

Comitato Esecutivo del 24 ottobre 2023

Punto 5 all' ODG

Stato di avanzamento delle attività associative sulla regolamentazione del factoring

ALLEGATO 5.2

Revisione della Direttiva contro i ritardi di pagamento

**ASSIFACT**

Associazione Italiana per il Factoring

Stato di avanzamento delle attività associative sulla regolamentazione del factoring
ALLEGATO 5.2

Comitato Esecutivo del 24 ottobre 2023

Punto 5 all'ODG

AL SERVIZIO DI FACTORING E IMPRESE: 35 ANNI INSIEME

Il Presidente

Milano, 19 ottobre 2023

Ns. Rif.: 249/23/VD

Egregio
Dott. Antonio PATUELLI
Presidente
ABI - ASSOCIAZIONE BANCARIA
ITALIANA
Piazza del Gesù, 49
00186 ROMA

OGGETTO: Revisione della Direttiva contro i ritardi di pagamento

Illustre Presidente

Il 12 settembre u.s. la Commissione Europea ha emanato un pacchetto di misure tese a fornire supporto alle piccole e medie imprese ("SME Relief Package"), nell'ambito del quale è inclusa una revisione della Direttiva contro i ritardi di pagamento finalizzata a fornire alle PMI un quadro normativo moderno e robusto per ridurre gli impatti dei pagamenti tardivi sui flussi di cassa di queste ultime, attraverso l'imposizione di un limite ai termini contrattuali di pagamento nelle transazioni fra imprese e fra imprese e pubblica amministrazione e l'introduzione di nuovi strumenti di recupero del credito. Tali previsioni confluirebbero, secondo la proposta della Commissione, in un Regolamento, direttamente applicabile senza la necessità di un recepimento nell'ordinamento nazionale (diversamente quindi dalla precedente Direttiva).

In tal modo la Commissione ritiene di poter migliorare i comportamenti di pagamento di pubbliche amministrazioni, grandi imprese e PMI, proteggendo queste ultime dagli effetti negativi dei ritardi di pagamento.

Questa Associazione ha esaminato il testo della proposta di Regolamento e, in questa prima approssimazione, ritiene utile condividere con codesta Associazione le proprie preoccupazioni e riflessioni in merito, in particolare, alle previsioni di cui all'art. 3 che introducono un limite massimo di 30 giorni ai termini di pagamento contrattuali sia nelle transazioni commerciali fra imprese sia in quelle in cui l'acquirente è una pubblica amministrazione.

In linea di principio, si ritiene che la proposta della Commissione presenti talune gravi criticità.

In primo luogo, si rileva come la scelta di limitare la libertà contrattuale in merito ai termini di pagamento appaia più come una misura finalizzata a comprimere i tempi nominali di pagamento (ovvero i giorni fra l'emissione della fattura e la scadenza) piuttosto che a ridurre i ritardi di pagamento (ovvero i giorni fra la scadenza e il pagamento). Dal punto di vista concettuale, tale imposizione appare quindi non correlata agli obiettivi dichiarati della proposta e sproporzionata nella ristrettezza dei termini massimi. Giova inoltre ricordare che nel settore della pubblica amministrazione, in cui un simile limite era già stato imposto dalla Direttiva attualmente in vigore, i tempi di pagamento risultano ancora oggi superiori, in media, al limite massimo di 60 giorni in tutti i Paesi europei (fonte: Intrum Justitia), sollevando dubbi sull'effettiva efficacia di tali misure.



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In secondo luogo, si richiama il fatto che, in tal modo, non solo verrebbe lesa la libertà contrattuale delle imprese, ma queste ultime sarebbero inoltre private di un'importante leva per lo sviluppo del fatturato, ovvero la politica di credito commerciale, discriminando la componente sana della filiera per la quale dilazioni più ampie sono sostenibili e gradite da entrambe le parti.

