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# Directive 2011/7/EU on late payments in commercial transactions

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European  
Implementation  
Assessment

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## IN-DEPTH ANALYSIS

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EPRS | European Parliamentary Research Service

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PE 621.842 – July 2018

EN



# Directive 2011/7/EU on late payments in commercial transactions

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## European Implementation Assessment

In April 2018, the Committee on Internal Market and Consumer Protection of the European Parliament requested an implementation report on Directive 2011/7/EU on late payments in commercial transactions, appointing Lara Comi (EPP, Italy) as rapporteur.

Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate General for Parliamentary Research Services.

Directive 2011/7/EU on late payments in commercial transactions (Late Payment Directive, (LPD)) strengthened European regulations first introduced in 2000 in favour of creditors. In addition to statutory interest, the application of which is still not automatic, maximum periods were established for payments in business-to-business transactions and those with public authorities, limiting contractual freedom, which is often abused by stronger companies. Following the largely correct transposition into national law, the situation continues to vary between Member States with regard to average payment periods (especially from public authorities), and the level of implementation of additional voluntary measures (such as prompt payment codes). In the absence of harmonised measurement methods, business surveys and consultations indicate improving practices, but the attribution of this development to the LPD cannot be separated from broader economic contexts and cultural aspects easily. Further exchange of best practices and better monitoring of their effectiveness might facilitate future developments in the area of late payments, including legislative action.

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## **LINGUISTIC VERSIONS**

Original: EN

Manuscript completed in July 2018.

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PE 621.842  
ISBN: 978-92-846-3209-1  
DOI: 10.2861/661189  
CAT: QA-03-18-071-EN-N

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## Executive summary

Directive 2011/7/EU on combating late payments in commercial transactions (within both the public and private sector) was not the first EU act that aimed to improve the situation for companies experiencing delays and other problems in their relations with other businesses and public administrations. Following the non-binding recommendations of the European Commission from 1995, the first directive on late payments was adopted in 2000. The recast of 2011 strengthened the existing rules in order to better protect creditors by introducing fixed terms of payment (30 days for public authorities and 60 days for private companies), regulating the statutory interest rates and compensation fees for the recovery costs, as well as encouraging awareness raising activities and additional measures to be considered by Member States and other stakeholders.

With a transposition deadline of 16 March 2013, some Member States encountered a number of problems, including the correlation between late payments and administrative burdens, shortcomings in national judicial systems, and debt refinancing. Eventually, and partly with the support of infringement proceedings opened by the European Commission, a correct transposition was ensured throughout the European Union. Taking the remaining differences in payment practices amongst and within specific countries into account, the European Parliament's 2015 analysis considered the new directive's impacts to be more limited than originally foreseen.

Subsequent evaluation of the Late Payment Directive (LPD), based on extensive surveys of businesses and consultation, led the European Commission to a generally positive conclusion about the directive's efficiency in its 2016 report. The LPD was found to have raised awareness of the problem of late payment and resulted in the adoption of various national measures supporting its provisions. Indeed, and also in the following years, average payment periods have slowly decreased, and the countries who experienced problems in the category of public authorities also made additional efforts to improve the situation (occasionally faced with infringement proceedings for bad application of the directive). At the same time, the fundamental freedom of contract in business-to-business relations continues to result in bigger companies taking advantage of their stronger position on the market, and a major number of creditors claim to not exercise their rights with regard to interest and compensation for fear of damaging commercial relationships. The term 'grossly unfair', which was somewhat clarified by the 2011 recast with regard to the limits of contractual relations, remains to be considered as too vague and subject to interpretation in the courts when dealing with commercial disputes. The directive appears to be coherent with the other EU policies and laws on debt recovery, although the latter only cover cross-border transactions.

The key to ensuring that standards set by this EU act are met in practice, in addition to the general economic situation that influences the financial situation of companies and public authorities alike, is improved access to information about the directive's aims and related rights. Evidence of the effectiveness of prompt payment codes, regular monitoring of payment practices, and other measures introduced in recent years in a number of Member States, is crucial to improving the situation in those countries and sectors where market imbalances between big and small companies or other difficulties prevail.

While it might be impossible to measure whether or not good payment practices, as established by the LPD, will actually lead to increased cross-border trade in the European Union, it is clear that they already contribute to a better business environment in each of the Member States.

## Table of contents

1. Introduction	8
1.1. Rationale for regulating late payments	8
1.2. Recast objectives	8
1.3. 2015 assessment of transposition and implementation	9
1.4. Evaluation report and its follow-up	10
2. Late Payment Directive standards and aims	12
2.1. Payment deadlines	12
2.1.1. Transactions between undertakings	13
2.1.2. Transactions between undertakings and public authorities	15
2.2. Statutory interest for late payment	17
2.3. Compensation for recovery costs	19
2.4. Recovery procedures for unchallenged claims	20
2.5. Unfair contract terms and practices	21
2.6. Information activities	22
3. Conclusions	24
3.1. Modest ambitions of the Late Payment Directive	24
3.2. Standards, contracts and reality	24
3.3. Possible future developments	26

## Table of figures

Figure 1 – Share of survey respondents that experienced late payments in the last three years (2015) and during the previous year (2018).....	12
Figure 2 – B2B payments terms and delays from 2015 and 2018.....	14
Figure 3 – PA2B payments terms and delays from 2015 and 2018.....	16
Figure 4 – Statutory interest in 2017.....	18

# 1. Introduction

## 1.1. Rationale for regulating late payments

In an ideal economy, all invoices would be paid in accordance with the agreed contract terms, the latter being determined jointly by the parties without putting any of them at a disadvantage. In reality, a significant proportion of European businesses occasionally experience 'late payment' of the amounts due for products or services they deliver or provide to other companies or public authorities. The smaller the company, the bigger the risk that such a situation, including the need to write-off the unpaid invoices as a loss, might hamper its cash flow and ultimately even lead to bankruptcy. Legislative or non-legislative measures introduced to avoid late payments as much as possible can therefore contribute to companies' survival and, ultimately, economic growth and employment.

To improve the situation in the European Union, by establishing and/or partially harmonising the payment terms and regulations on late payments, [Directive 2000/35/EC](#) ('LPD 2000') was adopted in June 2000,<sup>1</sup> following a [recommendation](#) issued by the European Commission in 1995 and its evaluation of 1997 - themselves not deemed to have made enough difference. The European Parliament expressed support for a legally binding instrument, inter alia in its resolution of 4 July 1996.<sup>2</sup>

Separate legislative acts relevant to judicial claims related to late payments were adopted by the European Union in subsequent years, introducing the [European enforcement order for uncontested claims](#), the [European order for payment procedure](#), and the [European small claims procedure](#). In effect, some of the suggestions of the 1995 recommendation concerning redress procedures were transformed into law with regard to cross-border trade. Moreover, the [European account preservation order](#) applies throughout the European Union (with the exception of Denmark and the United Kingdom) from January 2017, and also facilitates the recovery of funds.

Although a slight decrease in average payment time was observed across Europe after the adoption of the 2000 Directive, significant differences existed between Member States and sectors, as well as persistent delays in payments from the public authorities. The LPD 2000 was eventually subject to a review process, which resulted in a [proposal](#) in April 2009 for a number of changes that could also help European companies cope with the economic crisis.<sup>3</sup> In addition to the existing main provisions, additional tools or incentives were proposed to reduce the number of late payments in commercial transactions and to shorten payment periods for public administrations.

## 1.2. Recast objectives

The [impact assessment](#) that accompanied the new legislative proposal, eventually leading to the adoption of [Directive 2011/7/EU](#) in February 2011,<sup>4</sup> identified a number of reasons for the occurrence of late payments and their reluctant acceptance by creditors: the market structure and specificity of relations between companies, the changing macroeconomic conditions and cycles,

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<sup>1</sup> Referred to throughout as the 2000 Directive or 'LPD 2000'.

<sup>2</sup> OJ C 211, 22 July 1996, p. 43.

<sup>3</sup> COM(2009)126 final.

<sup>4</sup> Referred to as the 2011 recast, 2011 Directive or 'LPD 2011' throughout.

access to bank credit and public budgetary constraints, and poor internal management of payment registers, as well as absence of effective and efficient remedies.

The rationale of the 2011 recast, which repealed the 2000 Directive, was to strengthen the existing rules to protect creditors against other (often larger) businesses, as well as public authorities. This was considered especially important in the context of a credit crunch due to the financial crisis.

