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UDK: UDK: 339.5 (4-672EU)  
BIBLID: 0352-3713 (2014); 31, (10-12): 17–29  
PREGLEDNI NAUČNI RAD

## **COMBATTING LATE PAYMENTS IN COMMERCIAL TRANSACTIONS IN THE EUROPEAN UNION**

**ABSTRACT:** The lack of financial discipline in payments in commercial transactions between entrepreneurs and persons of public law is a perennial problem of the European economy.

Late payments cause insolvency and complicate financial management of undertakings, which greatly reduces their competitiveness and profitability in the market. The risk of these adverse effects significantly increased in the period of the economic crisis.

This article conducts a juridical and economic analysis of European legislation on combatting late payments in commercial transactions with a special accent being put on Croatian legislation, as the youngest European Member State.

*Keywords: commercial transactions, payments, national legislation, the European Union*

### **1. Introduction**

Obligatory relations are regularly directed toward their realization as quickly as possible, for a purpose thereof is an interchange of commodities and establishment of equilibrium, so an obligation discharge deadline is one of

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significant suppositions for a legitimate duty discharge<sup>1</sup>. Growing liquidity problems caused by the fast growing number of firms not paying their invoices on time is a major problem not only of the Croatian but also European economy. Most at risk from liquidity problems are European small and medium-sized enterprises<sup>2</sup> representing the most significant market share in the European Union.<sup>3</sup> According to the European Commission, SMEs provide two out of three jobs and serve as the driving force for growth, job creation and innovation.

Although a lot has been said, and despite the EU Late Payment Directive, only few governments showed interest to help Europe's SMEs in their struggle with late payment by bringing some new national legislation concerning this problem.<sup>4</sup>

Since March 2013, contractual payment periods in EU must be set at a maximum 30 / exceptionally 60 days. Some countries are ready for this, but the others are far from the European target.<sup>5</sup>

According to the latest data, 55% of all 10,000 entrepreneurs taking part in EPI 2014 say they are suffering from adverse effects of late or non-payment of bills and invoices. With 36 % of business respondents believing that their very survival is being threatened by late payment and every second company claiming that it prohibits growth, makes this the highest percentage in the history of the European Payment Index.<sup>6</sup>

While monitoring the occurrences on the EU market, several attempts to solve this problem were effectuated in Republic of Croatia as well during the harmonization of the legal system with *acquis communautaire*. The recent data of the Ministry of Finances of Republic of Croatia demonstrate a continuous downfall of insolvency during the past months, so it might seem as if the latest legal stipulations harmonized with the Directive 2011/7/EU have

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<sup>1</sup> Gorenc, V., (2009). The time of fulfillment of an obligation (is it possible that increased insolvency can be eliminated by bringing "new" regulations referring to the payment deadline), *Accounting, revision and finances*, (July) 171-174, p.171

<sup>2</sup> SMEs

<sup>3</sup> Viscicka, S., (2010) Combat late payment in commercial transactions: the experience of the European Union, 6th International Scientific Conference – Business and Management, EPI 2012, Vilnius, pp. 278–285;

<sup>4</sup> Good practice examples are France: LME – Loi de Modernisation de L'Economie (Modernisation of the Economy Act); the United Kingdom: the Late Payment of Commercial Debts (Interest) Act since 1998; Germany: Gesetz zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr

<sup>5</sup> Economic Outlook, 2012, (2014, September 16th) taken from: <http://www.oecd.org/eco/economicoutlook.htm>

<sup>6</sup> Intrum Justitia, Press Release, (2014, September 16th) taken from: <http://mb.cision.com/Main/8612/9583117/243252.pdf>

finally been achieving desired results. Later in the text, we will try to explicate possible reasons for such results.

The paper will try to pinpoint the significance of timely pecuniary obligations and consequences of a lack of financial discipline; to analyze legal regulation preventing belated payment deadlines in business transactions at the EU level, with a special emphasis put on Republic of Croatia as the youngest Member State; to consider the contractual and realistic payment deadlines in certain EU Member States and respond to the question of how to ensure a payment discipline as one of fundamental conditions for an effective functioning in the European market.

A general attitude is corroborated whereby a legislative intervention is more important than an improved credit or financial management in solving the late payment problem.<sup>7</sup>

## **2. European legal regulation on combatting late payments in commercial transactions**

As it had been mentioned before, a purpose of obligatory relations is an interchange of commodities and the establishment of financial equilibrium, so financial discipline is one of significant suppositions for a legitimate obligation discharge.<sup>8</sup>

Late payments cause insolvency and complicate financial management of undertakings, which greatly reduces their competitiveness and profitability in the market. The risk of these adverse effects significantly increased in the periods of economic crisis.

