⁾ European late payment survey (1994) by *intrum justitia*.

Article 2 — Transparency, information and training, VAT

Paragraph 1 — Transparency

(a) Many payment problems arise because the time limits are badly defined when the contract is negotiated by the commercial partners. Moreover, a large number of transactions (35 %, according to the CBI's 1990 survey) are conducted without a written contract. This is particularly true for SMEs, which in the vast majority of cases do not conclude written contracts. In other cases, the time limits are too vague ('payment within 30 days', for example), the starting point (delivery, invoicing etc.) is not specified and there is no mention on the date from which payment is deemed to have been made (cheque sent or received, debtor's account debited or creditor's account credited). Problems can also arise when the seller's general conditions of sale contradict the purchaser's general conditions of purchase. In order to ensure the minimum and necessary degree of transparency, it is clearly desirable to specify in each contract both the payment period and the precise date by which payment must be made. This would avoid disputes or disagreements over interpretation, which delay payments unnecessarily. France has made such indications on the invoice obligatory, with failure to comply punishable by a fine of FF 100 000 (Law of 31 December 1992).

Since many transactions are conducted without a written contract, it is also necessary to make subsidiary legal provision for a legally applicable payment period in the absence of a written contract. In Denmark, Norway and Sweden, where such provision exists⁽¹⁾, an improvement in payment discipline has been observed.

(b) It is also important to be clear about the financial consequences of late payment from the outset. Vague references to interest on late payment in the general conditions of sale are not always dissuasive enough.

(c) In order to avoid negligence in the procedures for checking goods or services, or spurious complaints made with the aim of delaying payment, it is useful to specify a maximum period following delivery, after which the recipient is deemed to have accepted the goods or services. This is the practice in a number of Member States. Complaints of this nature are frequently made in order to delay the granting of

a writ of execution, particularly in cases where an injunction for payment has been sought.

(d) A 1992 Commission survey on payment periods in public procurement contracts revealed that payment periods differ according to the type of contract concerned (supplies, services, works), the level of administration (central government, local authority, public-law institution, etc.) and the type of payment (advance, account, balance). The starting and finishing points of payment periods are also often left vague.

The EU Directives on public procurement contracts⁽²⁾ stipulate that notices of invitation to tender must indicate the basic arrangements for financing and payment and, by reference to the texts by which they are governed, it is important that this requirement of transparency should be fully met. However, the Member States interpret this provision differently, and payment periods are frequently omitted from invitations to tender and can only be calculated by referring to the texts which govern them. This results in a lack of transparency and makes it difficult for businesses, particularly in other Member States, to fix a price for their bid. In addition, a large number of payments involve amounts below the thresholds laid down in the EU Directives.

In order to strengthen transparency in contractual relations, provision should be made for notices or specifications for public procurement contracts⁽³⁾ to contain precise details of the payment periods and payment deadlines used by the awarding authority. In this way, the obligation of transparency will apply to both private and public operators alike.

Paragraph 2 — Management information and training

Information and training for businesses can go a long way towards improving payment periods. All those involved in business development have a part to play here, particularly professional federations and other organizations. The Economic and Social Committee accorded priority to information and training schemes in its opinion of 30 June 1993.

⁽¹⁾ Where a payment deadline has not been contractually specified, payment is fixed at 30 days after the invoice date or, in the absence of an invoice, at 30 days after the creditor has requested payment.

⁽²⁾ Council Directives 93/36/EEC, 93/37/EEC and 93/38/EEC of 14 June 1993. OJND L 199, 9. 8. 1993.

⁽³⁾ In this context, public procurement contracts are defined in the broad sense of the term (see remarks on Article 6).

Paragraph 3 — Value added tax

Late payment has an adverse effect on businesses' cash flow. These problems can be compounded, particularly for SMEs, by the pre-financing of VAT on transactions for which they have not yet been paid. As things stand, VAT is usually collected before the customer has paid the seller.

The Sixth Council Directive on VAT⁽¹⁾ provides for two types of measure designed to alleviate, for small businesses at least, this problem of pre-financing of VAT by businesses.