The main aim of the Late Payment Directive, as specified in the title established in 2000 and maintained in 2011, is to combat late payment in commercial transactions.<sup>5</sup> Recital 9 of the 2000 Directive underlined that differences between payment rules and practices in the Member States constitute an obstacle to the proper functioning of the internal market, while the subsequent one stressed the need to address competition distortions resulting from substantially different rules applied to domestic and transborder operations.<sup>6</sup>

The 2011 recast reformulated the payment deadlines that should apply in business-to-business (B2B) transactions and those between private companies and public authorities (PA2B). It also raised the interest rate to be optionally applied to late payments, and introduced a minimum fixed amount to cover creditors' administrative costs. While the possible exclusion of debts related to insolvency proceedings from the scope of the LPD was maintained, the 2011 recast deleted the optional exemption for interest claims of less than €5, following the argument from the European Commission's impact assessment that interest imposed from the first day of an overdue payment would have a stronger deterrent effect.<sup>7</sup>

### 1.3. 2015 assessment of transposition and implementation

While the 2000 Directive was supposed to be transposed by Member States into national laws by 8 August 2002, the final provision of LPD 2011 clarified that only significant changes made by the recast were subject to a new transposition obligation before 16 March 2013.

Analysis published by [EPRS](#) in July 2015 pointed out that only 21 out of 28 Member States had correctly transposed the 2011 Directive by April 2015, with the figure rising later to 25 and the remaining three countries (France, Poland and Portugal) expected to allow infringement procedures to be closed shortly after. Three separate infringement procedures for unsatisfactory application of the Directive (against Greece, Italy and Spain) were open at that time.

The analysis was based on a survey of Member States that identified national measures transposing the LPD 2011, and presented problems encountered with its implementation, such as the correlation between late payments and administrative burdens, the shortcomings of national judicial systems, and debt refinancing. Acknowledging that 'the real test on implementation is whether the expected gains of the 2011 Directive have been realised', the analysis concluded that the EU law's impacts were 'more limited than originally foreseen'.<sup>8</sup>

An appreciation of the LPD and infringement actions launched subsequently by the European Commission led the authors of the analysis to assess the general situation of B2B and PA2B payments in the European Union positively, with no major problems in business to business

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<sup>5</sup> This was reflected in one of the first recitals of the 2000 directive, and later set out in Article 1 of the 2011 recast.

<sup>6</sup> See also recital 5 of LPD 2011.

<sup>7</sup> SEC(2009) 315, p. 23.

<sup>8</sup> S. Reynolds and J. Davis, [Transposition and implementation of the Directive on Late Payments in commercial transactions: Implementation in Action](#), EPRS, European Parliament, 2015, p. 6.

transactions (apart from the difficulties in recovering debt, which is not really covered by the LPD). The worrying element was that public authorities in some countries were still far from the standards set by the 2011 Directive in their relations with private companies. Additional indication of the need for European regulation of the protection of debtors against debt extortion (often linked to criminal activity) complemented the suggestion for a joint future review of LPD together with EU legislation on procedural matters (namely the European order for payment procedure and the European small claims procedure).

## 1.4. Evaluation report and its follow-up

In accordance with Article 11 of the 2011 Directive (although with a slight delay – in August 2016), the European Commission published an [implementation report](#),<sup>9</sup> which was based on an external [evaluation study](#),<sup>10</sup> additional consultations and other sources. The report indicated that, because of the recent entry into force of the LPD, the difficulty in isolating its role from other factors, and the challenging economic context (including problems occurring in specific Member States), carrying out the ex-post evaluation was challenging.

Importantly, and as happens with other legislative texts, the difficulties with gathering data were cited, as neither the 2000 Directive nor the 2011 recast established any obligation and/or common methodology for that purpose. While the additional consultation among business representatives largely confirmed the findings of the external research based on surveys and selected interviews, a comparison between the situation before and after 2015 was not possible because of the changes in the European Payment Index (EPI) used for that purpose.

The evaluation study took note of the infringement procedures the European Commission launched against some Member States for non-communication of transposition measures (all cases now closed), incorrect transposition (all cases now closed), and bad application (Greece, Italy and Spain, as mentioned above).

The European Commission's implementation report stated, inter alia, that:<sup>11</sup>

- the 2011 Directive had raised awareness of the problem of late payment and sparked considerable interest, leading to the adoption of various national measures supporting its provisions;
- average payment periods are slowly decreasing, with significant problems remaining in the category of public authorities;
- half of creditors do not exercise their rights for fear of damaging commercial relationships, and many small and medium companies (SMEs) accept terms imposed by larger companies;
- the positive assessment of the efficiency of LPD is due to the limited regulatory costs (in terms of purely administrative costs). The possibility to attribute payments made within the prescribed periods as businesses' costs can be rather confusing and the evaluation study limited itself to assessing the Directive's costs as marginal), especially in

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<sup>9</sup> COM(2016)0534 final.

<sup>10</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015.

<sup>11</sup> For a more detailed description of main findings, see SWD(2016)278 final.

comparison with the estimated benefits in the form of €158 million daily savings in finance costs for the companies not being paid on time;<sup>12</sup>

- the Directive is coherent with the rest of the European Union policies and laws, especially the regulations on debt recovery;<sup>13</sup>
- softer measures are necessary to deal with matters related to issues such as market imbalances between big and small companies;
- EU added value was generated in the form of streamlined payment practices, which should gradually lead to increased cross-border trading.

While the evaluation study referred to the stakeholders' opinion that the impacts of the directive 'would have been unlikely to be achieved by Member States individually',<sup>14</sup> the implementation report concluded with a number of recommendations for actions that could accelerate the positive impact of the Late Payment Directive, without suggesting any legislative modifications.

Among the soft measures implemented by several Member States and supporting achieving the LPD objectives, prompt payment codes and specific sector initiatives (such as the Groceries Code Adjudicator in the UK<sup>15</sup>) were given the most attention. An impressive example of inter-sector activity is the Spanish platform supporting numerous actions that could improve payments.<sup>16</sup> Other examples of supportive measures include administrative penalties, VAT regulations, and monitoring mechanisms for public authorities.<sup>17</sup>

Finally, the implementation report formulated a number of recommendations for Member States, as well as consideration of follow-up actions to be taken by the European Commission. These elements covered further exchange of best practices (especially in the framework of a [Late Payment Expert Group](#)),<sup>18</sup> additional guidance on some provisions of the 2011 Directive (especially a clearer definition of 'grossly unfair' and the calculation of the payment periods, which never materialised in separate documents), and improved measurement of late payments to facilitate the provision of data and allow cross-country comparison (which does not exist to date). A separate study focusing on the effectiveness and efficiency of both binding and voluntary measures in B2B relations, introduced by all Member States, should be published by the European Commission soon.

Apart from the data gathered by the European Commission and the results of the evaluation study, important information about the state of play in commercial payments were obtained from a large number of businesses in 2015 and 2016 by an independent entity (Intrum Justicia) and published in the form of annual European Payment Reports (EPR).<sup>19</sup> Data from subsequent editions, especially EPR 2018, will be referred to in specific parts of the following chapter.<sup>20</sup>

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<sup>12</sup> This figure was a result of applying a standard interest rate for overdraft facilities to the estimated amount paid late each year – see Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 62.

<sup>13</sup> As mentioned in point 1.1.

<sup>14</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 9.

<sup>15</sup> <https://www.gov.uk/government/organisations/groceries-code-adjudicator>

<sup>16</sup> <http://www.pmcm.es/>

<sup>17</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 32.

<sup>18</sup> This group – consisting of the European Commission and Member States' representatives – met twice in 2012, once in 2013 and 2014, twice in 2015, and since then only once, in November 2017.

