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AL SERVIZIO DI FACTORING E IMPRESE: 35 ANNI INSIEME

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OGGETTO: Position paper EUF - Call for evidence for the revision of the Late Payment Directive

Si trasmette agli Associati il position paper in oggetto, che riporta le osservazioni dell'EU Federation for the Factoring and Commercial Finance Industry in merito alla "call for evidence" della Commissione Europea preliminare alla revisione della direttiva contro i ritardi di pagamento.

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17 March 2023

Re.: Call for evidence for the revision of the Late Payment Directive (Ref. Ares(2023)219034 - 12/01/2023)

Dear Madam or Sir,

The **EU Federation for the Factoring and Commercial Finance Industry (EUF)** is the industry body and voice for the European factoring industry (EU transparency register no. 39275004756-35). The EUF's members and partners consist of 13 national factoring and commercial finance associations (representing in the EU [in alphabetic order] Austria, Belgium, Croatia, the Czech Republic, Denmark, France, Germany, Greece, Italy, the Netherlands, Poland, Portugal and Spain) as well as the international factoring association FCI and the UK and Norway as partners.

It is in its role as the representative body of the European factoring and commercial finance industry that the **EUF wishes to provide feedback for the revision of the Late Payment Directive 2011/7/EU** (hereinafter: LPD).

1. A short overview of factoring and commercial finance in the EU

Factoring and commercial finance (FCF) are generic terms for a range of asset based finance services which include factoring, invoice discounting, international factoring, supplier finance/reverse factoring and asset based lending. Hereinafter, we will generically use the term factoring for ease of reference.

Due to differences between national laws, especially in civil or contract law, and also because of diverse requirements and wishes of the factoring clients, there are many variations on each of these product sets and the precise nomenclature varies from market to market, but all exist to **provide working capital funding and financing solutions to businesses/clients, particularly SMEs, based upon the debt invoicing or receivables created by the client**. With a factoring solution and based on a contract entered into by the factoring company and its client, the factoring company agrees to pay an agreed percentage of approved debts/receivables as soon as the receivables are assigned or (in some jurisdictions) pledged to it by its client. If credit protection is part of the factoring agreement, it is referred to as "non-recourse" factoring, while a factoring agreement where the credit risk on the debtor remains with the seller is called "with-recourse" factoring. The factoring company will often also undertake all credit management and collections work.

Factoring is simply a unique blend of services designed to ease the traditional problems of selling on open account terms, including issues relating to late payments and mainly aimed towards SMEs.

In 2021, the **factoring industry in the EU provided over €274 billion of working capital financing to almost 265,000 businesses**. As repeatedly shown by EUF research and surveys¹, **factoring clients are mostly SMEs and principally businesses in the manufacturing, services and distribution sectors**.

The amount of working capital provided by the European factoring industry has to be seen in relation to the total factoring turnover, which in 2021 was over € 2 trillion. In relation to the total GDP of Europe, the factoring industry turnover represented more than 11% of EU GDP in 2021.

Factoring is not financing an asset, as banking credit is. Factoring is the financing of suppliers to the real economy directly against their commercial invoices, providing liquidity against these invoices through an outright purchase

¹ cf. the EUF White Papers of 2016 and 2019 on Factoring and Commercial Finance at <https://euf.eu.com/what-is-euf/whitepaper-factoring-and-commercial-finance.html>

of them. The suppliers to the real economy benefit because they receive 90% or more of an invoice value within a day or two from shipment instead of waiting for the contractually agreed period of time to pass in order to receive payment by their end customers, or having to deal with the end customers' late payments. This differs from traditional banking credit, which is the provision of debt capital to finance general working capital or long term assets to a business by way of a loan.

2. Factoring and late payments

Factoring is part of a set of solutions to the problems and negative consequences which businesses (especially SMEs) face due to late payments of their contractual partners, be it in B2B or in B2G relations: Due to the aforementioned quick provision of liquidity or working capital funding through factoring, businesses which use factoring (i.e. factoring clients/sellers) can avoid the negative effects of overly long payments terms and late payments. Moreover, EUF statistical data from the last years show that with 53% (2020) and 51% (2021) of the total factoring turnover respectively, non-recourse factoring is predominantly used – this means that in addition to the aforementioned provision of liquidity, the factoring clients very often also receive credit protection against the late payment or default of their debtors.

the evidence that factoring is part of the solution to issues caused by late payments has been supported by inter alia the European Parliament's [resolution of 17 January 2019](#) on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions, in which the European Parliament in its statements on remedial measures to the problem of late payments also urged the Commission and the Member States to inter alia consider supporting measures for factoring and moreover pointed to supply chain financing and factoring as innovative types of payment and financing which allow the creditor to be paid in real time as soon as the invoice is issued.

