

Position Paper

**of the German Insurance Association (GDV)
Lobby Register No. R000774**

on the

Commission's Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions

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German insurers are grateful for the opportunity to comment on the Commission's proposal for a Regulation on combating late payment in commercial transactions. The proposed Regulation is relevant for the insurance industry with regard to its trade credit insurance operations. Trade credit insurance covers the risk of default of accounts receivable from the supply of goods and services based on the granting of supplier credits. The trade credit insurer will reimburse undertakings when their customers are unable to pay because of insolvency or in the event that the payment is long overdue, thus protecting them from bad debt. Another major function of trade credit insurance is the continuous monitoring of the creditworthiness of the customers as well as the provision of professional advice to and representation of the trade creditors in insolvency proceedings. The volume of transactions for the supply of goods and services covered by German trade credit insurers amounted to about EUR 510 billion in 2022.

Executive Summary

The insurance industry acknowledges the Commission's objective to improve payment behaviour in commercial transactions, thus protecting small and medium-sized enterprises, in particular, against late payments. However, we consider the

instruments proposed by the EU Commission to achieve this objective, in particular replacing the current Late Payment Directive by a Regulation, introducing an absolute maximum period for payments in commercial transactions and introducing interest rates for late payments that are 8 % above the reference rate of the ECB to be inappropriate.

The proposed instruments disproportionately interfere with the freedom of contract of undertakings and do not take any account of country-specific as well as industry-specific characteristics. As a result, fragile undertakings will face considerable liquidity problems and an increasing risk of insolvency. A mandatory maximum period also restricts the insurability of accounts receivable in trade credit insurance. In addition, the proposed instruments will reduce the international competitiveness of European undertakings as compared to business partners outside of the European Union which are less heavily regulated and which will continue to insist on applying longer and flexible payment periods.

1. Change from a Directive to a Regulation

The Commission's proposal aims to repeal the current Late Payment Directive (Directive 2011/7/EU of 16 February 2011) and replace it by a Regulation. A Regulation, however, would directly and strongly interfere with civil and contract law of the EU Member States and automatically prevent the consideration of national and/or sectoral specificities.

A Directive, in contrast, provides much more flexibility and is to be preferred given that the payment behaviour in commercial transactions varies significantly across EU Member States as well as across industries.

2. Payment periods (Article 3)

The core of the proposed Regulation is the introduction of an absolute maximum period of 30 days for payments in commercial transactions between undertakings as well as between undertakings and public authorities (Article 3(1)). Procedures of acceptance and verification for ascertaining the conformity of the goods and services provided with the requirements of the contract shall only be allowed where necessary due to the particular nature of the contract in question and provided that the maximum duration of that procedure does not exceed 30 days (Article 3(2) and (3)).

We believe that introducing such a short and strict maximum period of 30 days would be wrong. This is due to the following reasons:

- A strict maximum period interferes significantly with the freedom of contract, which is particularly protected in Germany by Article 2(1) of the German constitution (*Grundgesetz, GG*). Payment periods reflect market realities and should be left to the parties to a contract in commercial

transactions, provided that none of the parties is being unduly disadvantaged. Strict payment deadlines that do not provide for any exceptions and cannot be adjusted to individual needs might also infringe Article 16 of the Charter of Fundamental Rights of the European Union. Article 16 protects the freedom to conduct a business in accordance with Union law and national law and practices and thus also the freedom of negotiation and the freedom of contract.

- The current Late Payment Directive already provides a good framework for national solutions that take account of the various interests. It provides for a maximum period of 60 days from which the parties may deviate, provided that it is not “grossly unfair” to the creditor. It is the responsibility of the Member States to introduce and also enforce respective national provisions. Moreover, Member States are allowed to introduce more stringent provisions on certain aspects. For instance, pursuant to German law, provisions in standard business terms which provide for a payment period of more than 30 days shall be, “in case of doubt”, deemed unreasonably long and thus ineffective (Section 308(1a) German Civil Code (*Bürgerliches Gesetzbuch, BGB*)). Such a provision leaves sufficient scope for allowing a payment period of up to 60 days in exceptional cases, even in accordance with the standard business terms. This provision has proven its worth in commercial transactions in Germany, and there should be the possibility to retain it.
- The practices applied in commercial transactions are too diverse to be adequately reflected through a single, mandatory and in addition very short payment period applying to each and every business relation. This heterogeneity is due to *national* characteristics relating to the economic structure and payment practice as well as to *industry-specific* characteristics such as different production cycles and different lengths of supply chains.
- A strict maximum period makes it impossible to respond in a flexible way in times of crisis. In exceptional cases (such as the COVID pandemic or the war in Ukraine most recently), undertakings should have the possibility to extend the payment period agreed upon, taking into account their mutual interests.
- A strict maximum period will create significant problems in terms of liquidity for undertakings that have already been fragile and that rely on being granted longer payment periods in order to being able to continue their business. This will also affect small and medium-sized enterprises in particular, whose competitiveness the EU Commission wants to improve with the proposed Regulation. In their role as debtors, SMEs benefit from flexible and longer payment periods. Restricting the ability to obtain external