The research made by the European Commission has showed that the reasons for late payments in commercial transactions are as following: financial problems 23%, intentional late payment 35% and administrative inefficiency 17%.<sup>9</sup>

Member States try to find a solution to the problem causing the SMEs to effectuate payment delays for a couple of years. The adduced problem is tried to be solved while harmonizing legislation at the EU level, pertaining to

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<sup>7</sup> Peel M. J., Wilson, N., Howorth, C., (2010). Late Payment and Credit Management in the Small Firm Sector: Some Empirical Evidence, *International Small Business Journal* 18(2), p. 20.

<sup>8</sup> Gorenc, V., (2009). The time of fulfilment of an obligation (is it possible that the increased insolvency can be removed by bringing some “new“ regulations referring to payment deadlines), *Accounting, revision and finances* (July), pp. 171-174

<sup>9</sup> Vukmir, B., (2006). Pecuniary obligations in commercial transactions (Article 174 of ZOO), *Law and Taxes*, (April) 3-7

irregular payments, disrespect of contractual deadlines, and compensation for a damage inflicted thereby.

Since the first attempt of solving the problem of late payment in the EU in 1995<sup>10</sup>, and after the Directive on Combatting Late Payments in Commercial Transactions 35/2000/EC came into force, payment delays in commercial transactions still remained a growing problem in European economy.

In the United Kingdom, one out of three payments from the public sector was late<sup>11</sup>. The British Chambers of Commerce says that almost one fifth of SMEs are employing a dedicated person to chase late payments.<sup>12</sup>

The most success in fighting late payments made France. In 2009 all delays in payments between companies were reduced by 10 days, and for SMEs, reduction was 11 days.<sup>13</sup>

## 2.1. The Directive on Combatting Late Payments in Commercial Transactions 2000/35/EU

The European parliament and the Council adopted the Directive 2000/35/EC on combatting late payment in commercial transactions on 29th June 2000. The aim of the Directive was not only to ensure that previously unreasonable legal of contractual payment became reasonable, but also the Directive sought to curtail late payments.<sup>14</sup>

The Directive eliminates the need for a reminder before a payment is considered late.<sup>15</sup>

Setting the final date of the payment period on 30 days and demanding that Member States should ensure that interest is payable as of the date following the payment date or the period of the amount specified in the contract<sup>16</sup> were first main protection measures for combatting late payment in commercial

<sup>10</sup> On May 1995 the Commission adopted a recommendation on payment periods in commercial transactions OJ L 127

<sup>11</sup> According to a survey made in 2009 by the Federation for Small Businesses.

<sup>12</sup> Taken from: <http://www.euractiv.com/innovation-enterprise/governments-struggle-fulfil-prom-news-380108> (2014, Oktober 2nd)

<sup>13</sup> taken from: <http://www.euractiv.com/innovation-enterprise/governments-struggle-fulfil-prom-news-380108> (2014, Oktober 2nd)

<sup>14</sup> [http://ec.europa.eu/enterprise/policies/single-market-goods/documents/late-payments/index\\_en.htm](http://ec.europa.eu/enterprise/policies/single-market-goods/documents/late-payments/index_en.htm) (2014, October 2nd)

<sup>15</sup> Perales Viscasillas, S., (2007). Late Payment Directive 2000/35 and the CISG, 19 *Pace International Law Review*, (Spring 2007/1) 125–142, p. 130.

<sup>16</sup> Viscicka, S. (2010). Combat late payment in commercial transactions: the experience of the European Union, in: Aleksandras Vytautas Rutkauskas, Remigijus Počas (editor), 6th International Scientific Conference – Business and Management, Romualdas Ginevičius, Vilnius, p. 280.

transactions defined in the European Parliament and the Council Directive 2000/35/EC on combatting late payment in commercial transactions.

The provisions of the Directive are limited to payments in commercial transactions<sup>17</sup> and they neither apply to transactions with consumers, nor to the interest rates. In the introduction it was stated that late payments<sup>18</sup> as breach of contract, gives debtors a financial advantage which further supports the slow process of debt collection (the Directive 2000/35/EC: 36).

The Directive left the payment deadlines to national legislatures and the very parties to a contract, stipulating only deadline overdue consequences subsequent to a deadline fixed by contractual parties or the one stipulated by the law, providing for a payment deadline in cases wherein it is unstipulated either by contractual parties or by law.

In addition to inter-commercial relations, the Directive pertained to business transactions between companies and public organs, i.e., public enterprises, as well. As SMEs are closely connected to public works and affairs with these organs, their belated payments represent an equal detrimental effect as well as a failure of payment by private debtors.

## 2.2. The Directive on Combatting Late Payments in Commercial Transactions 2011/7/EU<sup>19</sup>

After the adoption of the Directive from the year of 2000, an average payment period in EU has stabilized, but different payment periods in commercial transactions remained a major problem. On February 23rd 2011, the European Parliament and Commission adopted a new Directive on Combatting Late Payment in Commercial Transactions.