- (a) Article 10 (2) of the Sixth Directive on VAT provides for the possibility of deferring payment of VAT until invoices have been paid.

Some Member States apply this provision in order to reduce the accounting requirements to which SMEs are subject and, in doing so, succeed in sparing them from the necessity of pre-financing VAT. In 1987 the United Kingdom, for example, introduced a cash accounting scheme, whose threshold of application has recently been raised to a turnover of £ 350 000 (ECU 445 000), while in Germany a similar measure has been taken for small businesses with a turnover lower than DM 250 000 (ECU 130 000), this threshold being currently under review. France applies the 'règle d'encaissement' (cash-receipts accounting rule) to the services sector, irrespective of the size of business involved. The other Member States should be encouraged to consider introducing such a system, for small businesses at least.

- (b) A further means of lessening the adverse effects of long delays in payment on businesses' cash flow would be to allow VAT returns to be submitted on an annual basis, by small businesses at least. The Member States which do not already provide for this should seriously consider introducing such a measure, which is, moreover, permitted by Article 22 (4) of the Sixth Council Directive on VAT.

Article 3 — Compensation for late payment

Failure to adhere to agreed deadlines is often the result of an imbalance in the relations between the Contracting Parties. The law can help to redress this imbalance by strengthening the means of dissuasion for bad payers. The majority of businesses consider that the existing

legal framework is not dissuasive enough for bad payers. The majority of businesses consider that the existing legal framework is not dissuasive enough for bad payers. On the contrary, in most Member States, slow legal procedures, low interest rates on late payments, etc. mean that bad payers are genuinely better off than good ones.

In order to help solve this problem, measures need to be taken in the following areas:

- (a) Methods of obtaining interest on arrears vary widely from one Member State to another, and this affects the degree to which they can serve as an effective deterrent. More widespread acceptance of automatic payment of interest on arrears, without any special formalities, would be beneficial for businesses in the European Union.

In some Member States, the right to interest has to be recognized by the courts on a case-by-case basis if it has not been expressly provided for in the contract, while in others it depends on a formal demand being sent. The rules governing the point in time at which interest begins to accrue also vary from one Member State to another⁽²⁾, and do not always guarantee adequate compensation in the case of late payment.

It is important that interest should be claimable automatically and independently of the face value of the invoice because, if it is not, a debtor need only pay the face value just before the ruling for the creditor to lose any right to interest. Businesses which regularly pay their customers late would, in this way, run the risk of their creditors taking legal action in respect of the full amount of interest due (depending on the time limits applicable to debts). Some organizations have also suggested that businesses should be obliged to disclose their interest-arrears debts in their annual accounts.

- (b) In addition, in several Member States the level of the interest rates for late payment — generally applicable in the absence of express definition in the contract — bears no relation to actual market rates. This rate of interest should be set in all Member States at a level high enough to dissuade bad payers. It should be at least equal to the commercial rate for overdrafts. Alternatively, it could be set at the

⁽¹⁾ Council Directive 77/388/EEC of 17 May 1977, OJ No L 145, 13. 7. 1977, p. 1.

⁽²⁾ Document SEC(92) 2214 final, III.1.

discount rate plus a certain percentage to reflect the prevailing market rates, as is the case in Denmark and Sweden. In Denmark the statutory rate is the discount rate plus 5 %, while in Sweden it is the discount rate plus 8 %. This means that, in the countries where contractual payment periods are adhered to most strictly, there is no financial advantage attached to borrowing from suppliers rather than from the bank.

- (c) Over and above the cost of interest, late payment also occasions considerable recovery costs in terms of the staff of the business involved, the formalities to be completed, the fees for recovery agencies or lawyers and, of course, the legal costs.

Practice as regards the reimbursement of these costs varies widely from one Member State to another.

In some Member States the courts do not allow the granting of damages as well as interest, in others the legal costs (including lawyers' fees) of successful parties in litigation are not always (or adequately) reimbursed, and in others the courts do not award compensation for the administrative costs of recovery.