<sup>19</sup> <https://www.intrum.com/press/publications/>

<sup>20</sup> For more details, see <https://www.intrum.com/press/publications/european-payment-report/>

## 2. Late Payment Directive standards and aims

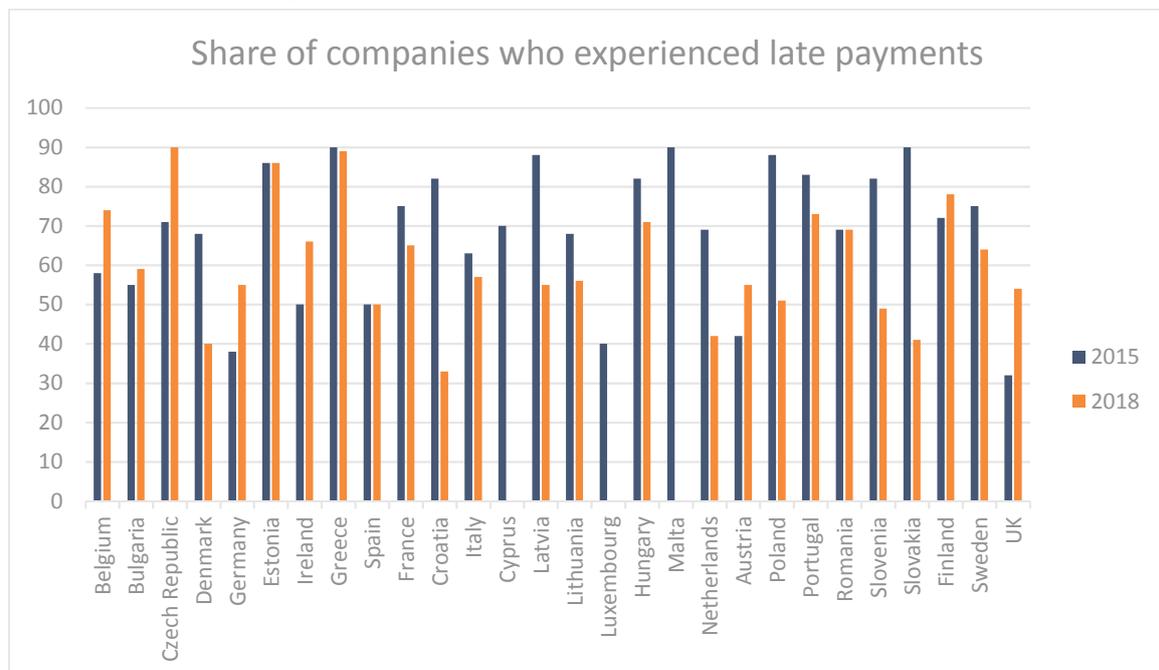
The general aim of the Late Payment Directive to address the issue of late payments in commercial transactions can be split into a number of very specific rules, most of which are supposed to discourage late payment by making it less attractive for the debtors, or at least allow the creditors to be compensated for the delay. Harmonisation of these rules in the European Union could potentially facilitate cross-border trade, although there are many other factors (outside the scope of this analysis), that also need to be taken into account in that respect. This chapter looks at each of the elements of the 2011 Directive, and provides the basic information on their implementation.

### 2.1. Payment deadlines

Among the explanatory recitals added to the Late Payments Directive in 2011, one of the first acknowledged that most goods and services in the EU are supplied in commercial transactions and to public authorities on a deferred payment basis. The precise deadline for making the payment is usually agreed upon by the parties, but it can also be indicated in the invoice or set by law.

To strengthen incentives for timely payments, the LPD had to establish a benchmark on the time beyond which a payment would qualify as being 'late' and thus fall under the subsequent rules. While the 2000 Directive established a general 30-day period only for those cases where the date or period for payment was not set out in the contract, the 2011 recast introduced two general rules: 60 days for B2B transactions and 30 days for those with public authorities. References to different contractual agreements have thus become an exception rather than the rule, and subject to assessment of fairness. The following figure confirms that significant differences continue to exist with regard to the occurrence of late payments in EU Member States.

Figure 1 – Share of survey respondents that experienced late payments in the last three years (2015) and during the previous year (2018).



Source: 2015 evaluation study and 2018 EPR (the latter did not cover Luxembourg, Malta and Cyprus).

It is important to note that the fact that a high percentage of companies have experienced a late payment does not necessarily mean that a majority of payments are actually late. According to the 2018 EPR, the latter amounts to 13 % (which in itself could still be considered to be too high), and the main causes are identified as: debtors in financial difficulties (with a decrease to 62 % from 72 % in 2016), intentional late payment (decrease to 48 % from 63 % in 2016), administrative inefficiency (rather stable – slightly below 50 %) and disputes (around 20 %).

The resulting losses can nevertheless be considerable, with companies reporting write-offs of between 0.55 % (in Denmark) and 3.10 % (in Ireland) of yearly revenue, due to unpaid invoices.<sup>21</sup>

### 2.1.1. Transactions between undertakings

As mentioned above, the 2011 recast introduced a **60-day maximum for payment** periods fixed in a B2B contract, and the possibility for parties to agree a longer period was made subject to the condition that such an agreement would not be grossly unfair to the creditor.

In case the payment period is not set in the contract, the rules that were established by the 2000 Directive remain valid:<sup>22</sup>

- 30 days from the date of receipt of the invoice (or equivalent request),
- 30 days from the date of receipt of goods or services (if the above is unclear or occurred earlier),
- 30 days from the date of acceptance or verification of conformity, if such a procedure was to be expected. A 2011 addition stated that this procedure should not exceed 30 days, unless expressly agreed in the contract<sup>23</sup> and not being grossly unfair to the creditor.<sup>24</sup>

In transposing these provisions into national law, a few Member States went beyond the minimum standards, to ensure stronger protection for creditors:

- Sweden omitted the word 'grossly' – possibly limiting the option of extending the payment term through contract agreement;
- France decided that the only exception to the 60-day limit is when the agreed contract stipulates payment 45 days from the end of the month – meaning a possible term between 30 and 75 days;
- Bulgaria regulated that the right to receive interest starts as soon as two weeks following receipt of the invoice;
- Germany decided to make payment due immediately if no date was set by the contract, and that the maximum term agreed by the contractors should not exceed 30 days;
- Austria made limited the maximum term in principle to 60 days;
- Spain established the 60-days maximum without any exceptions;
- Croatia introduced an ultimate maximum of 360 days.

For comparison, the following figure shows the practice as reported by businesses in almost all EU countries.

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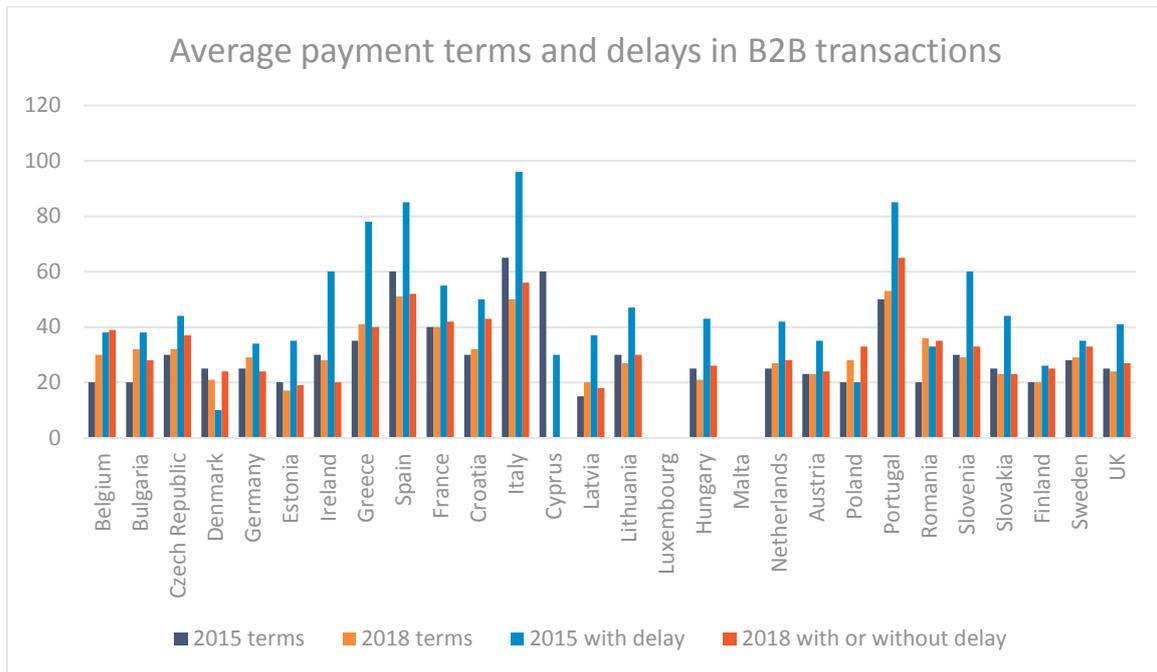
<sup>21</sup> [European Payment Report 2018](#), p. 16.

<sup>22</sup> The 2011 recast added 'any' in the introductory phrase of the relevant article.

<sup>23</sup> During an Expert Group meeting, the European Commission clarified that 'expressly' simply means 'in writing'.

<sup>24</sup> Recital 26 referred to 'particularly complex contracts' as justification for such an extension.

Figure 2 – B2B payments terms and delays from 2015 and 2018.



