Official Journal
of the European Union

EN
C series

C/2024/2101

26.3.2024

Opinion of the European Economic and Social Committee on Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions

(COM(2023) 533 final — 2023/0323 (COD))

(C/2024/2101)

Rapporteurs: **Panagiotis GKOFAS**

Alena MASTANTUONO

Angelo PAGLIARA

Referral	Council of the European Union, 6.10.2023
	European Parliament, 2.10.2023
Legal basis	Article 114 and 304 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	20.12.2023
Adopted at plenary	17.1.2024
Plenary session No	584
Outcome of vote	
(for/against/abstentions)	215/14/8

1. **Conclusions and recommendations**

1.1. The European Economic and Social Committee (EESC) welcomes the Commission's Communication on the SME Relief Package. It also welcomes the Commission's intention to further combat late payments. Paying on time contributes to a healthier economic environment and serves the strategic purpose of deepening the single market. At the same time, the Committee is concerned that the transformation of the current Directive into a Regulation might limit the flexibility of Member States and of the business environment at a time of multiple headwinds across the EU, and calls for further assessment of the proposed measures as well as a proportional and customised approach to implementation.

1.2. The EESC notes that the culture of late payments differs considerably across sectors and across Member States. It also identifies two major general problems linked with late payments: first, the enforcement of the current rules; and second, late payments by public authorities, despite a 60-day cap laid down by the current Directive. Average actual payment by the public sector is 13 days longer than that of businesses, which have no cap on payment terms. For this reason, the EESC calls on public authorities to lead by example and comply with the rules in place.

1.3. The lengthy and expensive nature of court proceedings in some EU Member States as well as the fear of impacting business relationships discourages creditors from recovering the amount owed through the courts. It is necessary to make better use of digital tools, and to promote financial literacy and other means of guarantees (i.e. bank guarantees, payment of the purchase price as a pledge or right of retention) as well as alternative ways of resolving disputes.

1.4. The EESC sees the potential benefit of introducing national enforcement bodies. However, it stresses that such authorities will have to operate objectively and guarantee maximum confidentiality when treating the commercially sensitive information of both undertakings and public authorities, without imposing further obligations on reporting.

1.5. The EESC supports the development of financial literacy programmes provided in collaboration with national authorities, the banking sector, European agencies/institutions (e.g. ESBA/ ECB) as well as business organisations. Public services or agencies, in addition to social partners and chambers of commerce, could provide financial literacy and late payment advisory services without being subject to State aid regulation.

1.6. Special attention should be paid to late payments concerning commercial transactions between European businesses and third country entities.

1.7. The report evaluating how the regulation has been implemented should take into account assessments and reports by the EESC, social partners and chambers of commerce, in collaboration with the other co-legislators.

2. **Background**

2.1. In September 2023, the Commission published the SME Relief Package, including a proposal for a Late Payment Regulation, a proposal for a Directive on tax simplification for SMEs, and a set of measures to improve SMEs' performance, with emphasis on improving the Better Regulation Agenda, increasing access to finance, upskilling of the workforce and other supporting mechanisms.

2.2. The package also includes the revision of the legal framework on the Late Payment Directive in order to address the shortcomings resulting from the current EU legislation. More specifically, the Commission's action focuses on the lack of preventive measures, the effective enforcement of the late payment mechanism, the absence of a maximum payment term and the facilitation of SMEs' access to redress mechanisms.

2.3. According to the Payment Report 2023 from Intrum, the average payment term in B2B relations is 41 days, with an average actual payment time of 56 days. Average payment terms offered by the public sector are 52 days, with an average actual payment taking 69 days.

2.4. While access to finance vary among Member States ([1]), it remains a significant burden on economies and businesses which experience structural deficiencies or/and are more exposed to economic crises.

2.5. The global hike in interest rates in the banking sector has had a spiral effect on the liquidity constraints of businesses and SMEs, especially those implementing an investment scheme. In addition, it is not only nominal interest rate increases, but also interest rate differentials that distort business performance, especially for SMEs.