Pertanto, si sottolinea come i tempi di pagamenti all'interno di una filiera non rappresentino soltanto l'esito di una negoziazione commerciale fra le parti, ma sono anche e soprattutto espressione e conseguenza dei cicli monetari delle imprese che la compongono, i quali a loro volta dipendono da fattori non negoziali come, ad esempio, la durata del ciclo tecnico e la rotazione del magazzino. La proposta della Commissione sembra quindi scontare una visione eccessivamente ottimistica, secondo cui accelerando i termini di pagamento si otterrebbe automaticamente la disponibilità di fondi per pagare i fornitori.

Occorre infine sottolineare che una siffatta normativa potrebbe potenzialmente generare, in assenza di modifiche dei comportamenti delle imprese, un ulteriore, significativo ed ingiustificato incremento delle esposizioni scadute deteriorate e dell'impatto del calendar provisioning del sistema.

Una possibile soluzione alle suddette problematiche risiederebbe nel lasciare libertà alle imprese di decidere i termini di pagamento nelle transazioni tra privati ma al contempo assicurare la libertà di cessione dei crediti, in modo da contemperare libertà contrattuale e finanziabilità del capitale circolante.

In questa prospettiva, questa Associazione ritiene opportuno un attento approfondimento delle conseguenze inattese e non volute dell'introduzione di tali imposizioni sia da parte del sistema industriale che del sistema bancario e si mette sin d'ora a disposizione per ogni attività in merito in cui codesta Associazione ritenesse di avviare.

Ringraziando dell'attenzione concessa, porgo

Cordiali saluti

Massimiliano Belingheri

Il Presidente

Milano, 19 ottobre 2023
Ns. Rif.: 250/23/VD

Egregio
Dott. Carlo BONOMI
Presidente
CONFINDUSTRIA
Viale dell'Astronomia, 30
00144 ROMA

OGGETTO: Revisione della Direttiva contro i ritardi di pagamento

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Ringraziando dell'attenzione concessa, porgo

Cordiali saluti

Massimiliano Belingheri

Xx October 2023

Re.: Proposal for a regulation on combating late payment in commercial transactions - COM(2023) 533 final

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 its views and suggestions regarding the Commission's proposal for a regulation on combating late payment in commercial transactions (COM(2023) 533 final)**, hereinafter referred to as Late Payments Regulation or LPR.

1. Introduction and summary of EUF position

While the **EUF supports fostering a prompt payment culture and combating late payments** and is generally **in favour of reviewing, improving and consequently retaining the current Late Payments Directive (LPD)**, we wish to **express our concern** that the proposal for the **new LPR is not the right tool to successfully combat late payments as it is imbalanced, ineffective and even counter-productive** in achieving its goals such as protecting SMEs, and **disregards certain important aspects and measures**.

In short, our **main points of critique and suggestions for improvement** are:

- **Retaining/amending Late Payments Directive as more suitable legislative instrument:** Going from the current Late Payments Directive (LPD) to the proposed Late Payments Regulation entails **harmonizing for the very first time certain aspects of the various national civil/contract laws** – a **huge step towards a harmonized European civil law** which inter alia requires that the LPR can easily be incorporated into the national civil law frameworks; however, the **LPR lacks further details and explanations** in this aspect, e.g. regarding its **scope of application and definitions**, the **rules on retention of title and on the automatism of late payment interests**. **Retaining and amending the current LPD would therefore be the more suitable legislative instrument.**
- **No strict cap to payment periods at 30 days:** Given the economic reality of payment terms and actual payment times, introducing a **cap for payment periods at a maximum of 30 days without any exceptions or options to adapt** to certain industries, classes of businesses or the fair and valid needs and wishes of contractual partners **unduly encroaches on the basic legal principles of contractual freedom and freedom to conduct a business** and is **likely to rather exacerbate than solve the issue of late payments**. The strict "one size fits all"-approach would have **unintended side effects**, such as **eliminating the possibility for suppliers/creditors to intentionally and freely offer longer payment terms** as a sales promoting measure to the benefit of their (SME) customers.
- **Consider liquidity issues of businesses as main reason for late payments:** With its focus on stricter rules on payment terms and the enforcement of LPR-compliance, the **LPR proposal disregards businesses' (un-)willingness and (in-)ability to pay on time as one of the main reasons for late payments** - (temporary) liquidity issues of businesses should not be ignored since they will not be

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remedied by the measures foreseen in the LPR and continue to exist, particularly in the current economically strenuous times.