In Denmark, Norway and Sweden, there is provision for fixed amounts to cover the costs incurred by creditors as a result of late payments. In Denmark and Norway the amounts vary according to the value of the debt, while in Sweden specific amounts have to be paid at each stage of the debt-collection procedure. The debt-collection agencies generally charge between 5 % and 8 % of the invoice value for their services, which are provided before legal action is taken ⁽¹⁷⁾.

There is an efficient system of reimbursement of administrative costs in Denmark, Germany, Sweden and Norway, where payment practices are among the best. Studies have shown that there is a link between the short payment periods in some Member States and the efficiency of their legal systems.

Article 4 — Redress procedures

The existence of penalties for late payment does not act as an effective deterrent unless it is backed up by simple, rapid and inexpensive redress procedures via which disputes can be settled and the creditor can obtain fair compensation.

⁽¹⁷⁾ Legal proceedings will generate additional costs for the creditor. In order to compensate creditors for legal costs and lawyer's fees, a very small number of countries provide for the reimbursement of such costs by the unsuccessful litigant.

Apart from procedures not involving legal proceedings, the main procedures currently available for obtaining rapid judicial decisions in the Member States are the simplified procedures for 'small claims' and the procedures involving injunctions to pay.

- (a) Despite the operational improvements, legal proceedings are inevitably fairly formal and the courts are so busy that claims take a long time to settle. Businesses therefore frequently prefer to write off a debt rather than spend time and money on litigation.

For this reason 'extra-judicial' procedures, in particular conciliation and mediation, should be encouraged.

- (b) Simplified procedures tend to be conducted in local courts (county court, Amtsgericht, etc.), do not generally require the presence of a bailiff or lawyer (which keeps the cost down) and tend to be fairly informal. The judge will often try to reconcile the parties before embarking on any judicial procedure.

The main limiting factor in disputes between businesses is the ceiling on the value of the claim. Ceilings vary between ECU 227 (in Greece), ECU 5,121 (in Germany) and, in a single case, ECU 66,836 (in Denmark, where payment discipline is very good) ⁽¹⁸⁾.

These procedures are therefore frequently unsuitable for disputes between businesses.

They are also too formal in some Member States, where, for example, the services of a lawyer are required.

Finally, shortcomings in enforcing rulings have been reported in some Member States (United Kingdom).

- (c) The payment injunction procedures which exist in some Member States are based on an application to the court by the creditor. The court then reports the claim to the debtor, who has the right to contest the

⁽¹⁸⁾ The ecu conversion is based on the conventional rate applied by the Commission in June 1993.

claim within a given period. If the claim is not contested, there is a judgement by default and the creditor is granted a writ of execution.

In Germany, the '*Mahnverfahren*' (demand procedure) can be used for any dispute involving the payment of money, irrespective of the amount concerned. This procedure can also be conducted via electronic data transmission, so that the courts are able to issue writs of execution without the intervention of a judge and with a minimum of delay. If the claim is contested, the standard procedure before a judge is followed, but the debtor has to pay all the creditor's legal costs and lawyers' fees if his contestation is disallowed.

The French injunction procedure is more formal than the German one, although the timescale (approximately three months) is comparable. While it works reasonably well for small claims, it would appear to be less effective for larger ones, which are subject to systematic appeal because the debtor is not obliged to bear the costs arising from the prolongation of the procedure (see Article 3.c).

Belgium's summary injunction procedure is limited in scope, since it requires a hearing before a justice of the peace (claims lower than Bfrs 75 000).

The sole condition is that there must be written proof of the contract. A bailiff is not required. The procedure, which is started unilaterally when the creditor applies to the judge, may lead to a judgement by default. It is not used a great deal, particularly because it is obligatory to engage the services of a lawyer.

In Italy, the injunction procedure can be used to obtain a writ of execution within 60 days, provided the claim is not contested by the debtor. The limitations of the procedure are the dissuasive 3 % tax which the creditor has to pay to obtain the writ and the necessity of engaging the services of a lawyer. Moreover, injunctions cannot be served abroad, so that this procedure is of no use for international contracts.

The Commission feels that it is worth making the simplified procedures and the injunction procedures easier to use and introducing them in Member States which do not have them.