In particular, a strong position has been taken regarding late payments by public authorities and the need to foster the use of factoring as a solution to the consequences of the delays, on which the Parliament:

*“ [...] Points out that, despite the fact that the Late Payment Directive was adopted in February 2011, and despite the new mechanisms for the protection of entrepreneurs that some Member States have recently put in place, thousands of SMEs and start-ups across Europe go bankrupt every year while waiting for their invoices to be paid, including by national public authorities; **urges the Commission and the Member States to consider** mandatory forms of adequate compensation, such as offsetting, **and other supporting measures, such as, for example, guarantee funds for SMEs and factoring** for companies owed money by a public authority, so that they are not forced to go bankrupt because of it; [...]”*

*12. Notes with great concern the situation in some Member States, where public authorities have greatly delayed payments for goods and/or services supplied to them by undertakings (with the health sector being one of the worst affected), **included non-assignment clauses in supply contracts** and prevented (through law) suppliers from enforcing their claims in courts, thereby leading these businesses into extreme financial difficulties or even bankruptcy;*

*[...] expects, therefore, **a sharp increase in electronic invoicing and the gradual replacement of traditional types of payment with innovative types (e.g. supply chain financing, factoring, etc.)**, so that the creditor can be paid in real time as soon as the invoice is issued [...].”*

This view is also supported by the “[Study on Supply Chain Finance](#)” as published by the European Commission in 2020 (hereinafter: SCF Study 2020) and by the “[Study on Building a responsible payment culture in the EU: Improving the effectiveness of the Late Payment Directive \(2011/7/EU\)](#)” which was prepared for the European Commission and published in July 2022 (hereinafter: 2022 Study): Amongst its key results, the 2022 Study mentions that the issue of “late payments and excessively long payment terms [which] negatively affect the

financial conditions of businesses ... can be mitigated with use of selected financial instruments, namely factoring and invoice trading”.

The EUF therefore welcomes that the Commission in this Call for evidence for the revision of the LPD also explicitly mentions the ban on assignment among “unfair practices” and suggests that the update Directive should indeed consider overcoming obstacles and hindrances to factoring as a means to better achieve the LPD’s obligations and ultimate aims.

3. EUF Comments on problems the LPD revision aims to tackle

Although the relevant literature has shown some effects in alleviating the financial constraints of the businesses in EU, the **LPD has not yet led to a significant decrease of late payments in B2B or G2B relations, especially not in the public sector or with public administration (PA) debtors**. Even though the aforementioned 2022 Study mentions that there are signs of improvement, the quoted **decrease in percentages of EU businesses which have experienced problems with payment delays is rather slight** considering that in a substantial number of EU member states, more than half of the businesses still report problems with late payments.

3.1 Ensure effective compliance instead of introducing overall stricter maximum payment terms

The **problem of late payments is still particularly persistent in B2G relations with PA debtors**: Data from Intrum Justitia shows that the **average actual payment time for the public sector in Europe in 2021 was 62 days** (cf. Intrum Justitia’s European Payment Report 2021), so despite the rules and standards set by the LPD and implemented by the EU member states around a decade ago, PA debtors are still paying late.

In at least 17 of the 27 EU member states, Intrum Justitia’s data shows that the **average actual payment time in 2021 for the public sector was equal to or over 60 days, i.e. at least twice as long as the maximum period of payment foreseen for PA in the LPD**. In fact, the **LPD’s PA-related limitation of periods of payment to 30 days (extension to 60 days is foreseen only for very few cases) was not complied with by nearly all EU member state in 2021**.

In contrast, the average actual payment time in Europe for B2B relationships amounted to 52 days on average, with the EU member states’ individual average actual payment times varying between 50 and 58 days, hence staying under the LPD’s 60 days’ general limitation to periods of payment in B2B-relationships. Against the background of late payments still being a serious issue for many businesses, this on average compliance with the LPD’s standards for payment periods in B2B-relationships and the non-compliance with PA-related maximum payment period shows that the problem of late payments needs to be tackled from a different angle than through overall fixed and stricter maximum payment periods.