financing through supplier credits will have a particularly strong impact on fragile undertakings since it is very unlikely that they will be able to compensate their additional financing needs through other forms of financing, in particular through additional bank loans. The proportion of fragile SMEs amounts to up to 20 % in some EU Member States and even in the large economies of Germany (7 %), France (14 %) and Italy (9 %) it is quite significant¹. Particularly in the currently difficult economic environment where banks are reluctant when it comes to granting loans, these fragile undertakings would very likely be exempted from additional financing, which would increase their risk of insolvency and jeopardise existing recovery agreements. It is estimated that a non-negotiable limitation of the payment period to 30 days would create additional financing needs of EUR 2 trillion for SMEs across the EU².

- In addition, pursuant to the new rules, agreeing on payment schedules providing for instalments would only be allowed if they do not exceed the maximum payment period of 30 days. This restriction seems to be very impractical and would render the frequently used instrument of payment schedules, which aim to give debtors some “breathing space” to overcome their liquidity problems in times of crisis, meaningless. In general, this could have an adverse effect on the recovery and restructuring practice that is well-established and commonly used in Germany.
- Imposing a strict legal requirement to use a payment period of 30 days would also limit the insurability of accounts receivable in trade credit insurance. Pursuant to the general terms and conditions of insurance (*Allgemeine Versicherungsbedingungen, AVB*) of trade credit insurers, which are common in the German market, there is the possibility to maintain insurance cover for future supply of goods and services even when the maximum credit period has been exceeded, provided that the insurer confirms the continuation of the insurance cover. An absolute maximum period, however, could result in the fact that the insurer will be prohibited by law to confirm the continuation of the insurance cover, which in turn would result in the fact that the insurance cover will no longer apply when the debtor is facing a financial crisis. As a result, a significant instrument to support the continuance of the debtor’s business operations would automatically be prevented and the debtor’s risk of insolvency would increase.
- Finally, another argument against a strict and short maximum payment period is the fact that other major industrial nations outside of the European Union are subject to less strict regulation. For instance, in the U.S. the contracting parties are free to agree on their payment periods in commercial

¹ Allianz Research

² Eikon/Refinitiv, Allianz Research

transactions; with the only exception of business transactions between undertakings and public authorities where the payment period for public authorities is limited to 30 days for the benefit of the undertakings³. Undertakings in Asia, including China, are not subject to strict regulation of payment periods either; the average number of days that it takes for an undertaking to collect payment after a sale has been made (Days Sales Outstanding) is 70 days in Asia, in China it is 76 days⁴. It is to be assumed that non-European business partners of EU undertakings will continue to insist on longer and flexible payment periods. European undertakings that operate in industries with global supply chains will be put at a competitive disadvantage in case they insist on applying the strict EU provisions in commercial transactions.

3. Interest for late payment and compensation for recovery costs (Articles 5 to 8)

According to Article 6 of the proposed Regulation, the interest rate for late payment shall be 8 % above the reference rate set by the European Central Bank (which is currently at 4.5 %), which shall be automatically due by the debtor. Furthermore, pursuant to Article 8, a flat fee compensation for recovery costs shall be automatically due by the debtor to the creditor and shall amount to a fixed sum of EUR 50, per every single commercial transaction. In addition to this flat fee compensation, the creditor shall be entitled to obtain reasonable compensation for any recovery costs exceeding that flat fee compensation. The planned, very harsh and non-negotiable sanctioning of late payments would increase the impacts of the mandatory use of short payment periods on the liquidity of the concerned undertakings, as described under point 2, even more, and exacerbate their risk of insolvency. In its impact assessment report, the EU Commission estimates that the number of B2B invoices across the EU amounts to 15 billion per year⁵. In another section of the report it is stated that more than 50 % of invoices are paid late⁶. Based on these findings, if the average invoice amount is EUR 1,500, there might be additional financing needs of EUR 1.9 trillion⁷.

³ Prompt Payment Act (1982)

⁴ Refinitiv Eikon, Allianz Research (based on: listed undertakings)

⁵ Impact Assessment Report, SWD (2023) 314 final, page 103, para. 373

⁶ Impact Assessment Report, SWD (2023) 314 final, pages 12 and 183, para. 654

⁷ Allianz Research

4. Enforcement authorities (Articles 13 to 15)

The proposed establishment of authorities that are responsible for the enforcement of the provisions of the Regulation will probably create considerable bureaucratic costs. The actual effectiveness of such authorities, however, seems questionable.

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