- **Supportive measures for inter alia factoring:** As stated in various studies, analyses and other preparatory documents leading up to the review of the current Late Payment Directive, **combating late payments effectively also means including supportive measures for factoring, supply chain financing and similar innovative types of financing as well as payment and technological solutions** which allow the creditor to be paid faster or on time; the EUF has made several suggestions in this regard, with a main focus on **limiting or prohibiting bans on assignments** which hinder the use of factoring – **disappointingly, the LPR proposal is silent on such support for factoring and also lacks concrete and detailed provisions to support and improve both financial knowledge and technological skills.** Moreover, the strict **cap on payment periods at 30 days is unnecessary and harmful in the case of factoring**, as the factoring clients (typically SMEs) receive liquidity at the outset while the end customers (often also SMEs) shall still benefit from longer payment terms.
- **Efficient judiciary and alternative dispute resolution and competition law instead of LPR enforcement authorities:** The introduction of national enforcement authorities with new powers as foreseen in the LPR proposal creates an **undue mix of civil law elements (with effects mainly inter partes) and public law elements (with effects erga omnes)** and also leaves questions open with regards to the **separation of powers between judiciary and executive powers.** Also, an **uneven playing field** would arise both with a view to **penalties being developed under national law** as well as **in the context of global trade** since the LPR-compliance of businesses from third countries outside the EU cannot be enforced. In the interest of protecting basic principles of a **free-market economy**, the EUF suggests to instead **improve and foster efficient and low-cost systems of both traditional judiciary as well as alternate dispute resolutions** and consider **amending measures under competition law to better tackle negative effects or abuse of asymmetrical bargaining powers.**
- **Adopt measures to specifically address late payments of public authorities:** Even though late payments affect all kinds of businesses, **businesses in B2G-relationships are generally more negatively affected by even longer actual payment periods**, and the LPR proposal does not specifically address or try to remedy late payments by public authorities. The EUF considers that **in order for the public sector to effectively and sustainably change its payment behaviour, other measures outside of the scope of any LPD or LPR are needed.**

In order to better explain our aforementioned viewpoints and suggestions, we hereby provide you with

- a short overview of factoring and commercial finance in the EU,
- an overview of how factoring helps tackle the negative effects of late payments and
- our more detailed comments on the LPR proposal and suggestions for improvement.

2. 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 generally 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. It is worth noting that this payment is generally made to the factoring client at the outset, irrespective of the remaining maturity of the assigned receivables. 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.

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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 it is mainly aimed towards SMEs.

In 2022, the **factoring industry in the EU provided over €310 billion of working capital financing to more than 300,000 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 2022 was over € 2.38 trillion. In relation to the total GDP of Europe, the **factoring industry turnover represented more than 12% of EU GDP in 2022**.

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 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 delivery or 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 other forms of financing such as 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 and therefore has a different cost-structure and does not provide e.g. the credit protection factoring offers.

3. 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; in some cases, factoring can even foster earlier or prompt payments since it enables the factoring client/creditor to e.g. allow for discounts on early payments. On the other hand, as flexible tools that adapt to the economic needs of the parties, factoring can combine immediate provision of liquidity to the factoring clients/suppliers with longer payment terms to the benefit of the end customers/debtors, who often also are SMEs. 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, the European Parliament took a strong position regarding late payments by public authorities and the need to foster the use of factoring as a solution to the consequences of the delays in B2G-relationships.