Source: 2015 evaluation report and 2018 EPR (the latter did not cover Luxembourg, Malta and Cyprus).

It is interesting to note that, while the average contract terms remained more or less the same (with an equal number of countries where they fell slightly and those with some increase), there was a significant improvement in recent years with regard to payment delays (where the previous EU average – as reported by the European Commission between 2011 and 2014 – fell only from 20.5 to 19.3 days).

The overall EU average payment term fell from 56 days in 2011 to 34 in 2018, but the comparison with the data available for 1990s showed that, in some countries, the situation has not improved in the long term. In the specific case of Greece, where the average payment duration for B2B transaction fell significantly, a new practice of upfront payments established in the wake of the financial crisis might have contributed to this result.

According to the 2015 evaluation study, half of the businesses that responded to the survey considered that the situation has not changed, and one in three actually declared a deterioration.<sup>25</sup> Apart from the economic situation, which influences payment behaviour in each country, differences in prevailing business cultures are constantly referred to as an explanation of diverging payment periods, especially when they are longer than contractual terms. The EPR annual reports confirm that late payment is more common in southern EU Member States.

Even more importantly, **power imbalances** between big and small companies contribute to the fact that stronger players can impose longer payment terms as debtors, or be spared from additional costs in case of delay. The 2015 evaluation study was quite clear in stating that the LPD 'has not had any impact on these market structures' and that larger firms can continue to impose terms on smaller ones – the latter accepting the terms in order not to lose the seller-buyer relationship. Especially in difficult times 'firms across the supply chain are exposed to liquidity constraints and obtaining free credit from suppliers is the easiest remedy to problems with cash flow'. In some

<sup>25</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 43.

sectors, such as food and drinks, this has become a major problem and led to such projects as the Supply Chain Initiative which promotes good businesses practices throughout the EU.<sup>26</sup>

Prompt payment codes have indeed been established in a number of countries (with examples in Ireland,<sup>27</sup> the UK<sup>28</sup> and France),<sup>29</sup> providing either legal obligations to publish information on payment practices, or encouraging good practices towards suppliers. Such measures were also described by the Member States' representatives during the Late Payment Expert Group meetings, while business organisations' representatives diverged in their opinions – some claiming that, for example in the construction sector, the codes have allowed bigger companies to impose abusive practices.<sup>30</sup>

### 2.1.2. Transactions between undertakings and public authorities

Throughout the European Union, public contracts (PA2B) continue to constitute an important element of the economy, and numerous companies (including small and medium ones) sell products and/or provide services to public authorities. Taking account of the usually stable financial situation of public budgets, including credit opportunities, national and local authorities should in principle have no trouble to pay their private contractors' invoices. The 2011 recast therefore introduced a shorter **standard payment period of 30 days**, with a possibility of extending it by law to a maximum of 60 days in two very specific cases: public authorities carrying out activities on the market and subject to transparency requirements, and recognised healthcare entities.<sup>31</sup> Apart from Ireland, the UK and the Netherlands, all EU Member States decided to apply these exemptions.<sup>32</sup>

The 2011 Directive envisaged a possibility to set a longer payment period (up to 60 days) in the contract, but imposed the condition that the longer period is objectively justified in the light of the 'particular nature or features of the contract'. In comparison to the transactions between undertakings, setting the date of receipt of the invoice in a contract was prohibited. The order of calculating the payment period otherwise applies exactly as in B2B transactions (see above; excluding the addition made in 2011 on the procedure for acceptance or verification of conformity).

At the time of the 2015 evaluation study, the average payment duration in PA2B decreased from 65 days in 2011 to 58 days in 2014, but actually increased in 10 Member States. Moreover, significant differences were identified in terms of payment terms between the different regions of Spain and Italy.<sup>33</sup> The figure below shows the comparison between the study data and information gathered by the 2018 European Payment Report, showing further improvement in the situation, especially in the southern countries mostly concerned.

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<sup>26</sup> <https://www.supplychaininitiative.eu/>

<sup>27</sup> <https://www.promptpayment.ie/>

<sup>28</sup> <http://www.promptpaymentcode.org.uk/> – suggesting that the 60-day period could be extended not in the contract but because of 'exceptional circumstances'.

<sup>29</sup> <https://www.economie.gouv.fr/cedef/delais-de-paiement-entre-entreprises>

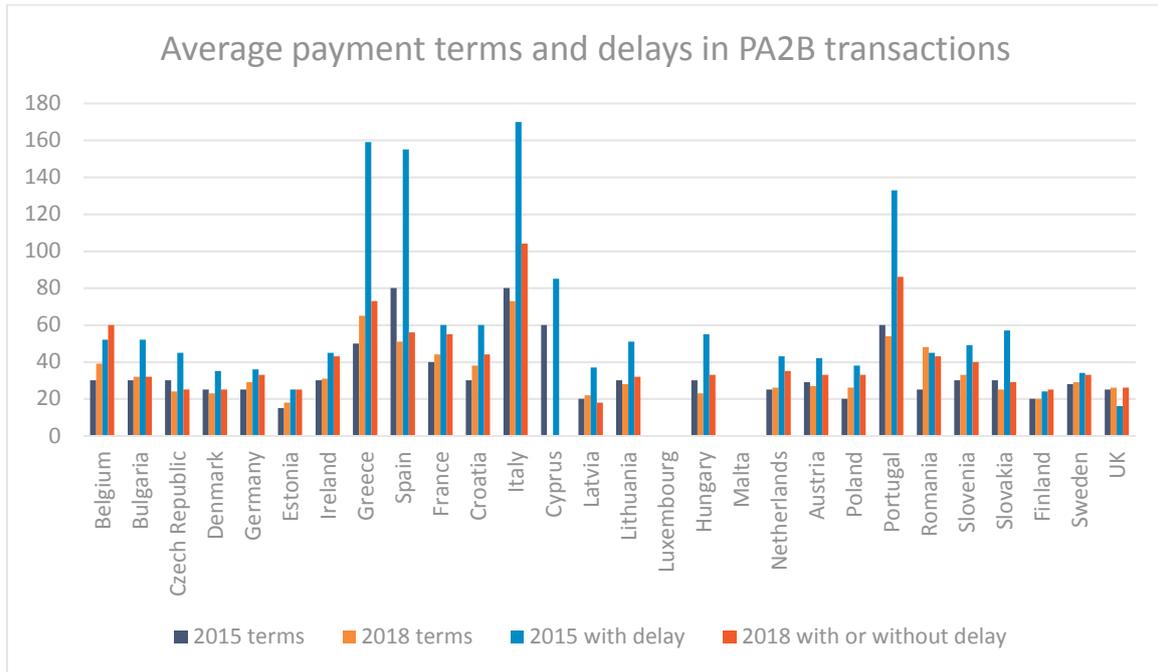
<sup>30</sup> See Minutes of the 6th meeting on 25 November 2015.

<sup>31</sup> See recital 25 of the 2011 Directive for extensive justification.

<sup>32</sup> France opted for a 50-day period for healthcare.

<sup>33</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 52.

Figure 3 – PA2B payments terms and delays from 2015 and 2018.



Source: 2015 evaluation report and 2018 EPR (the latter did not cover Luxembourg, Malta and Cyprus).

While the current situation indicates that many Member States are either within, or close to, the aim of 30-days, countries with accumulated debt continue to experience difficulties in implementing the LPD with regard to public authorities. Notwithstanding such justification, the European Commission opened **infringement cases** against countries where public authorities are furthest from the 2011 Directive's standard and this has led to additional efforts by the respective governments.

The 2015 evaluation study referred to a specific measure introduced in Italy, even though some of the delays in payment by its public authorities might have been explained by their wish to avoid a (temporary) increase in deficit or debt. One of the rules, introduced by a decree in 2014, stated that if the average delay in payments exceeds 60 days, no recruitment by that authority is possible in the subsequent year.<sup>34</sup> In addition to legislative measures, significant financial amounts were attributed by the central government to regional authorities, to cover outstanding bills, and electronic invoicing is being introduced at various levels to speed up future payments. However, in June 2018, the European Commission sent a reasoned opinion to Italy (one step before bringing the case to the Court of Justice in Luxembourg), that its law which systematically extends the time for processing the payment of invoices in public works might be in breach of the LPD.<sup>35</sup> Separately, in February 2018, the Commission brought a case to the Court of Justice for Italy's sustained and systematic infringement of Article 4 of the LPD, referring to entire categories of public authorities and the average time taken to pay in respect of all the transactions concluded by those authorities.<sup>36</sup>

<sup>34</sup> This law was later declared illegitimate by the Italian Constitutional Court – see <https://www.leggioggi.it/wp-content/uploads/2016/01/Corte-Cost.-272-2015-MICHELE-NICO.pdf>

<sup>35</sup> [http://europa.eu/rapid/press-release MEMO-18-3986 en.htm](http://europa.eu/rapid/press-release_MEMO-18-3986_en.htm)

<sup>36</sup> Case [C-122/18](#)

Another example of measures contributing to the decrease of payment duration is Spain, where the central government is now obliged to cover regions' invoices after six months, and penalties are imposed on public officials committing to expenditure without guaranteed resources.