Article 5 — Cross-border trade

Further difficulties often arise in addition to the problems of payment periods when the trade is between different Member States. To prevent these difficulties from hindering the growth in intra-Community trade, and in particular the involvement of SMEs in this trade, the necessary measures must be taken to remove these obstacles to the complete success of the Internal Market.

- (a) Some of these obstacles are linked to the lack of information and training in businesses on the legislation, procedures and practices in the other Member States regarding payment periods and late payment. Initiatives aimed at better management of payment periods in cross-border trade should be further developed.

Some of the difficulties which are specific to international trade arise from the delays by banks in transferring payments, which are additional to the delays caused by customers. The Commission has recently adopted a proposal for a Directive⁽¹⁾ on cross-border credit transfers, which should solve the main problems regarding this matter. While the problem of banking delays is distinct from that of delays between businesses, they must be dealt with together to achieve rapid, effective and inexpensive payment procedures for intra-Community trade operations. As regards businesses, better management of their foreign currency accounts and better invoice layout, for example, could supplement the measures to ease and speed up cross-border payments. In particular, as suggested during the consultations, it is in the businesses' interests to consider whether issuing invoices in ecus and managing an ecu account, rather than a multiplicity of currencies, would simplify and reduce the costs of obtaining cross-border debts.

- (b) As regards recovery procedures, there are specific problems in some Member States in obtaining a writ of execution for cross-border debts which are not in dispute. A good practice in this field is the German '*Mahnverfahren*' system, which can be brought into play for foreign debtors (Hague Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters) and foreigners can use it for German debtors. There is a specialized court in Berlin to deal with this.

⁽¹⁾ COM(94) 436 final.

- (c) There are also specific difficulties in seeking legal redress when the dispute involves parties from different Member States. The difficulties arise particularly in executing judgments made in a different Member State.

As regards consumers, the Commission has adopted a Green Paper on access of consumers to justice and the settlement of consumer disputes in the Single Market⁽²¹⁾. Some structural defects in the legal procedures have exactly the same effects on consumers and businesses. In following up this Green Paper, the Commission will pay particular attention to this aspect.

Article 6 — Public procurement contracts

Several factors argue in favour of additional solutions for public procurement contracts. The general solutions (see Articles 1 to 5) are based largely on the principle of the contractual freedom of the parties concerned. However, this principle cannot be directly transposed into the field of public procurement contracts because of the economic imbalance between the partners, the impossibility of genuine negotiation with a public authority and the public character of one of the contracting parties. In this context, it is advisable to define public procurement contracts in the broad sense of the term, i.e. contracts awarded by government awarding authorities (including regional and local bodies, local authorities and public-law bodies) and public-law enterprises, as defined in Directive 93/38/EEC⁽²²⁾.

- (a) It is important to make civil servants and government employees aware of the importance of their payment practices for the economy as a whole. Training, in particular in the form of seminars and guidance circulars, would be a useful medium via which to promote such awareness.

Greater importance should be attached to the speed of reception and payment procedures as an indicator of sound management. 'Best practices' could be disseminated and used to improve the public image of certain public authorities. A number of cities in France have staged public relations campaigns to highlight their short payment periods and attract businesses.

- (b) Since the measures determining the payment periods applicable to public authorities, their legal nature, the periods themselves and the adherence they command vary widely across the various Member States, the Commission prefers to present the Member States with a general recommendation designed to improve payment practices rather than issue detailed instructions on how to proceed.

It therefore invites the Member States to examine the periods which their public authorities apply to businesses in such areas as tax debts (reimbursements) and payment for public procurement contracts.

However, as regards the periods themselves, the Commission feels that it is necessary, in view of Community policy on the opening up of public procurement contracts, to ensure that there is a maximum payment period applicable throughout the Union. It suggests that this should be 60 days. Member States which already practise shorter payment periods should not, of course, allow this recommendation to lead to a deterioration.

It is important that the Member States should clarify — in legal texts and other reference documents used by government authorities — the starting and finishing points of payment periods (see c).