The EUF wishes to point out that while limiting or capping the duration of payment terms in B2B- and B2G-transactions may be a theoretically adequate means to combat late payments, such **limits and caps on payment periods will in practice hardly deter creditors from actually paying late**, also irrespective of whether certain payment terms can be considered unfairly long or are imposed on weaker or smaller businesses. **Therefore, the EUF does not consider it necessary to review the LPD’s rules to tighten limits on or introduce maximum payment terms. Rather, actual practical measures to more effectively and easily enforce compliance with already existing (limited/maximum) payments terms would be more relevant than fixing (new/stricter) maximum payment terms by law².**

Such practical measures can **e.g. relate to the enforcement of debts and in particular late payment interest (including an inflationary adjusted and raised fixed compensation sum for recovery costs) through means**

² In June 2018, the EU Commission published a study on [“Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour”](#). This study mentions and ultimately presupposes appropriate enforcement for any strict(-er) payment terms to be effective.

for alternate dispute resolution which should also be easily accessible and beneficial for SMEs in particular.

Such measures can also relate to increasing the financial risk for late paying debtors by e.g. introducing an economic incentive to pay the debt in question including through late payment interest and the fixed compensation sum for recovery costs where the matter has not been taken to court yet; as soon as court proceedings are pending, a significantly higher rate of late payment interests could apply. For creditors, the question whether they should take legal action against late-paying debtors is often a matter of "fear factors", in particular enforcement costs and (legal and business relations) risk outweighing the (economically) positive effects of receiving payment on a debt. Making a **clear financial or economic distinction between late payment interest for out of and in court collection proceedings could well incentivise some debtors to pay in a more timely manner and also save creditors from having to initiate costly, cumbersome and protracted court proceedings and hence help them overcome certain "fear factors"**.

In the perspective of creating a culture of prompt payments and a legal environment that incentivize the debtors to pay interest for late payments and the compensation for recovery costs automatically and without request from the supplier, **the EUF also suggests to consider providing that when the debtor pays the due invoice, such interest and costs, if not paid together with the capital, start accruing legal interests on the amount due at the date of payment.**

In this context, the EUF wishes to reiterate an argument that we already put forward in a position paper in 2009, issued during the legislative process of the LPD: Problems such as the enforcement of judgements and titles, especially in cross border cases (in particular with regard to the different enforcement costs amongst Member States), remain one of the main reasons why creditors are deterred from enforcing their rights with respect to late payments. A **European harmonization of enforcement costs, at least in cross-border cases, could be another step towards reducing the aforementioned "fear factors"**.

3.2 Support for innovative forms of financing such as factoring

Innovative forms of financing like factoring offer a solution to the late payments problem many businesses (especially SMEs) have. Therefore, these forms of financing **should be supported in order to hereby combat either late payments as such or at least the negative effects late payments have on businesses.**

The SCF Study 2020 enumerates certain barriers to the growth and cross-border development of factoring, including bans on assignments. The EUF is of the opinion that **limiting or even prohibiting bans on assignments and similarly hampering contractual clauses** (e.g. clauses used by suppliers which require their clients to inform these suppliers of any assignments or even ask for their previous permission) **that make factoring difficult or even impossible would be an appropriate means of support.** Therefore, the **EUF strongly advocates for and supports the suggestion to introduce such limits or even prohibitions of bans on assignments** as they would create more legal certainty and decrease risks for both factoring providers and factoring clients and hence increase the availability and use of factoring in the EU.

This is backed up by statistical data on the development of factoring turnover before and after the introduction of a change to the German Commercial Code (HGB) in 1994 which stated that bans on assignments agreed on in B2B-relationships had no effect on the validity of the assignment and hence provided a solution at least in part to the issue of bans and limitations on assignments: After the introduction of § 354a HGB, the total factoring turnover showed an overall continuous and also stronger increase from year to year than in the previous years: As an example, the total factoring turnover in Germany went from around 3.3 billion Euro in 1980 to just over 9.9 billion in 1994 to for the first time crossing into 3-digit billion Euro numbers in 2008 (cf. the data collated by Deutscher Factoring-Verband e.V. for the corresponding years).

