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Late Payment Regulation should consider common market practice

Provide business partners more flexibility in order to take their individual situation into account

Position paper on the European Commission's proposal for a Late Payment Regulation, 26 October 2023

Introduction

Deutsches Aktieninstitut rejects the present draft regulation on late payments, as its implementation does not consider standard market practices in payment transactions and would create a high administrative burden for companies.

In particular, this concerns the following aspects:

- The maximum payment term of 30 days set out in the draft regulation does not take into account that longer payment terms represent a means of financing and are thus in the interest of both creditor and debtor;
- The provisions on verification or acceptance procedure are too restrictive, especially for complex products that require longer periods;
- There is no need to introduce null-and-void contractual terms or enforceable titles for creditors, as sufficient legal options already exist in the form of dunning procedures and civil actions;
- A mandatory interest for late payments is in many cases exclusively associated with a high administrative burden and does not take into account the current common practice of dunning.

Overall, the harmonization efforts in the European Commission's draft regulation are too far-reaching. It is therefore essential that the draft regulation will be improved during the current legislative process. More flexibility for business partners to properly reflect the prevailing individual situation must be possible.

1 Maximum payment term of 30 days

We reject a maximum term for late payments of 30 days without exceptions (Art. 3(1)). Longer payment terms do not automatically mean that debtors do not want to pay. On the contrary, longer payment terms are a way for creditors to support customers in the context of a long-term positive business relationship:

- In the agricultural industry, payment terms of up to 160 days are common, as farmers are regularly only able to pay after the harvest has been completed;
- Not only in agriculture, but in supply chains as a whole, longer payment terms bridge a period during which the goods are "in transit". A payment term is then, for example, "pay-when-paid," meaning that suppliers do not have to pay until their customers pay. The usual payment period is 60 to 120 days.

Payment terms longer than 30 days thus fulfill a financing function. By restricting payment terms to a maximum of 30 days, suppliers/customers would be forced to finance the purchase price for seed, fertilizer or other intermediate products with bank loans. Thus, longer payment terms are in the interest of both parties. A restriction without exception is therefore not appropriate.

Furthermore, the practices of international payment transactions must be taken into account. Although the draft regulation covers EU matters only, it would also apply if a contractual choice of law is made in favor of German law. If the movement of capital is subject to government controls (as is the case in China, for example), this can lead to considerable delays that are not attributable to the debtor.

Therefore, a deviation from the 30-day term must be permissible if it is expressly so agreed between the parties and not grossly unfair.

This holds also true for the restrictions on verification or acceptance procedures. Depending on the scope and complexity of the service provision with correspondingly complex verification or acceptance procedures, appropriate periods are agreed in individual contracts which are usually longer than the required 30 days (Art. 3(2)). It is also customary to extend the length of the verification or acceptance procedures by mutual agreement.

This particularly affects larger projects that are unique and non-standardized, or that involve complex integration services, implementations or configurations. A rigidly specified acceptance period of 30 days is often too short to allow the

necessary verification or acceptance procedures to be carried out, and to give the contractor sufficient time to rectify defects. In addition, it may well be in the interest of both parties if the acceptance period is subsequently extended by mutual agreement if, for example, serious defects occur that cannot be rectified within the mandatory period of 30 days.

With a mandatory term of 30 days, the client would possibly be forced to refuse acceptance, which would lead to an unnecessary legal escalation that is not desired by either side.

2 Additional power of action is not necessary and administrative burdens are unreasonable

The introduction of null-and-void contractual terms or enforceable titles for creditors is not necessary (Art. 9 and Art. 12). There are already sufficient possibilities under domestic laws, especially civil actions. In our view, these existing instruments are appropriate and sufficient.

Furthermore, the draft regulation enables designated parties (so-called enforcement authorities, Art. 13 and 14) to take legal and administrative action in order to enforce monetary claims, and calls for an expedited procedure for monetary claims (Art. 12); thus treating monetary claims differently compared to non-monetary claims (e.g., the claim for specific performance). However, there is no justification for such a distinction since the creditor of a non-monetary claim (specific performance) deserves equal legal protection. In fact, non-monetary creditors already face certain disadvantages in proving their right to performance in legal proceedings (e.g., evidence is typically more difficult to obtain), and therefore should not be disadvantaged even more.

The draft regulation would also lead to an unreasonable administrative burden for companies, in particular due to the mandatory interest on late payments (Art. 5). As per the draft regulation, a flat fee compensation of 50 Euros is due (Art. 8(1)) for all late payments (Art. 5(1)). These would have to be calculated and tracked by the companies for each payment delay. As a gesture of goodwill or due to the special nature of the business relationship, many companies in their role as creditors do not want to enforce these claims against their debtors. A mandatory payment of interest or a lump-sum compensation contradicts this practice.

An unrestricted obligation for debtors to pay interest also contradicts current practice, which provides for a reminder or notice as a first step in the event of late payments. This reminder gives the debtor the chance to either settle the invoice (plus interest), or to justify why this has not yet been done. It is essential that such an option is retained.

Finally, there is no need for mandatory enforcement of interest, as the creditor's rights in this regard are sufficiently protected by the existing possibilities under domestic laws, such as dunning procedures and civil law actions.

To make matters worse, the member states must designate national enforcement authorities (Art. 13) that can use sovereign power to take action against violations of the regulation (including fines, investigations etc.). Such a practice creates an unnecessary administrative burden on the member states as well as corporates, and

is neither necessary nor appropriate for the intended purpose. Such intervention in legal relationships under private law has been, so far, uncommon in the existing legal system and requires special justification – which is not provided in the draft regulation.

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