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

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>

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”.

As recently as during the Commission’s call for evidence in spring 2023, bans on assignments were explicitly mentioned among “unfair practices”, and the Commission then indicated that the review process of the Directive should also consider overcoming obstacles and hindrances to factoring as a means to better achieve the LPD’s obligations and ultimate aims. The EUF was therefore negatively surprised to find no reference to fostering factoring nor any limitations to bans on assignments and no exceptions from the strict cap to payment periods for receivables subject to factoring in the current LPR proposal, all the while other measures (which the EUF has criticized as less or even ineffective) are to be enhanced. It is against this background that the EUF wishes to further elaborate its viewpoints and suggestions.

4. EUF Comments on LPR proposal and suggestions for improvement

Going from the current Late Payments Directive to the proposed Late Payments Regulation entails **harmonizing for the very first time certain aspects of the 27 national civil/contract laws** – this would mean a **huge step towards a harmonized European civil law** which in itself has been an object of much controversy over the last decades. Notwithstanding this fundamental controversy, such harmonization also requires that the LPR can easily be incorporated or fit into the national civil law frameworks. However, the current proposal unfortunately lacks clarity: The LPR’s scope of application and definitions are unclear and incomplete with a view to e.g. the transfer of receivables and hence change of creditors (the new creditor/assignee has not delivered goods or provided services to the debtor), and also with regard to what types of contractual relationships are actually covered by the LPR and more specifically by the term “commercial transaction” (e.g. contracts governed by the law of an EU member state or contracts entered into by a person within the EU). Also, further explanation is needed on how e.g. the rules on retention of title are to fit in with the different national civil laws when introduced through a regulation instead of a directive which allows for nationally adequate legislation. Furthermore, it also remains unclear how the automatism regarding late payment interests is to fit in with national civil and procedure laws. **Retaining and amending the current LPD would therefore be the more suitable legislative instrument.**

The **EUF welcomes** that member states are to **encourage SMEs to use digital tools to get paid faster and that access to financial literacy and credit management training is to be fostered**, but is **disappointed in the lack of more concrete and detailed support for tools such as trade and supply chain finance solutions** which actually already help businesses counter late payments and their negative effects by providing quick access to liquidity. In its response to the call for evidence on the review of the Late Payments Directive in March 2023, the EUF already explained in detail why and how limitations to or even a prohibition of bans on assignments would support factoring and similar forms of receivables finance and hence allow particularly SMEs to improve their liquidity and working capital situation.

In addition to this, the LPR proposal unfortunately **also lacks concrete and detailed provisions to support and improve both financial knowledge and technological skills**. Intrum’s European Payment Report 2022 (p. 12) shows that 53% of businesses “lack skills and resources in-house to improve management of late payments”, mainly because of issues such as outdated back-office systems and technology as well as recruitment problems – these are issues that will not be solved or alleviated by the new LPR, despite the affirmed support for e.g. digital tools. **The EUF therefore maintains its viewpoint that supporting and fostering e.g. factoring would be a more effective means to avoid and counteract late payments than capping contractual payment periods at 30 days and enforcing this through fines and other sanctions.** Therefore, the EUF wishes to recall recommendations from previous studies and as well as the EUF’s statements made during the call for evidence and consultation process earlier this year, whereby **factoring and similar forms of trade and supply chain finance which provide access to liquidity should be promoted or facilitated further through targeted measures such as introducing limitations to or prohibitions of bans on assignment and clauses with similar hampering effects on factoring** (e.g. clauses used by suppliers which require their clients to inform them of any assignments or even ask for their previous permission, or credit institutions unduly refusing negative pledges to clarify rights to and ownership of receivables). **Moreover, longer payment terms in excess of 30**

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days should remain to be possible in cases where factoring is used as the factoring client will receive liquidity at the outset, i.e. when the receivables are assigned, and irrespective of their remaining maturity.