The case for such a step has been recognised more recently in the UK, where legislation was introduced in 2018 to prohibit the ban on assignment clauses in debtors' terms of sales. It should be noted, however, that the focus of the debate around poor payment practices in the UK has been predominantly around those seen in B2B

relationships, rather than B2G relationships, with public bodies in the UK required to operate under relatively strict targets already. As a consequence, the regulations described below are focused on B2B relationships.

The [Business Contract Terms \(Assignment of Receivables\) Regulations 2018](#), made under the enabling [Small Business, Enterprise and Employment Act 2015](#), were introduced to nullify ban on assignment clauses in order to enable more small and medium sized businesses to use their accounts receivable as collateral for invoice finance (the general term used for factoring in the UK) and in doing so increase their overall access to finance. Crucially, it is smaller businesses that are also disproportionately impacted by poor payment practices and, as noted elsewhere in this response, factoring/invoice finance can also play an important role in mitigating the risks caused by poor payment practices for smaller firms.

There are some significant challenges in providing a detailed analysis of the beneficial impact of the changes in the UK. Primarily these are because it was anticipated that the impact of the measures would build over time from the point of introduction in 2018, however the COVID-19 pandemic, the subsequent lock-downs and the suppression of economic activity that resulted, along with some specific features of the UK government's lending support schemes, contributed to some temporary but significant distortions to the commercial finance market.

As a consequence, it is difficult to provide a 'like-for-like' comparison however it should be noted that total IF/ABL ('Invoice Finance and Asset-Based Lending'; the descriptors used by UK Finance, the industry's representative body in the UK) was circa £288 billion for 2017, the last full year before the introduction of the changes. It is expected to exceed £300 billion for the first time in 2022, which whilst not without economic challenges, will be the first full year clear of lock-downs.

These examples clearly show the positive effects limitations to bans on assignments can have on the use of factoring. Other EU member states such as the Netherlands are considering introducing limits to or prohibitions of bans on assignments.

Outside of the EU, bans on assignment have been tackled in the US, in Australia and Canada (Ontario).

Under the US Uniform Commercial Code (Article 9-406), ban on assignments clauses and the requirement for the debtor's consent for assignment is invalidated.

In Australia, the Personal Property Securities Act 2009 nullifies ban on assignment clauses.

In Ontario, the Personal Property Security Act nullifies a ban on assignment.

Moreover, an override of bans on assignments and anti-assignment clauses are also contained in different international legal instruments that relate specifically to factoring, namely in the [Unidroit Convention on International Factoring](#) of 1988 and also in the [Unidroit Model Law on Factoring](#), which is likely to be adopted later this year. Both of these international legal instruments, that can be considered as benchmarks for the international best practices in regulating the transfer of receivables, ultimately state that the transfer or assignment of a receivable is effective notwithstanding any agreement between the debtor and a transferor which prohibits or limits in any way a transferor's right to assign or otherwise transfer the receivable.

Bearing in mind these national and international examples, EUF suggests that the European Commission considers, when revising the Late Payments Directive and in adherence with the position of the European Parliament:

- i. urging Member States to:
 - a. **override bans on assignments in order to support and facilitate factoring as a means of easing the burden of late payments especially on SMEs;**
 - b. **remove any domestic laws, regulations or contractual practices by the public sector that conflict with the aims of the Directive, such as clauses or laws requiring the debtor's consent for the assignment or allowing the debtor to refuse an assignment, and**

- ii. **implementing a “black list” of unfair practices, among which we strongly advise to list, at least, unduly limiting and hindering clauses introducing bans on assignment or the need for the debtor’s consent for the assignment. harmonizing and simplifying the formal requirements for a valid transfer or assignment of receivables on EU-level**, especially with regard to B2G transactions (in certain Member States, such as Italy, assignments of receivables against PA debtors are complicated and hence time-consuming and costly).

The Commission may also wish to clarify that the LPD is aimed to create a legal framework that dis-incentivizes late payments practices in trade receivables, with the aim to reach a better balance of otherwise “unfair” supplier-buyer relationships, while it is not conceived as, nor should it be interpreted as, a reason to necessarily equate mere late payments with the buyer’s insolvency, the first being a behaviour of the buyer and the latter being a condition of the buyer. The experience of the factoring companies, indeed, explains that most of the past due invoices are actually paid sooner or later. Actual losses in trade receivables are normally lower than losses in banking, and often follow such banking losses rather than anticipating them since, even in the case of financial difficulties, the buyer needs the supplies to keep flowing in to continue its business. A misconception of the purpose of the LPD by other European authorities, especially in the context of prudential regulation, could give way to unnecessarily penalizing prudential policies on purchase receivables.