A reasoned opinion was sent by the European Commission to Portugal in October 2017 with regard to its health sector, where average payment periods reached over 300 days.<sup>37</sup> A similar case in the same sector resulted in a letter of formal notice sent to Slovakia in February 2017.<sup>38</sup>

Similar to the prompt payment codes established for B2B transactions, successful examples of such measures exist also in the area of PA2B. A government policy in Ireland aims at ensuring payment by the authorities within 15 days, and the UK government's objective is currently 5 days. To ensure the monitoring of payment terms and deadlines (if not delays), transparency measures and/or reporting obligations are necessary, as noted by Member States during the Late Payment Expert Group meetings.

On a number of occasions, the possibility to introduce additional links between late payment and EU rules on **public procurement** was mentioned, including some form of influence over the way that subcontractors are paid by the contracted companies. The possibility to exclude companies not complying fully with the 2011 LPD from public procurement was put forward by the European Commission as possible additional measures during a meeting of the Late Payment Expert Group as early as April 2015.<sup>39</sup>

Linking the requirements of the LPD to the public procurement framework<sup>40</sup> was also the subject of the REFIT Platform Opinion of April 2017, in which the stakeholders rejected the proposal to cross-reference between these complementing legislative acts.<sup>41</sup> At the time, most Member States' representatives considered that any double regulation could increase administrative burden, and supported increased efforts to ensure proper implementation of the Late Payment Directive through training, information campaigns and soft laws. Others expected positive results, especially from requiring public authorities to ensure that prompt payment is passed on any subcontracting companies in their contracts. The REFIT Platform also pointed to the promotion of e-invoicing and e-procurement services as modern tools that can contribute to a culture of prompt payment, especially in public administration.<sup>42</sup> Indeed, representatives of the European Commission recently claimed that this could usually speed up average payments by 3-4 days.<sup>43</sup>

## 2.2. Statutory interest for late payment

The most obvious measure to make late payment less attractive for the debtor is to make it more expensive than making the payment on time. This led directly to the benchmark established by the 2011 recast as a sum of the reference rate applied by the European Central Bank (or national central banks for countries outside the euro area)<sup>44</sup> and at least 8 percentage points (up from 7 set in the

<sup>37</sup> [http://europa.eu/rapid/press-release\\_MEMO-17-3494\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-3494_en.htm)

<sup>38</sup> [http://europa.eu/rapid/press-release\\_IP-17-239\\_en.htm](http://europa.eu/rapid/press-release_IP-17-239_en.htm)

<sup>39</sup> Another idea proposed was to exclude such companies from any Corporate Social Responsibility labels.

<sup>40</sup> The current framework comprising three major acts: Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public procurement, and Directive 2014/25 on procurement in utilities sectors).

<sup>41</sup> See [https://ec.europa.eu/info/sites/info/files/opinion\\_xii13a\\_adopted.pdf](https://ec.europa.eu/info/sites/info/files/opinion_xii13a_adopted.pdf), p. 7.

<sup>42</sup> A specific act regulates this matter: Directive 2014/55/EU on electronic invoicing in public procurement.

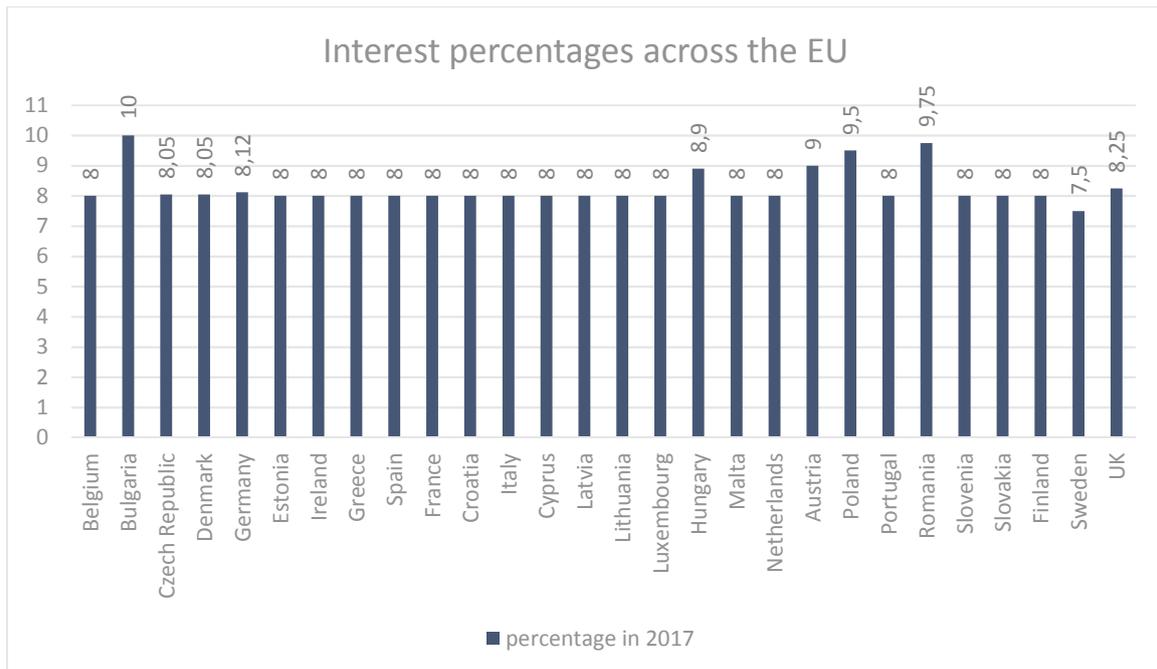
<sup>43</sup> Meeting in DG GROW in June 2018.

<sup>44</sup> Article 2(7)(a)(ii) also gives the Member States using the euro the possibility to establish a different rate, albeit still linked to the one set by the ECB.

2000 LPD). Taken formally, the calculation of the time from which a payment should be considered as late, is necessary precisely for the purpose of applying the statutory interest.

When transposing this element of the Late Payment Directive into national law, a majority of Members States established the 8 % addition, with a few opting for 9 % (Austria, Germany, Romania, and partly Slovakia – for the fixed rate),<sup>45</sup> or 10 % (Bulgaria, France, Hungary). The current interest rate in all EU Member States can be consulted on the website of the European Commission, and can be seen in detail in figure 4 below.<sup>46</sup>

Figure 4 – Statutory interest in 2017.



Source: European Commission.

It is important to note that the 2011 Directive does not oblige the creditor to claim interest for late payment. On the other hand, a company should be able to charge the interest rate without the need to give the debtor prior notice (whether another enterprise or a public authority).<sup>47</sup> Taking account of the position of numerous businesses (60 % of survey respondents) that claimed that using the option of charging interest was often disregarded for the sake of maintaining a good relationship with the debtor, the 2015 evaluation study put forward a proposal for an automatic calculation among its recommendations. The European Commission's implementation report took note of small and medium enterprises' reluctance to exercise their rights, referring to inherent aspects of business culture related to the different positions of companies on the market and sector specificities.<sup>48</sup> Larger businesses' organisations, and most Member States, appear to be against the automatic calculation of interest in case of late payments.

At the same time, as will be mentioned in detail (under point 2.5) below, a contractual term which excludes interest for late payment should be considered – in accordance with Article 7(2) of the

<sup>45</sup> In Slovakia, the variable interest rate would be complemented by 8 %.

<sup>46</sup> [http://ec.europa.eu/growth/smes/support/late-payment\\_en](http://ec.europa.eu/growth/smes/support/late-payment_en)

<sup>47</sup> See recital 16 in LPD 2011.

<sup>48</sup> COM(2016)534 final, p. 3.

2011 LPD – as grossly unfair, and thus potentially declared invalid by the relevant national authority or court. The ambiguity of the situation merits additional reflection.