The LPR proposal clearly defines a late payment as a “payment not made within the contractual or statutory payment period” (cf. art. 2(3) of the LPR proposal) – a creditor who has to wait for payments from their debtor faces the most problems when this wait comes unexpected and was not planned for, in contrast to agreed and hence planned longer payment terms. **Shortening the payment period** which may be contractually agreed upon **to a maximum of 30 days - without any exceptions, specific rules for certain industries or classes of businesses or other options to adapt to the specific needs and wishes of contractual partners** – on the one hand completely ignores the economic reality in B2B- and B2G-relationships with unintended negative side effects e.g. for SMEs as debtors and in particular for certain types of businesses with especially high working capital demands. On the other hand, it disregards the main reason for late payments, namely businesses’ (un-)willingness and (in-)ability to pay on time. It is unfortunately unavoidable that businesses will continue to have liquidity issues (temporary or short-term and to varying degrees), particularly in economically strenuous situations such as currently with various crises following each other.

The EUF agrees with the Commission’s aim and welcomes the idea of fostering a culture of prompt payments, but the economic reality shows that late payments will never be completely eradicated, even though they can be reduced and perhaps even minimized. In 2022, average payment terms offered in B2B-relationships ranged between 36 and 44 days, and actual payment times averaged between 48 and 61 days (cf. Intrum’s European Payment Report 2022). In roughly half the EU member states, the payment gap increased from 2021 to 2022 (by between 1 and 7 days), while in the other half, this payment gap remained unchanged or even decreased by a day. This shows that payment terms and actual payment times do not coincide and that capping payment terms offered at 30 days would not lead to the desired decrease in actual payment times. The analysis and introduction prefacing the proposal for the LPR identifies several different reasons for and means of combating late payments, but it disregards the aforementioned main reasons for late payments, namely businesses’ (temporary or short-term) liquidity issues which cannot be solved through decreasing payment periods and sanctioning e.g. longer payment terms and late payments through fines to be paid on top of late payment interest and compensation for recovery costs. Adding further to the debt of businesses which pay late because they have liquidity constraints will rather exacerbate than contribute to solving the issue of late payments.

For B2G-transactions, the economic reality in 2022 is even further away from what the LPR proposal aims for: In contracts with the public sector, the average payment terms offered ranged between 42 and 57 days, while the average actual payment time was between 57 and 74 days; in nearly all EU member states, the payment gap for the public sector increased by up to 14 days between 2021 and 2022. This shows that the **public sector is the main problem when it comes to late payments.** The EUF considers it unrealistic and also unlikely that one public authority imposing e.g. fines on another public authority or entity for infringement of the LPR will actually change the public sector’s payment behaviour. Moreover, this is likely to cause budgetary window-dressing since it is ultimately the same public sector that both spends and receives the fines. Ultimately, the LPR proposal does not specifically address or try to remedy late payments by public authorities. The EUF considers that in order for the public sector to effectively and sustainably change its payment behaviour, other measures outside of the scope of both LPD or LPR are needed.

The proposed LPR also identifies SMEs as being “heavily affected by ... negative consequences” of late payments while the “root cause of late payments “ is considered to be “asymmetries in bargaining power between a large client (debtor) and a smaller supplier (creditor)” (p. 2 of the LPR proposal) – this disregards the fact that SMEs are debtors just as often as they are creditors, and that bargaining power is neither always mismatched in contractual negotiations and relationships nor always dependent on a smaller business entering into a contract with a larger business. The proposed LPR ignores that constellations are diverse and a “one size fits all”-solution does not work when considering e.g. larger businesses as creditors/suppliers willing to freely grant longer payment terms to SME debtors as a sales promoting measure. The EUF wishes to stress once more that it does not consider asymmetrical bargaining powers causing (SME) creditors to being forced to accept longer payment terms as the main reason for late payments, but rather sees businesses’ general (un-)willingness and (in-)ability

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to pay on time, even more so when businesses have (temporary or short-term) liquidity issues during economically strenuous times such as over the last years which were marked by different crises. **In cases where asymmetries in bargaining powers are abused to the detriment of one party in a transaction or contract, such abuse should be tackled through measures under competition law.** Not only is competition law generally better suited and aimed at dealing with questions surrounding asymmetrical bargaining and market powers, but this would also lead to less red tape in comparison to introducing new national authorities tasked with the enforcement of the LPR.