3. **General comments on the proposal for a regulation on combating late payments**

3.1. The compounded effect of high energy and raw material costs and the repayment of loans needed to sustain economic activities during the COVID-19 pandemic radically changed the importance of timely payments, especially for European small and medium-sized enterprises (SMEs). While public authorities and large companies are able to differentiate their portfolio of customers and suppliers, SMEs rely on a limited number of customers, financial volumes and reserves and operate mostly at the regional and local levels. However, the difference in the bargaining power among parties is just one of the reasons behind late payments: the inefficient enforceability of existing rules represents a major obstacle for creditors which tend to not exercise their rights to preserve their business relationship with the debtor.

3.2. The situation has been further exacerbated by the exceptionally high inflation and the consequent interest rate hikes, something which undermines investments. The payment terms deteriorate during periods of economic turmoil owing to the need for companies to secure their cash flow and reserves. Unlike large businesses, SMEs have limited access to bank loans ([2]) and therefore late payments represent for some a source of temporary financing and help them cope with liquidity shortages. Therefore, the EESC supports the Commission's intention to make the cash flows more predictable but raises concerns over the solution proposed by the Commission.

3.3. The EESC acknowledges that the ripple effect of delayed payments does not only affect the smooth running of day-to-day operations for businesses. Late payment culture, which differs across the EU and sectors, also hinders long-term investment planning of companies.

([1]) European Central Bank Survey on the Access to Finance of Enterprises in the euro area — October 2022 to March 2023.
([2]) 'Delay now, pay later — why SMEs must not put off investing in innovation and greening', oecdcogito.blog.

3.4. In its impact assessment, the Commission acknowledges the impossibility of quantifying the social implications of late payments (3). However, such a practice is detrimental to small business owners, their families and their employees with serious consequences on payments of utilities, rent and loans, as well as their morale and productivity. In addition, in 2022 47 % of the companies surveyed by Intrum stated that faster payment would help them to hire more employees (4).

3.5. Following the adoption of the Late Payment Directive (Directive 2000/35/EC) in 2000 and its first revision with Directive 2011/7/EU, the evidence of unfair payment practices among all concerned actors (public authorities, large companies and SMEs) became increasingly evident especially in the case of payments from public authorities to companies (5).

3.6. The EESC acknowledges that the current Directive 2011/7/EU has generally proven itself over the years. It strongly contributed to improving the payment morale, raising awareness of the issue, and guaranteeing a fairer business environment. Nonetheless, late payments still do exist today and the EESC recognises the need for efficient action. Hence, the EESC considers it appropriate to explore options for improving the enforcement and improve the payment culture. However, as with any other regulatory change, it should be approached judiciously, especially when it comes to private law rules.

3.7. This year, the average payment term offered in B2B is 41 days and 52 days in the public sector. The actual payment term in B2B is 56 days, 3 days more than last year, still much less than the actual payment term of the public sector, which pays in 69 days. This is a clear indicator that there is a problem with respecting the agreed payment terms rather than with the length of the payment terms itself. The EESC therefore believes that the Commission, with its proposal, is attempting to tackle the issue of long payments instead of late payments by introducing excessively restrictive measures, instead of improving the current enforcement framework with more effective rules.

3.8. The EESC highlights that the relevance of late payment greatly differs among Member States (6) as well as sectors. The Commission should therefore have further evaluated the possibility of amending the existing Directive and — in case of significant changes should have rather opt for a revised Directive (so-called recast). This would prevent all entities, regardless of size and balance of power, from being impacted. SMEs are in need of relief and the new rules should aim at providing a fairer environment for them. However, in practice, the set of proposed rules will deprive the SMEs of the flexibility they require from their business partners and would impose unnecessarily strong conditions on them.

3.9. The Commission's action to achieve timely payments should not compromise the possibility of the parties involved in the negotiations of contracts to agree on longer payment terms. Therefore, the EESC underlines the importance of flexible negotiations when setting payment terms and highlights strong concerns over the Commission proposal. In effect, the proposed 30-day cap eliminates contractual freedom between companies. Despite the flexibility that companies have today — freedom to negotiate the payment term, they pay much earlier than the public sector, which has a cap of 60 days. Interfering with freedom of contract does not seem justified here and would be disproportionate with regard to realistically expected benefits.