3.3 Introducing tools for monitoring and enforcing LPD compliance

The **EUF also supports tackling the lack of tools for monitoring and enforcing compliance in the revision of the LPD**, as mentioned in the call for evidence. With regard to enforcing compliance, the **EUF advocates for strengthening the enforcement of existing rules rather than tightening the rules as such** (cf. above).

The **introduction of monitoring tools such as the collection and publication of data on average payment periods and payment performance by a neutral third party (i.e. not by the affected companies themselves) could also help foster a culture of prompt payment and be used as a basis for possible future legislative measures, customized to tackle shortcomings that may be detected in specific areas** such as e.g. certain industries where late payments are more frequent³. As an example, tailor-made measures relating to payment terms with a view to reducing late payments in a certain sector/industry have already been adopted business-to-business relationships in the agricultural and food supply chain (cf. directive (EU) 2019/633). **Given the currently available data and practical experiences, the EUF sees no need to expand or generalize existing customized measures to all B2B or B2G relationships**; neither is there currently a need to introduce new customized measures. Rather, it is the understanding of the EUF that there are plans to undertake such **data collection through a new Late Payments Observatory**, which we support as a good idea, also in the interest of avoiding unnecessary new administrative or reporting requirements for businesses.

4. Conclusion

Unfortunately, the Late Payments Directive of 2011 has not yet led to a significant decrease of late payments in B2B or G2B relations, especially not in the public sector or with public administration (PA) debtors. The analysis of average actual payment times in B2B and B2G relationships shows that the problem of late payments needs to be tackled from a different angle than through overall fixed and stricter maximum payment periods. **The EUF rejects the introduction of new and stricter limits and caps on payment periods as these will in practice hardly deter creditors from actually paying late.**

Rather, the **EUF supports introducing actual practical measures to more effectively and easily enforce compliance with already existing (limited/maximum) payments terms**. Such practical measures can e.g.

³ In the aforementioned study on “Business-to-business transactions: a comparative analysis of legal measures vs. soft-law instruments for improving payment behaviour” of June 2018, the findings include late payments being more frequent in specific sectors (e.g. in the construction or food and drinks sector) than others and that access to information on payment practices of business partners can help businesses in their choice of reliable business partners.

relate to the **enforcement of debts and in particular late payment interest (including an inflationary adjusted and raised fixed compensation sum for recovery costs) through means for alternate dispute resolution** which should also be easily accessible and beneficial for SMEs in particular, or they can entail a **clear financial or economic distinction between late payment interests for out of and in court collection proceedings** in order to incentivise more timely payments, and a **European harmonization of enforcement costs, particularly in cross-border cases**.

As shown by different studies over the last years, factoring is part of a set of solutions to the problems and negative consequences which businesses (especially SMEs) face due to late payments of their contractual partners, be it in B2B or in B2G relations. **The EUF therefore strongly advocates for the removal of the obstacles and hindrances to the uptake of factoring and invoice finance, such as bans on assignment and limiting clauses or laws allowing the debtor to refuse the assignment or conditioning the latter to the debtor's consent, in particular when the debtor is a public authority.**

The EUF also believes that a "blacklist" of unfair practices would be useful, including the above-mentioned clauses which unduly limit and hinder the use of factoring and similar forms of financing.

Moreover, **harmonizing and simplifying the formal requirements for a valid transfer or assignment of receivables on EU-level** could also support the more widespread use of factoring, especially with regard to B2G transactions where late payments are a key issue for SME business partners.

Last but not least, the **introduction of monitoring tools such as the collection and publication of data on average payment periods and payment performance** could also help foster a culture of prompt payment and be used as a basis for possible future legislative measures, customized to tackle shortcomings that may be detected in specific areas such as e.g. certain industries where late payments are more frequent.

Please do not hesitate to contact the EUF should you have any queries regarding the aforementioned viewpoints or require more information on the factoring industry in Europe.

With kind regards

Fausto Galmarini
Chair
EUF