An important judgment concerning this matter was recently delivered by the Court of Justice<sup>49</sup> in a case of Spanish legislation adopted to facilitate reducing the number of invoices unpaid by public authorities.<sup>50</sup> The specific provision, which was subject to a preliminary question of a court in Murcia in 2013, made the immediate recovery of the debt conditional upon the waiver of interest for late payment (and of compensation for recovery costs – discussed below), with the economic and financial crisis given as justification for such extraordinary measures. The Court declared that such a measure is compatible with the LPD, providing that the agreement to waive interest and compensation in exchange for immediate payment of the principal amount was entered into freely and voluntarily by the creditor (to be verified by the referring court).

The European Commission, when reporting on the above-mentioned judgment to the Late Payment Expert Group meeting in November 2017, declared that it will continue to apply the Directive with vigour, in full respect of Court decisions.<sup>51</sup> A few months earlier, the Commission sent a complementary letter of formal notice to Greece with regard to its new legislation, which removed creditors' rights to interest and compensation.<sup>52</sup> In June 2018, this case remains open.

### 2.3. Compensation for recovery costs

As already indicated in the 2000 Directive, introducing reasonable compensation for creditors for the costs incurred due to late payment was also supposed to discourage debtors from taking advantage of low interest rates and slow procedures for redress.<sup>53</sup> Interestingly, the possibility of setting up maximum amounts for different levels of costs was also referred to at that time, with ultimate competence left in the hands of the Member States. The legislative proposal made by the European Commission in 2009 contained a fixed compensation equal to 5% of the amount specified, in addition to the statutory interest for late payment and the compensation fee for the recovery costs.<sup>54</sup>

The establishment of a fixed sum in the 2011 recast was aimed at limiting the administrative and internal costs linked to the recovery,<sup>55</sup> but the door was left open for claims to recover other costs, such as instructing a lawyer and/or employing a debt collection agency. The Member States were also given the possibility to set a higher fixed sum, or subject the sum to inflation-related increase.<sup>56</sup>

Almost all EU countries introduced this provision into their national law in a similar way, setting a **minimum sum of €40** (or equivalent amount in national currency). In Austria and the Netherlands, this amount is fully fixed. In the UK, the minimum of GB£40 applies to debts below GB£1 000 pounds,

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<sup>49</sup> [Case C-555/14](#)

<sup>50</sup> Royal Decree Law 8/2013 of 28 June 2013 on urgent measures to combat late payment by the public administrative authorities and to support local authorities with financial problems.

<sup>51</sup> Minutes from the 7th meeting of the expert group on the Late Payment Directive 2011/7/EU, p. 5.

<sup>52</sup> [http://europa.eu/rapid/press-release\\_MEMO-17-1281\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-17-1281_en.htm?locale=en)

<sup>53</sup> See recital 16 and Article 3(e) in LPD 2000.

<sup>54</sup> The situation in EU Member States at that point (under the 2000 Directive) was presented in the Impact Assessment, SEC(2009)315, p. 37.

<sup>55</sup> See recital 19 in 2011 recast.

<sup>56</sup> See recital 21 and article 6 of LPD 2011.

and GB£70 for debts between GB£1 000 and GB£10 000, and GB£100 pounds for those of higher value (which is similar to what the European Commission originally proposed).

The 2015 evaluation study considered that the minimum fee of €40 is not proportional, and should be higher, indicating the related risk of damaging the business relationship as justification. Although (as mentioned above in relation to statutory interest), at least half of European companies do not pursue late payments through the use of such instruments, it is rather difficult to imagine that a significantly higher amount would have a less damaging effect for those relationships, while at the same time sufficiently balance the loss of related benefits. In any case, the 2011 LPD only set a minimum amount, so it is possible that future national regulations and/or business contracts will set it higher. On the other hand, a return to a larger variety of solutions might not necessarily facilitate cross-border trade, especially for SMEs. A different practice, reported by some of the stakeholders, is to offer business clients a discount for timely payments – and thereby replace penalties for delays with a positive encouragement measured in concrete savings.

It is important to note that, although the Late Payment Directive did not regulate any aspect of the procedural law regarding redress, it underlined the general principle of non-discrimination set out by the Treaty on the Functioning of the European Union.<sup>57</sup>

## 2.4. Recovery procedures for unchallenged claims

With regard to unchallenged claims, the 2000 Directive already obliged Member States to ensure that an **enforceable title** is obtained within 90 days following the necessary action or application made by the creditor in accordance with national law, irrespective of the amount of debt. The 2011 recast modified a reference to private international law, which became integrated into the EU *acquis*, and included a suggestion of an expedited procedure inside the relevant recital and article. The exclusion of periods for the service of documents and any delays caused by the creditor from the calculation of 90 days was not modified. Accompanying reference to equal treatment of companies regardless of the Member State of establishment continued to underline the cross-border aspect of LPD's aims with regard to the facilitation of trade and public contracts.

Concerns about the variety of different national recovery procedures were listed in the 2015 evaluation study among the issues to be clarified in the future, and included such elements as the eligible sums of claim and the need for a lawyer's assistance. Half of the companies that were surveyed never used litigation or alternative dispute resolution to recover unpaid invoices, as both time and costs were considered to be discouraging factors.<sup>58</sup> Stakeholders from a number of countries (Bulgaria, Greece, Spain, France and the Netherlands) raised concerns about the effectiveness of these provisions of the LPD, while Swedish businesses were quite satisfied with the relevant practices in their country.<sup>59</sup>

In the 2016 implementation report, the European Commission declared it would explore the possibility of comparing national justice systems implementing this provision, and present the results in the EU Justice Scoreboard. While the [2018 Scoreboard](#), published on 28 May 2018, does not contain such specific analysis, the functioning of national law enforcement in the field of late payment was assessed in the framework of a separate study on B2B relations<sup>60</sup> (already mentioned

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<sup>57</sup> See recital 20 in the 2000 Directive.

<sup>58</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 39.

<sup>59</sup> *Idem*, p. 58.

<sup>60</sup> Information obtained directly from DG GROW.

under point 1.4 above), and should be analysed in search of possible best practices to be encouraged.

## 2.5. Unfair contract terms and practices

The inclusion of a separate article on unfair contract terms and practices into the 2011 LPD did not establish any new rules, but provided a more visible clarification of the term used earlier with regard to the basic freedom of contract – '**grossly unfair**'. Largely similar provisions were included in the 2000 Directive in the article on the interest to be paid in case of late payment, and it was clear that this EU act does not affect national provisions relating to the way contracts are concluded, or regulating the validity of contractual terms which are unfair to the debtor.

Notwithstanding the above-mentioned limitations, the 2000 Directive underlined the need to prevent abusive use of the freedom of contract to the disadvantage of the creditor. In effect, such terms of contract or practices related to the date or period of payment, the rate of interest or the compensation for recovery costs, which are not properly justified and only provide the debtor with additional liquidity, 'may be regarded as constituting such an abuse'.<sup>61</sup>

To allow national courts to judge on a case by case basis when conflict arises, the 2011 LPD called for all circumstances of cases to be considered, and slightly rephrased the three examples from the 2000 Directive to provide clarification:

- any gross deviation from good commercial practice, contrary to good faith and fair dealing,
- the nature of the product or the service, and
- any objective reason for the debtor to deviate from the statutory interest rate or the compensation fee.

In addition, the 2011 recast also provided that a contractual term or a practice which excludes interest for late payment should always be considered grossly unfair, while those which exclude the right to compensation for recovery costs should be presumed as such.

Should a specific term or practice be found grossly unfair, the 2011 LPD obliged Member States to ensure that it is not enforceable or gives rise to a claim for damages. Interestingly, the final provision of Article 3(3) of the 2000 Directive on the statutory terms to be applied, unless the national court itself determines fair conditions, was not maintained in the 2011 recast.

In the absence of identified jurisprudence at national and/or European level (with the notable exception of the case referred to under point 2.2 above, which concerned national legislation and not an individual contract),<sup>62</sup> **the assessment of the implementation of these provisions is not possible** at this stage. Most Member States, although addressing the European Commission with similar concerns regarding the use of the term 'grossly unfair',<sup>63</sup> have not provided any additional criteria when transposing the 2000 and 2011 Directives into national laws,<sup>64</sup> possibly avoiding infringement procedures. Business organisations' representatives expressed their reservations regarding the term during a meeting with the Late Payment Expert Group in November 2015, but

<sup>61</sup> See recital 28 of LPD 2011, which also contains a direct reference to the [Draft Common Frame of Reference](#).

<sup>62</sup> [Case C-555/14](#).