Furthermore, **introducing maximum payment periods and a maximum duration for procedures of acceptance or verification of 30 days unduly encroaches upon the basic principles of contractual freedom and the freedom to conduct a business.** The cases where asymmetries in bargaining powers between the contractual parties result in unfair payment terms and conditions being agreed upon should not set the standard or form the basis for a legal rule; this unduly disregards any and all fair payment terms and conditions that have valid reasons for exceeding the foreseen maximum 30 days payment period. An example of this are creditors who are in a comfortable position regarding their working capital and liquidity, e.g. because they use financing solutions such as factoring, and thereby can offer extended payment terms freely to their debtors, allowing expenditures to be matched with cash flow requirements at each level of the supply chain. In these and other cases where the creditor is already sufficiently protected from late payments or late payments simply are not a (major) issue, the limitation of contractual payment periods and hence the limitation of contractual freedom through the LPR is both unjustified and unnecessary. **Hence, any rule on a maximum payment period should foresee exceptions or options to adapt similar to the current rule in the LPD. As a minimum, there should be exceptions for longer payment terms to the benefit of (SME) debtors or at least not the detriment of the suppliers/creditors as well as for longer payment terms granted by suppliers/creditors in combination with or when using a financial solution such as factoring.** The latter aspect could be incorporated into the definition of “commercial transaction”, the currently suggested definition being too simplistic and ignoring the aforementioned scenarios.

The duration of payment terms and procedures of acceptance or verification as well as the question of whether they are fair and appropriate also depends on which industry is affected. Unfortunately, the proposed LPR does not take this aspect into account, either. The explanatory memorandum of the proposed LPR mentions the Directive on unfair trading practices in business to business (B2B) relationships in the agricultural and food supply chain (UTP Directive) as being closely linked, but fails to mention and take into consideration that both the duration of payment terms and procedures of acceptance or verification as well as their effects vary from one industry to another, which is exactly why the UTP Directive focused only on the very specific agricultural and food supply chain. **The foreseen maximum periods of 30 days also seems haphazard and too rigid with a view to the different transactions and industries it covers.** The aforementioned UTP Directive covers the agricultural and food sector, i.e. trade in products which tend to perish quickly (in contrast to e.g. machinery, textiles or construction services/projects), and it only considers payment terms of more than 30 or 60 days respectively to be unfair trading practices – **choosing 30 days as a maximum period for both payments and acceptance/verification procedures for all kinds of contracts and all kinds of goods and services seems arbitrary. Applying the same standards to contracts with different economic backgrounds while ignoring economic realities and commercial usages does not “bring fairness to commercial transactions”.**

Neither does it “bring fairness to commercial transactions” if **businesses located and operating from outside the EU can de facto continue to impose payment terms longer than 30 days when entering contracts with European suppliers/creditors – in the context of global trade, this puts European businesses at a disadvantage.** The LPR does not tackle or remedy late payments in international trade where the debtor is not located within the EU and therefore remains unaffected by e.g. penalties for LPR non-compliance; instead, the analysis of the impact assessment made in explanation of the proposed LPR simply states that the “risk that, in international transactions, companies would systematically choose long payment terms ... is also estimated to be limited” (p. 9 of the LPR proposal). Once more, this **completely disregards the variations between different industries and also categories of businesses.**