3.10. In this regard, the EESC refers to the results of the open public consultation carried out by the Commission (7), which clearly concludes that maintaining the current rules on payment terms is the preferred option among the respondents (29 % of respondents). Moreover, several stakeholders, by indicating '*Other options*' from among those available, specified that they were against limiting the freedom of contract. Lastly, remarking on the crucial nature of the point raised, the EESC refers to the European Parliament resolution on the state of the SME Union published in July 2023, highlighting the importance of '*addressing payment delays […] while ensuring a balanced approach that preserves the freedom of contracts*' (8).

3.11. The EESC agrees that the procedure for verifying or accepting goods or services should not exceed 30 days from the date of the reception of the goods or services. However, it stresses that this will pose a problem for some entrepreneurs owing to the technical aspects of their goods. Careful monitoring of the sectorial approach is needed taking into account the asymmetric exposure of some economic sectors.

(3) SWD(2023) 314 final, Impact assessment point 227, page 58.
(4) Intrum 2022 — Annual and Sustainability Report 2022 — Long-term credit management for a sound economy.
(5) As reported by the European Commission, in some Member States, public authorities take on average 100 days to settle their invoices, with peaks which can considerably exceed this figure: 'Late payment: Commission refers Italy to Court of Justice for failing to ensure suppliers are paid on time'.
(6) The Commission SME Performance Review report stresses the existence of severe discrepancies in the implementation of the current Late Payment Directive rules across Member States, highlighting that late payments are becoming a form of financing at zero costs. The document is available at: Annual Report on European SMEs 2022/2023.
(7) Late payments — update of EU rules.
(8) TA(2023)0294.

3.12. The EESC acknowledges that one of the main shortcomings of the current directive is the lack of a clear definition of ‘grossly unfair’ and the need for courts to interpret such a definition. The ambiguous provision raised concerns over the years as it left companies space to deviate from the ‘reference’ of 30 days that can be extended to payment periods longer than 60 calendar days in B2B. In this regard, the EESC takes note of the Commission’s intention to replace this concept with a list of practices null and void under Article 9 of the proposed regulation.

3.13. However, from a legal perspective, Article 9 is impossible to enforce. The reason is that it is impossible to declare practices null and void — as stated in Article 9(1)(d) — by ‘intentionally delaying or preventing the moment of sending the invoice’. Moreover, in line with point 3.9, the EESC believes that the references to payment periods in B2B transactions should be removed from Article 9(1)(a), as this is something that should be agreed exclusively by the contractual parties.

3.14. While the EESC sees the benefit of introducing national enforcement bodies, guaranteeing that they function correctly and efficiently will be key. Therefore, such authorities will have to operate objectively, independently and guarantee maximum confidentiality when treating the commercially sensitive information of both undertakings and public authorities. Until now, national authorities have failed to ensure that the enforcement mechanisms work properly — especially in G2B (Government to business) transactions. With evidence of chronic late payments from the public sector to businesses, the EESC highlights concerns about public authorities’ enforcement capacity over other public authorities belonging to the same governance structure.

3.15. Many social economy enterprises are among the economic operators which suffer significantly from payment delays by public authorities. The issue takes on further relevance when considering that — in many cases — such enterprises have the public sector as their sole client for providing social assistance services, and education and training. Considering that there is no private market for such companies, they are particularly exposed as they have no alternatives to public procurement.

3.16. As a result, late payments are among the factors discouraging the participation of SMEs in public procurement. The evidence presented by the Commission points to the lack of timely payments among public authorities. Hence, the EESC welcomes the proposed payment term set at 30 days for G2B transactions. Public authorities should lead by example as they represent an essential partner for businesses. The new regulation suggests better protection of subcontractors in public construction works by requesting that contractors provide evidence to contracting authorities (or entities) that they have paid their direct subcontractors. This will have an enormous impact on suppliers who use payment from the contracting authority to pay subcontractors.