- (c) It is widely felt that inefficient management is one of the main causes of late payment by public authorities. The formalities are endless and complex and the budget-management techniques employed are not always designed to encourage speedy payment, particularly if there are no financial incentives to promote adherence to deadlines. The terms of acceptance and payment are not always clearly defined and the time limits for the procedures preceding the payment phase are often not made explicit. In the construction sector, in particular, acceptance procedures come in for frequent criticism.

The principles laid down in the United States of America's Prompt Payment Act illustrate one possible approach. This law provides for a period of seven days for acknowledgement of the acceptance of goods or services, spells out the conditions under which an invoice can be deemed to have been received by the authorities, fixes a seven-day period after receipt of the invoice in which the supplier may be notified of any irregularities, and stipulates that payment must be made within 30 days of receiving the invoice.

⁽²¹⁾ COM(93) 576 final, 17. 11. 1993.

⁽²²⁾ Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ No L 199, 9. 8. 1993, p. 84.

- (d) In the interests of transparency *vis-à-vis* potential suppliers, it is important that checks be made on the payment periods practised by public authorities and

that the performance of the various agencies in this regard be known.

Annual publication of these performances is already the rule in some Member States (in France and the United Kingdom, for example).

The Commission, which has not always escaped criticism as regards its own payment procedures, has already taken the necessary steps to improve adherence to its payment period of 60 days. In addition, it carries out regular checks on the periods applied by its departments. The last check showed that the average payment period had improved considerably.

- (e) It is still exceptional for public authorities to pay interest if they fail to adhere to payment periods. Some Member States in fact advise their public authorities not to pay interest, but in most cases businesses forego the interest they are owed for fear of being excluded from future contracts.

Under these circumstances, there is no financial incentive for public authorities to adhere to the agreed payment periods.

The best way of coping with this problem is to generate across-the-board acceptance of the principle — already applied by some Member States (France and Belgium) and in the United States of America

(Prompt Payment Act) — that interest on arrears will automatically be paid by public authorities.

- (f) The Commission considers that the Member States should shoulder some responsibility for payments to subcontractors involved in public procurement contracts. As things stand, almost half the Member States have no provisions in this regard. Based on experience in some Member States, two types of solution could be proposed, namely:

- the awarding authority imposing terms on which the successful bidder must pay the subcontractors and checking on those terms in the course of performance of the contract,
- the awarding authority paying the subcontractors directly.

Article 7 — Report

The Commission considers that the impact of its recommendation should be evaluated. Accordingly, it intends to examine the impact of this recommendation on rules and practices in the Member States in three years' time. The Member States are therefore requested to submit a report on all aspects covered by the recommendation before 31 December 1997. On the basis of this evaluation, the Commission may decide to propose further measures in respect of certain aspects of the recommendation.

RECOMMENDATION ON PAYMENT PERIODS

1. OBJECTIVES

2. TRANSPARENCY, INFORMATION AND TRAINING, VAT

Transparency

- (a) payment periods in commercial contracts
- (b) consequences of delay in payment
- (c) period for making any objections
- (d) payment periods in public contracts

Management information and training

- (a) drafting of commercial documents and contracts
- (b) payment practices and recovery procedures
- (c) management tools + EDI
- (d) techniques of debt-collection

Alleviating the fiscal effects of delays for small enterprises

- (a) defer payment of VAT until invoice settled
 - (b) defer regular VAT returns
-

3. COMPENSATION FOR LATE PAYMENT

- (a) right to interest on arrears
 - (b) level of statutory interest rate applicable in the absence of any contractual rate
 - (c) other compensation
-

4. REDRESS PROCEDURES

- (a) extra-judicial procedures
 - (b) simplified procedures for limited sums
 - (c) accelerated recovery procedures
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5. CROSS-BORDER TRADE

- (a) information and training
 - (b) debts not in dispute
 - (c) resolution of law suits
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6. PUBLIC CONTRACTS

- (a) awareness-raising measures
 - (b) maximum payment period
 - (c) administrative procedures
 - (d) checks on payment periods
 - (e) right to interest on arrears
 - (f) procedures to help subcontractors
-