Limiting payment periods to a maximum of 30 days also means that **many SME debtors may encounter significant liquidity and working capital deficiencies** – which means further headwind in these current economically demanding times. **They may see themselves obliged to incur additional credit financing, with banks potentially being reluctant to expand the credit lines to (SME) debtors** – compared to suppliers interested in preserving a good, long-term customer relationship and thus willing to grant longer payment terms. Moreover, **additional credit financing would be accounted for as a financial liability, causing a deterioration of their balance sheet ratios and in the worst case a breach of covenants of existing financing solutions and even a technical default. As a further consequence, payment terms further down the supply chain will be shortened even if the proposed LPR does not apply to these links or transactions in the supply chain.** Namely, payment periods for end consumers will most likely also be shortened significantly, resulting in consumers having to agree more often to advance payments and forms of nearly immediate payments – this would be a **disadvantageous development in the current economic situation.** These side effects would occur without any need in situations where suppliers/creditors are willing to grant longer payment terms as a sales promoting measure.

Moreover, the **EU** agrees that combating late payments requires coordinated rules and that fragmentation and higher costs for companies resulting therefrom should be avoided (p. 2 of the LPR proposal). However, having the member states set up enforcement authorities who then have the power to impose fines or other penalties and interim measures for LPR non-compliance or infringements which ultimately are for the member states to define more clearly will cause a fragmentation of such penalties and hence create an unlevel playing field in the area of combating late payments in Europe. Also, the proposals for setting up national enforcement authorities and automatically due interests for late payments raise practical questions: How will such enforcement authorities fit into the national executive or judiciary systems and how will the principle of separation of powers between the executive and judiciary branches be maintained? Will such late payment interest be enforced through the aforementioned enforcement authorities or through court proceedings, and can creditors waive or forego their rights to interest payments at least in certain cases such as restructuring procedures to avoid insolvency and settlement and alternate dispute resolution proceedings, despite art. 5 (3) of the LPR proposal? It is also likely that these enforcement authorities will ultimately thwart the idea of promoting alternate dispute resolution, since imposing fines on businesses will not increase their will to enter into mediation or similar procedures.

Additionally, the proposed **LPR intertwines two different areas of law which so far have been separate – and for good reasons:** contract law regulates the agreement between two or more parties under civil law (i.e. generally inter partes), while fines and similar penalties are imposed by enforcement authorities for infringements of legal rules and requirements under public law which apply erga omnes. **In a free-market economy and with legal principles such a freedom of contract and to conduct a business, infringements of civil law and contracts in particular should continue to be remedied primarily by rights and claims of the individual, not a state or public authority. All in all, the EU considers competition law (including measures against unfair trade practices) generally better suited and aimed at dealing with questions surrounding asymmetrical bargaining and market powers, while improving and fostering more efficient and low-cost systems of both traditional judiciary as well as alternate dispute resolutions would help businesses to more readily and easily enforce their rights and claims.**

5. Conclusion

The **EU** advocates in favour of retaining and amending the current Late Payments Directive as it is a more suitable legal instrument for the harmonization of civil law than a regulation. Given the economic reality and experiences with the LPD and in order to avoid encroaching unduly on contractual freedom and the freedom to conduct a business, the **EU** is furthermore opposed to the introduction of a strict cap to payment periods at 30 days. Situations and interests are diverse, and exceptions are a must where longer payment terms are in the best interest of both parties (e.g. longer payment terms as a flexible, sales promoting measure willingly offered by suppliers to the benefit of SME debtors; longer payment terms combined with a financing such as factoring). The **EU** also points out that liquidity issues of businesses are the main reason for late payments and that the foreseen

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new rules to combat late payments should consider this more in order to increase their effectiveness. Instead of capping payment terms and introducing new authorities to enforce compliance with the new rules on late payments, other measures should be taken, including foremost the introduction of supportive measures for inter alia factoring (e.g. by limiting or prohibiting bans on assignments which hinder the use of factoring), of efficient judiciary and alternative dispute resolution systems and amendment to competition law and of measures which specifically address and combat late payments of public authorities.

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