3.17. The EESC encourages the co-legislators to consider alternative ways to ensure timely payments to subcontractors when assigning public contracts other than the one used in Article 4. Requiring the contractor to pay its direct subcontractors before or at the time when the request for payment has been made contravenes the objective of ensuring that everyone in the value chain is paid within a timeframe which allows for a healthy cash flow. As written in the Commission’s proposal, there is a clear risk to making the contractor responsible for pre-financing the work. In order to guarantee the payment of subcontractors without delay, the EESC recommends that the main contractor issues a declaration within a month starting only from the moment of receipt of the payment from the public authority. Such a declaration has to certify the payment of subcontractors within 30 days after receiving the payment from the public authority.

3.18. The new provisions included in Articles 5 and 6 — and based on Articles 3 and 4 of the current directive — are a step towards the objective of a culture of prompt payments. Unfair payment practices often include the unjustified forfeit of the interest as long as the underlying amount is paid. By making the payment of interest for late payments automatically due, debtors will be encouraged to respect the deadlines set in the contract. The Article 5(3) outlines that ‘it shall not be possible for the creditor to waive its right to obtain interest for late payment’. Although the EESC understands the objective to encourage SMEs to request for the payment for interest, there is also a concern that denying the possibility to waive such right might bring difficulties for SMEs as debtors.

3.19. The EESC believes the new proposed fixed sum of EUR 50 should take into account the proportionality with the transaction amount.

3.20. The EESC agrees with the Commission’s invitation to Member States to encourage SMEs to use digital tools for facilitating timely payments and accessing credit management training. As SMEs often lack financial and digital literacy, Member States should enhance collaboration with social partners, as well as chambers of commerce and industry to collect best practices and train companies and their workers on this matter. Considering the limited financial resources to be allocated for such training, business organisations should be granted support and means to train companies on this matter. This should not be regarded as State aid.

3.21. The EESC is fully supportive of Article 16 and underlines the importance of minimising existing barriers such as the complexity of initiating legal proceedings against debtors. In light of such lengthy and costly court proceedings, voluntary mediation as well as other forms of voluntary alternative dispute resolution (ADR) should be encouraged by Member States to quickly solve payment disputes.

4. **Specific comments**

4.1. The EESC also acknowledges that the Commission's objective should foresee the systematic implementation of voluntary processes for electronic invoicing and transfers to guarantee more legal certainty through electronic evidence. Nevertheless, considering the precarious economic framework that SMEs are currently facing, the adoption of digital payment practices should be supported and facilitated by the Commission and Member States. In addition, its introduction needs to be within the reach of all businesses. The EESC recommends a phased introduction to ensure that SMEs have time to acquire knowledge and the financial means to access such tools.

4.2. The EESC welcomes the Commission's attempt to address the lack of official data on late payments in Europe and remarks on the need to exchange good practices at the European level by strengthening the role of the EU Observatory on Late Payment. The EESC also believes that the observatory must collect information and data periodically produced by Member States, in collaboration with the national enforcement bodies (or other competent authorities) as well as private independent research centres to evaluate the effectiveness of the regulation. In any case, it should not bring any additional reporting obligation for companies.

4.3. The EESC highlights the external dimension of the proposal. Strict conditions on payment terms could potentially have an impact on commercial transactions within the single market and push business operations outside the EU. It would be easier to engage with suppliers from third countries which are allowed to accept longer payment terms. This could be a potential threat to Europe's competitiveness and should be avoided.

4.4. The EESC agrees that commercial transactions that are to be paid after the date of entry into force of this regulation should be subject to its provisions. However, this provision should only be applicable if the relevant contract was signed after its date of application. The EESC considers this necessary to provide a stable transition to both companies and public authorities from the current legal framework to the one proposed in the regulation.

4.5. The payment performance of the public sector to private sector contractors shall be monitored, analysed, and periodically reviewed not only on the basis of national programmes and reforms, but also via the broader participation of social partners and chambers of commerce representatives in the impact assessment and the upstream and downstream evaluation process.

4.6. The role of social partners and chambers of commerce in developing appropriate tools for the training and education of the broader society on financial issues, instruments and other procedures that will help promote financial literacy could be significant, as they are more familiar with the needs and shortcomings of their own sectors.

Brussels, 17 January 2024.

The President
of the European Economic and Social Committee

Oliver RÖPKE