23 April 2024

HOTREC position paper on Late Payments Regulation

HOTREC, the European Association representing Hotels, Restaurants and Cafés in Europe, takes note of the European Commission's proposal for a Regulation on combating late payment in commercial transactions[1]. With the Late Payment Regulation, the Commission aims to address the challenge of late payments in business-to-business relations all across Europe.

The proposed regulation introduces several significant elements:

- Binding maximum payment term of 30 days for all commercial transactions
- Automatic payment of interest and compensation fees for late payments
- Stronger enforcement and redress measures to protect creditors against late payers

Representing an industry comprising 99% of SMEs, HOTREC recognizes the importance of addressing late payment issues to uphold the competitiveness of SME companies. However, we believe that the current proposal lacks flexibility and should be reconsidered to better accommodate the varying economic contexts of different sizes, sectors, and business lifecycles. Implementing the proposed Regulation would mean a significant limitation of the freedom of contract in business between business relations. The one-size-fits-all solution fails to take into account regional or geographical aspects and differences in payment times between different parts of Europe and/or differences between industries or industry segments.

We believe that adopting a Regulation to amend Directive 2011/7/EU (LP Directive)[2] would not be appropriate as it would violate the principles of proportionality and subsidiarity outlined by the Treaty on the Functioning of the European Union. Any modifications should be implemented through a revision of the current Directive. This position is shared by the Italian Parliament (here) and the Swedish Parliament in the opinion of 14 November 2023, both of which consider the maximum payment term of 30 days to be excessively restrictive of contractual freedom.

Moreover, it is important that the new rules do not cause any negative economic effects on hospitality SMEs around Europe, which have been struggling for several years with COVID-19 recovery, cost inflation pressures, lack of labour supply, and soaring interest rates. HOTREC therefore calls on policymakers to address several key concerns and recommendations outlined in this paper.

HOTREC's requests:

1. Distinguish between late payments and longer payment terms
2. Avoid implementing a mandatory fixed payment term
3. Avoid additional regulatory burdens for businesses
4. Avoid unintended consequences concerning rules on creditor´s right to fixed compensation and penalty interest

[1] Please read here the Commission proposal for a regulation on combating late payment in commercial transactions.
[2] Please read Late Payments Directive here.

1. Distinguish between late payments and longer payment terms

HOTREC believes that it is fundamentally crucial to differentiate between late payments and longer payment terms. Late payments occur when a debtor fails to pay the invoice to the creditor within the payment term as agreed in a contract. In this sense, late payments cause heavy administrative and financial burdens on businesses. Long or extended payment terms, however, are mutually agreed between companies, normally based on trust developed through longstanding business relationships, and to address specific business needs, including the business lifecycle of a product and economic conditions in general. HOTREC stresses the importance of contractual freedom and therefore believes that longer payment terms should not be regulated in transactions between undertakings. Nevertheless, if they are regulated a possibility to agree on longer payment terms should always be available when justified reasons exists. These justifications could be considered especially in situations where there is clear imbalance in the contractual relationship.

Finally, HOTREC would like to point out that companies were only recently obliged to modify their contracts due to new provisions under the UTP Directive (applied by Member States not later than November 2021). This legislation will require new changes to contracts which would result in an unnecessary bureaucratic burden especially for micro-enterprises and SMEs. Moreover, the Late Payment Regulation proposal is not considering that a first evaluation by the European Commission on the application of the UTP Directive is already foreseen by 1st November 2025 (Article 12 UTP Directive).

2. Avoid implementing a mandatory fixed payment term

HOTREC disagrees that in commercial transactions, the payment period and the duration of approval or verification procedures should be limited to 30 days without the possibility of agreeing on a longer maximum payment period in any situation. An absolute payment term limit significantly interferes with contractual freedom.

At present, hospitality businesses can negotiate payment terms with suppliers which is important from a financial planning perspective. Businesses in the sector operate with low margins and cashflow issues, meaning that it is a normal practice that for certain products suppliers are often paid after the goods are sold. For example, restaurants order large stocks of non-perishable beverage products that are consumed over several months. A 30-day mandatory fixed payment term as envisaged in the proposal, would negatively impact restaurants, hotels and similar businesses by creating cashflow problems that would require them to raise working capital in a market that is currently driven by high interest rates. Companies will consequently have to either absorb the costs risking their financial viability or increase prices for consumers and be less competitive.