The Directive 2011/7/EC of the European Parliament and of the Council of 16th February 2011 on combatting late payment in commercial transactions came into effect on 16th March 2013 and all Member States had to implement the Directive into their legal system.

As well as the aforementioned one, the Directive should prevent a misusage of liberty to conclude a contract on creditors' account, the objective being an assistance to the SME's on the EU's internal market.

A new Directive limits a general deadline in all transaction categories in both public and private sector to 30 days, and, only exclusively, if it

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<sup>17</sup> "commercial transactions" means transactions between undertakings or between undertakings and public authorities leading to the delivery of goods or the provision of services for remuneration.

<sup>18</sup> "late payment" means exceeding the contractual or statutory period of payment.

<sup>19</sup> OJ L 48

is expressively adduced in a contract and justified by objective reasons, a payment deadline may be extended to 60 days. Implied hereby are merchandise deliveries and services to healthcare institutions and other situations justified by a specific business nature.

Furthermore, the Directive introduces stricter measures among entrepreneurs being belated in payments and stipulates deadlines and payment overdue compensations irrespective of the fact whether they pertain to payments between private and public companies, or, between companies and institutions.

Should a payment delay be effectuated, entrepreneurs will be obliged to pay a € 40 expenditure compensation minimum and a regular interest rate, increased in the case of a payment overdue by at least 8%.

The sanctions in the latest Directive with an interest rate of the reference rate plus at least 8% and a fixed sum of 40 EUR for any reasonable recovery costs exceeding the fixed sum for both public and private entities is milder for the sanctions from the Directive 2000.<sup>20</sup>

The new Directive came into force in March 2013 and all Member States had to implement it in their legal system.

### 3. Legal regulation in Croatia

As it had been mentioned before, growing liquidity problems caused by the fast growing number of firms not paying their invoices on time is a major problem of many European countries and Croatian economy isn't an exception. According to the due research in Croatia, respondents reported overall high bad debt loss percentages, 73% mentioned having liquidity problems due to late payments and 75% of them said that the ongoing recession was reducing sales and liquidity.<sup>21</sup>

Legal provisions being supposed to contribute to a financial discipline worked excellently in theory. However, they missed their performance in a regular business practice.

In addition to economists, insolvency in Republic of Croatia is also caused by the State, being one of the key non-payers. According to the Mega Drugstore Association,<sup>22</sup> the Croatian Health Insurance Institute discharges its

<sup>20</sup> Winther Bolet, M., (2011). A legal and economic analysis on the European Commission's Directive 2011/7/EU on late payment in commercial transactions, p.1.

<sup>21</sup> European Payment Index 2013.: (2014, September 16th) taken from: [http://intrum.crmplatform.nl/documents/IJ\\_EPI\\_2013\\_UK\\_SEC.pdf](http://intrum.crmplatform.nl/documents/IJ_EPI_2013_UK_SEC.pdf)

<sup>22</sup> Cf. taken from: <http://www.novilist.hr/Vijesti/Hrvatska/Ni-30-ni-60-Zdravstvo-i-dalje-najveci-duznik-kasni-i-do-820-dana> (2013, March 17th).

obligations within a 275-day deadline and hospitals within a 400- to 820-day one. Thereby, a discrepancy between the SMEs and public organ persons is repeatedly pronounced, and SMEs are literally obligated to accept the conditions of the “big ones” or stay without a business partner.

The first step in combatting late payments in commercial contracts in the Croatian legal system has been the introduction of legal provisions relating to the above problem in Article 174 in the Croatian Obligatory Relations Act in 2005<sup>23</sup>, with the aim of harmonizing the Croatian legislation with the legal system of the European Union - in particular with the European Commission’s Directive 2000/35/EC on Combatting Late Payments in Commercial Transactions of the European Parliament and the Council of the European Union.

The most important elements of Article 174 relate to the provisions on payment deadlines in commercial contracts, the interest rate right in the case of payment delay, and protection in the case of an unequal payment deadline contracting detrimental to a creditor.<sup>24</sup>

A basic principle consisted in the fact that Article 174 failed to stipulate payment deadlines but it was left to the contracting parties’ will. Thereby, contracting liberty between the parties was not limited, but if the parties failed to anticipate the deadlines by virtue of a contract applicable were the ones stipulated by Article 174.<sup>25</sup>

The fact already being said is that each commercial contract contains a condition through which a deliverer acquires his/her right to interest rates if a customer fails to pay for a commodity or service within a relative deadline, and the customer is obligated to pay the interest rates without a specific call. In such cases, payment deadline without a specific debtor’s call amounted to 30 days.<sup>26</sup>

The aforementioned deadline began to expire according to the following: from the day whereupon a debtor received an invoice or alternative corresponding payment request; if it was impossible to precisely establish the day of invoice reception or the reception of an alternative payment request, a payment deadline began to expire from the day whereupon a creditor fulfilled

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<sup>23</sup> *The Official Gazette*, 41/2008, 125/2011.