<sup>63</sup> <https://www.out-law.com/en/articles/2015/october/uk-courts-to-define-grossly-unfair-payment-terms-says-government/>

<sup>64</sup> Similar to the experience with the B2B prompt payment code, Ireland can be considered as an example, with its additional criteria set in the [Statutory Instrument No 580/2012](#).

the European Commission did not issue any further clarification to date, and does not plan to adopt any additional guidance documents. As was already mentioned under point 2.1.1 above, Sweden did not use the word 'grossly' in its transposition measures, so the protection of creditors in this country could, in theory, be stronger than in others.

Two additional procedural provisions were introduced by the 2000 Directive, and remained almost unchanged in the 2011 recast. One concerned the obligation for Member States to ensure that adequate and effective means exist to prevent the continued use of grossly unfair terms and practices. The other stated that this prevention should include the possibility for business organisations (the 2011 LPD deleting a restriction to SMEs' representatives) to file complaints or court cases in the interest of creditors and competitors. There were no reported problems with the transposition of these provisions into national law of the Member States, but their application probably relies on the availability of appropriate information throughout the business community. In the UK, a consultation process led to the modification of the national rules on representative bodies permitted to challenge certain contract terms and practices deemed 'grossly unfair' on behalf of businesses, but any change in the definition of the term itself was considered premature.<sup>65</sup>

## 2.6. Information activities

As with any other piece of legislation, the successful achievement of its aims and/or the use of rights granted depends largely on the availability of information concerning the established regulations, especially amongst those that are likely to be affected. The data available concerning the Late Payment Directive allows only a limited assessment of this aspect.

The European Commission's impact assessment accompanying the legislative proposal in 2009 considered a couple of options related to increasing awareness of the existing rules among businesses and organisations representing SMEs. The low effectiveness of these options was then considered in the view of numerous awareness-raising activities organised by national authorities and representative organisations following the transposition of the 2000 Directive.<sup>66</sup> Nevertheless, the 2011 recast introduced a separate article (Article 8), with a few obligations and incentives to increase public awareness of the new rules on late payments.

First and foremost, Member States are obliged to make the rate of statutory interest for late payments publicly available, and the European Commission must publish a compilation of this information. This provision has not raised any problems for its addressees, and the interest rates can be consulted – as already mentioned in point 2.2 above – on the relevant website.<sup>67</sup>

The following provision was less strict, and obliged Member States to use professional publications, promotion campaigns or any other functional means to **increase awareness** of the remedies for late payments among undertakings, with the notable disclaimer of 'where appropriate'. In practice, it was the European Commission's information campaign, from October 2012 to July or November 2014 in all 28 EU countries, that visibly contributed to the spread of knowledge about the 2011 LPD amongst European stakeholders (especially SMEs and public authorities) during its transposition and first year of application.

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<sup>65</sup> See <https://www.gov.uk/government/consultations/late-payment-and-grossly-unfair-terms-and-practices-changes-to-the-regulations>. In 2016, an independent [Small Business Commissioner](#) was created to consider complaints by small suppliers about payment issues with larger businesses, and to facilitate dispute resolution.

<sup>66</sup> SEC(2009)315 final, pp. 25-26.

<sup>67</sup> [http://ec.europa.eu/growth/smes/support/late-payment\\_en](http://ec.europa.eu/growth/smes/support/late-payment_en)

The awareness of European businesses regarding the regulatory provisions on the matter of late payments is reported to be relatively high, although different percentages are provided by various sources. The 2015 evaluation study indicated that companies are mostly aware of the rules on late payments, and of their right to claim compensation and/or interest. The level of knowledge was found to be lower among smaller and younger firms. The fact that higher awareness of rules was statistically linked to lower exposure to deterioration in average payment delays was portrayed as a positive effect of the 2011 LPD.<sup>68</sup> At the same time, the study underlined that 'the main determinant of late payment is not related to awareness of the rules but to country-specific effects'<sup>69</sup> and proposed to aim future campaigns at making late payment 'socially unacceptable'.

The 2016 implementation report of the European Commission pointed out that a high level of awareness of the rules on late payment is not necessarily accompanied with knowledge about the relevant EU legislation (namely the LPD). It underlined the important value of the exchange of best practices, notably in the framework of the dedicated [Late Payment Expert Group](#), although it has only met once per year on average so far. Short references to national legislation and practices, which were recorded in the minutes from this group's meetings, were recently replaced by more detailed presentations from the selected Member States' representative. Interestingly, increased public interest in the topic of late payments was indeed reported by some countries during the Expert Group meetings and attributed to the adoption and application of the LPD.

According to the 2018 European Payment Report, only 28 % of businesses were aware of the Late Payment Directive, but whereas the number was 27 % for SMEs, it was much higher (52 %) for large companies. Significant differences were also observed between the regions within the European Union, with 14 % in the eastern countries, and 45 % in the south. The EPR deplored the fact that on average only 33 % of SMEs (while that figure for all companies is 58 %, and 66 % in the southern Member States) declared knowledge of the national legislation which transposed the LPD.

Finally, although this is not a provision limited to sharing information, the Member States were invited by the 2011 LPD, through the use of the term 'may', to encourage the establishment of prompt payment codes (with clearly defined payment time limits and proper dispute procedures), or any other initiatives tackling the issue of late payments and contributing to a culture of prompt payment. A number of examples of such measures were provided in the document accompanying the European Commission's implementation report, covering the voluntary codes in Ireland and the UK (already mentioned above in relation to the payment delays in B2B transactions – see point 2.1.1), electronic invoicing in Sweden, Italy and Spain, administrative fines in Italy and France, and various transparency measures.<sup>70</sup> A more recent example of an interesting initiative supporting the objectives of the Late Payment Directive is the [Pay Me Now](#) campaign in the Netherlands.

On the European level, the [Your Europe](#) information portal contains basic advice with regard to late payment, and should soon be updated and redesigned.<sup>71</sup> Additional support for companies in cross-border relations can be provided by the [Enterprise Europe Network](#). Earlier, a special pilot project on the rapid and efficient enforcement of outstanding claims by SMEs operating across borders was implemented by the European Commission on the basis of a request from the European Parliament, resulting in a [guide on claims management](#), seminars in all Member States, and preparation of teaching modules for young entrepreneurs.

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<sup>68</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 7.

<sup>69</sup> Idem, p. 11.

<sup>70</sup> SWD(2016) 278 final, pp. 15-16.

<sup>71</sup> Information obtained directly from DG GROW.

## 3. Conclusions

### 3.1. Modest ambitions of the Late Payment Directive

Differences between payment rules and practices are still quite common in the European Union, and influence the proper functioning of the internal market negatively. It is argued that more timely payments in business-to-business (B2B) transactions and those between private companies and public authorities (PA2B) could contribute to the growth of European economies, increasing the number of jobs and cross-border trade. The Late Payments Directive, especially in its revised form as adopted in 2011, is an instrument contributing to this process, but its precise influence escapes the measurement methods available.

Similar to other EU legislative acts, some interpretations of this directive's aims can be overambitious, as might seem to be the case with the specific objectives referred to in the European Commission 2016 implementation report. In this report, the LPD was held to provide creditors with timely payments and measures that enable them to **fully and effectively** exercise their rights when paid late, and to confront debtors with **strict measures** that discourage them from paying late or from establishing excessively long contractual payment terms.<sup>72</sup> The available data on the state of play of commercial payments indicate that the rights granted to creditors are not necessarily exercised as was intended, and the measures against debtors are neither strict nor fully effective.

It is easier to look at the general objectives of the LPD and appreciate their relevance.<sup>73</sup> Indeed, the implementation of its provisions in all Member States streamlined, at least to some extent, payment practices across the EU, and is helping to develop a legal and business environment supportive of timely payments in commercial transactions. The Directive thus facilitates access to finance for companies (especially SMEs), and the functioning of the internal market. Establishing harmonised rules on late payment should also create better conditions for cross-border trade, but this latter also depends on many other factors. With regard to individual countries, those which had no significant problems with payment deadlines before the adoption of the 2000 Directive and/or its 2011 recast, were often those indicating that EU legislation had no significant impact.

It is important to be aware of the fact that the Late Payments Directive adopted in 2011 was a modest step forward in comparison to the previous act, introducing a few stronger provisions in areas where the situation in a number of Member States has not improved much in the past. In accordance with the minimum harmonisation principle, the European legislator permitted the Member States to maintain or establish more creditor-favourable conditions on both occasions.