According to Eurostat, the number of bankruptcies in the accommodation and food services sector increased by 82.5% in 2023 compared to the pre-pandemic period of 2019. This is a serious concern that would be aggravated with the introduction of strict provisions as proposed in the Regulation. Therefore, HOTREC underlines the importance of preserving contractual freedom, enabling businesses to negotiate terms tailored to their specific circumstances, as it is expected in a free market economy.

HOTREC is very concerned with Article 3.4. It states that the payment period set out in paragraph 1 is the maximum payment period and is without prejudice to a shorter period which may be provided for in national law. The article can be interpreted so that parties could agree on shorter payment terms only if enacted in a national legislation (*recital 13: This Regulation should be without prejudice to* *shorter periods which may be provided for in national law, and which are more favourable to the creditor*). This proposal also interferes significantly with freedom of contract and lacks acceptable justification. It is not unusual at all that agreed payment terms are shorter than 30 days (for example ten days). Parties should have a right also in future to agree what time debtor is given to fulfill its payment obligation without a stipulation in the law. This proposal would also create confusion in cross-border transactions as national legislation could vary from country to country. The Article 3.4 should therefore be removed.

3. Avoid additional regulatory burdens for businesses

The Late Payment Regulation is part of the Commission's proposed 'SME relief package'[3], a collection of measures aimed at boosting the competitiveness and resilience of SMEs in Europe. One of the key measures mentioned in the Commission's SME Relief Communication was to reduce reporting requirements burdens by 25%. In this respect, the Late Payment Regulation should not result in additional and unnecessary administrative and reporting burdens for companies. We understand that the European Parliament is considering introducing a requirement for large companies to have to report to public authorities supervising the adherence to the implemented contract rules. HOTREC is against the inclusion of such provisions as this would increase the administrative burden for large companies without any benefits.

Regarding the national enforcement authorities, the question arises to what extent their supervisory powers would entail, resulting in additional costs and administrative burdens (such as complying with reporting requirements for companies). HOTREC also does not support the idea of giving public enforcement authorities the dual role of carrying out own initiative investigations and market surveillance as well as carrying out sanctions. Additionally, it is highly unusual for an authority to be tasked with overseeing contractual relationships between companies. HOTREC stresses that there is no support among hospitality industry for a new enforcement authority. This would only increase red tape without any real benefits.

4. Avoid unintended consequences concerning rules on creditor´s right to fixed compensation and penalty interest

According to the Commission's proposal, the payment of penalty interest rate and fixed recovery cost compensation would be automatically applied and cannot be waived by the creditor. The current Directive, which provides a right to creditors to claim interest or recovery costs for late payment, is more proportionate and should remain as such. This provision is another means of significantly interfering with the businesses' freedom of contract.

There are instances whereby creditors may not want to enforce late payment fees due to several factors: such as for example taking into account the time of the delay or the sum of the debt, the business relations between the parties and whether late payment is a first time or recurring occasion. Creditors have the right to assess all the relevant factors and decide themselves on whether to claim fixed compensation and late interest from the debtor or to waive this right. The premise of these radical provisions fails to consider these practical situations.

[3] Please read here European Commission press release ''Championing Europe's SMEs: Commission provides new relief to boost the competitiveness and resilience of SMEs''.

If a fixed fee and late interest were mandatory in late payments, this would increase the costs of the debtors. These additional costs would make their weak financial situation even worse and make it harder for them to overcome their financial difficulties.

The Commission proposal would also create practical problems. Debtors pay invoices to creditors according to the invoice received. In case of late payments, creditors can send reminder letters or debt collection letters which replace the original invoice. If additional fees were mandatory in late payments without necessity of creditors reminder, debtors would have to add fixed fee to the invoice and calculate penalty interest which requires knowledge on ECB reference rate and exact time of the delay. Most debtors, especially SMEs, do not have this knowledge nor capabilities and would fail to correctly calculate these "additional fees" when paying the original invoice. Creditors would have to calculate additional fees and send debt collection letters even in situations where creditors do not want to pursue their rights. This would increase the administrative burden also for creditors. More disputes would arise between creditors and debtors particularly on the calculation of additional fees, as well on marginal overlaps around the payment due date between the processing of a payment by a debtor and receipt of the payment by the creditor. Such disputes, which are bound to occur, shall delay the settling of payments even further.