### 3.2. Standards, contracts and reality

The scope of the LPD is limited to payments made as remuneration for commercial transactions, and respect for contractual freedom remains visible in its provisions. The setting of maximum payment deadlines – beyond which statutory interest and compensation of costs can be claimed – is of course a clear indication of preferred behaviour, but the option of different terms in the contract remains possible for B2B transactions, as long as they are not 'grossly unfair' (which needs to be assessed by

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<sup>72</sup> COM(2016)534 final, p. 2.

<sup>73</sup> Idem

a judge on a case by case basis in case of conflict).<sup>74</sup> The results of business surveys and consultations indicate that a number of larger companies continue to dictate unfair contractual terms to smaller suppliers, taking advantage of the regulatory flexibility and stronger position on the market. Stakeholders in two countries with traditionally good payment situations (Finland and Slovenia), claimed that the Directive gave bigger companies additional leverage to impose longer payment periods.<sup>75</sup>

The 2011 LPD has indeed set clear standards with regard to the deadlines for payments in B2B and PA2B transactions, and harmonised the statutory interest rates to be applied in case of late payments, as well as the minimum amount of compensation for the costs of debt recovery. At the same time, on average, half of European companies admit that they do not pursue the possibility of claiming interest and/or compensation from those contractors that do not pay within the agreed time, with the two major reasons for this being maintaining good commercial relationships (39 %) and the procedures not being cost-effective (22 %).<sup>76</sup> The Directive acknowledged that the consequences of late payment can be dissuasive only if they are accompanied by rapid and effective redress procedures, but apart from the single provision on unchallenged claims, this is a matter which was left outside its scope and covered by separate EU legislation only in relation to cross-border trade.

The 2015 evaluation study considered that the LPD is still relevant because almost 80 % of companies (amongst those who provided comments) experienced late payments during the previous three years. The claimed efficiency and significant added value are somewhat contradicted by the acknowledgment of little evidence for the Directive's impact on payment behaviour and the continued practice of late payment.<sup>77</sup> Nevertheless, the percentage of late payments has decreased in subsequent years, as shown by the European Payment Reports.

The regulatory situation is slightly different with regard to business transactions with public authorities, where the contractual extension of the deadline for payment is only possible in a range from 30 to 60 days. This has allowed the European Commission to pursue infringement procedures against Member States with the longest average late payments, and motivated these countries to make additional efforts. Apart from the allocation of necessary financial resources and the introduction of modern administrative procedures (such as e-invoicing and payment reporting), examples of prompt payment codes have shown that good practices can be effectively shared between Member States, and serve as inspiration for voluntary measures, improving the business environment.

In fact, one of the principal observations of the European Parliament resolution of 4 July 1996 remains valid, because it continues to adequately describe the late payments situation. The resolution recognised that 'imposing by law the set payment periods is detrimental to commercial contractual freedom, yet improving confidence in the single market by setting clear standards, eliminating unfair payment practices by defining the underlying rules and creating a market free of credit obstacles while harmonising the widely varying legislation in Member States require a framework of minimum legislation to improve business culture, ensuring good and fair practices'.<sup>78</sup>

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<sup>74</sup> Recitals 18 and 19 from the 2000 Directive acknowledged that longer payment periods can be justified in certain contracts, but indicated the need to prohibit abuse of the freedom of contract to the disadvantage of the creditor.

<sup>75</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 54.

<sup>76</sup> *Idem*, p. 38.

<sup>77</sup> *Idem*, p. 6.

<sup>78</sup> OJ C 211, 22 July 1996, p. 43, point 5.

### 3.3. Possible future developments

Although late payments continue to be a problem for many (especially smaller) companies in the European Union, and the improved situation perceived in B2B or PA2B transactions cannot be attributed only to the implementation of the 2000 Directive and its 2011 recast, it seems that the standards set by the LPD are increasingly met in all EU Member States. Possible further developments can be envisaged in three areas: better monitoring of payment terms and practices applied in various transactions, improved sharing of best practices, and additional legislative initiatives.

In the absence of any provisions of the Late Payment Directive, there is no common methodology for the gathering of data concerning the payment behaviour of public authorities and businesses in Europe. This analysis has made use of the results of surveys and consultations among a fairly large number of companies, but the figures are mostly indicative and difficult to compare from one year to another. In its 2016 implementation report, the European Commission asked Member States to monitor progress with regard to average payment periods in public and private sectors, and promised guidance in respect of calculating methodology. In practice, this was done, *inter alia*, during the meetings of the Late Payments Expert Group, including a relatively recent example of how average payment periods are calculated in Spain.<sup>79</sup> In fact, some Member States either already have or are considering the introduction of mandatory reporting on payment times, starting with the bigger companies which can more easily bear the additional reporting costs. Establishing common indicators for such reporting mechanisms would have the benefit of limiting the risk that obligatory or voluntary monitoring brings different categories of data across the EU.

While acknowledging the limits of any legislative instrument to change payment behaviour on its own, additional importance should be given to those provisions of the 2011 LPD that invite Member States to invest in awareness-raising activities (which should not have been limited to the period of the Directive's transposition) and other initiatives supporting timely payments in commercial transactions. The growing number of prompt payment codes, advice and mediation arrangements, as well as administrative measures (including fines for repeat offenders), which contribute to reaching the aims set by the 2011 Directive, should be made easily available as examples of best practices. Ideally, their effectiveness could be compared on the basis of the improved availability of data, as mentioned above.

The idea of publishing the prompt payers' list, which was a 'good practice' specifically mentioned by the 2011 LPD,<sup>80</sup> would probably find more support than a publicly-disclosed 'naming and shaming' list of companies with most payment delays. This latter measure was considered and rejected by the 2009 impact assessment (*inter alia* on the grounds of estimated high reporting costs), and the European Commission later pointed out that such a 'blacklist' would not be an appropriate tool in the situation where the worst offenders are not private companies, but certain public authorities.<sup>81</sup>

As for the additional legislative initiatives, some industry stakeholders continue to propose the automatic calculation of interest, as a way to avoid the calculations that smaller companies need to make before deciding whether or not to claim statutory interest in case of late payment due by a

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<sup>79</sup> Minutes from 7th meeting in November 2017.

<sup>80</sup> Recital 30.

<sup>81</sup> Meeting of the Committee on Internal Market and Consumer Protection on 23 June 2015.

contractor with a stronger position on the market. Other proposals from business representatives aim at legislative clarification of 'grossly unfair', which is rather unlikely to happen.

The 2018 European Payment Report showed that introducing new national legislation in order to deal with late payments is supported by 42 % of businesses (24 % in the northern EU countries), while support for voluntary corporate initiatives has risen to 30 %. In the meantime, the practical limits of horizontal harmonisation of laws and practices with regard to late payments led the European Commission to make a separate legislative proposal on unfair trading practices in B2B relationships in the food supply sector.<sup>82</sup>

As in any other EU policy area, the effective implementation of the LPD in any sector of the economy will also continue to rely on the activity of the European Commission, especially in launching the necessary infringement procedures. The recent example of a case against Spain in relation to its law extending the payment period for public authorities confirms the efficiency of this instrument, as the regulation incompatible with the EU Directive was subsequently modified and the case closed.<sup>83</sup>

Eventually, the intervention logic as presented in the 2015 evaluation study might truly bring about the desired effects of the Late Payment Directive on the situation of companies in the European Union: shorter payment periods, fewer barriers to cross-border trade and reduced business costs leading to improved liquidity and competitiveness, as well as a reduced bankruptcy rate.<sup>84</sup> The subsequent improved financial stability would promote entrepreneurship, and make a positive impact on growth and employment in the internal market.

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<sup>82</sup> COM(2018)0173

<sup>83</sup> [http://europa.eu/rapid/press-release MEMO-18-3446\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-3446_en.htm)

<sup>84</sup> Ex-post evaluation of Late Payment Directive, published by the European Commission in November 2015, p. 27.

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To facilitate the European Parliament Committee on Internal Market and Consumer Protection's work on an implementation report concerning the Late Payment Directive (LPD), this analysis looks at the available data concerning the application and effectiveness of the LPD. Rather than simply updating a research paper prepared by EPRS in June and July 2015, it strives to identify the logical evolution of the Directive's key provisions, adopted in 2000 and subsequently modified in 2011. The analysis builds on the evaluation study published by the European Commission in 2016, subsequent surveys of European businesses in relation to late payment in commercial transactions, and selected examples of national laws and practices. The conclusions underline the LPD's modest ambitions, differences between its standards and some existing practices, and the possible future developments in the area of late payments.

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ISBN 978-92-846-3209-1  
doi: 10.2861/661189  
QA-03-18-071-EN-N