<sup>24</sup> Gongeta, S., Belaj, I., (2012). Deadlines of fulfillment of pecuniary obligations – a new legal regulation, in: Marijana Dukić Mijatović (editor), *The Collection of papers from the 8th traditional scientific meeting “Legal days of prof. Slavko Carić, PhD”*, Novi Sad, The Business Academy, pp. 274–282

<sup>25</sup> Vukmir, B., (2006) Pecuniary obligations in commercial contracts (Article 174 of the Law of Obligation), *Law and Taxes*, (April), pp. 3–75.

<sup>26</sup> Gorenc, V. et al., (2005). *The comment on the Law of Obligation*, RriF, Zagreb, p. 238

his/her obligation, and if a contract stipulated a special procedure for a delivery inspection, the deadline began to expire by the expiration of obligational subject's inspection, with a hypothesis that a debtor has received an invoice prior to the deadline expiration.

For the sake of the further harmonization of the legal system with *acquis communautaire* and subsequent to the European Commission's publication of a new Directive on combatting late payments in commercial transactions 2011/7/EU, the Croatian legislator passed the Act on Financial Transactions and Pre-Bankruptcy Accommodations, which has been in effect since October 1st 2012.

The Act stipulates entrepreneurial financial business transactions, pecuniary obligation execution deadlines and legal consequences of a belated pecuniary obligation execution and a pre-bankruptcy accommodation procedure.<sup>27</sup>

While promulgating the Act, the legislator bore in mind that the Directive 2011/7/EU is the one invoking minimal harmonization, allowing for the EU Member States to retain the provisions in the national legislature or to adopt the ones that could be more favorable to pecuniary obligations' creditors than the solutions anticipated by the Directive. Accordingly, amendments are suggested to achieve a higher degree of pecuniary obligation creditors' protection than those foreseen in the Directive.

Although the recent Act amendments reduced payment deadlines in the Croatian legal system to 30, i.e., 60 days, respectively, a quotidian business practice demonstrates that it is still reducible to a mere theory.<sup>28</sup>

As we can see, the legal frame was not very effective in practice, so in August 2011 we had 68,336 insolvent entrepreneurs and in March 2013 there were 67 019 insolvent ones.

As the recent Act tried to establish discipline concerning entrepreneurs and public law persons while complying to payment deadlines and invigorating overdue or insolvent entrepreneurs, multiple dubiousness with regard to the very purpose and Act implementation have emerged in practice.

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<sup>27</sup> For the purpose of this paper, there are analyzed only the payment deadline provisions without an analysis of conditions to launch a bankruptcy procedure.

<sup>28</sup> Croatian Health Insurance: 275 days; Hospitals: 400–820 days; Medica: 191 days; Altantic group: 121 days; Petrokemija: 78 days; Konzum: 189 days; Belje: 488 days; Ina: 150 days; An analysis of business transactions of the adduced companies was conducted by the economic analyst of *Banka* magazine Suzana Koščak. (April, 2010), (2014, September 9th) taken from: <http://www.banka.hr/komentari-i-analize/dm-zar-je-to-moguće-41273>



For that reason, the legislator launched the Bill on Amendments and Addenda to the Act on Financial Transactions and Pre-Bankruptcy Settlement in March 2013.

As it has previously been emphasized, the paper analyzes only the Act provisions pertaining to the obligation discharge deadlines, adducing solely the amendments pertinent thereto.

The new Bill thus specifies the provisions limiting contractual payment deadlines in business transactions between entrepreneurs in more detail while limiting them to 60 days, with a condition that it does not contradict the principles of conscientiousness and honesty. The deadline may amount to maximally 360 days, provided that a creditor has received a security instrument having a distraint document effect.

If the parties fail to contract a pecuniary obligation discharge deadline, a debtor is obligated to discharge a pecuniary obligation up to 30 days without a necessity to be reminded thereof by a creditor. Additionally, the Bill re-stipulates in more detail the existent Act provisions that in business transactions among entrepreneurs and public law persons a pecuniary obligation discharge deadline may be contracted up to maximally 60 day, with objective, justified hypotheses.

The pecuniary obligation discharge deadlines pursuant to the Bill also pertain to liberal arts, but they do not penetrate into the Act provisions stipulating an installment pay-off.

The Bill introduces a notion of “business transaction,”<sup>29</sup> stipulating that a creditor shall enjoy a right to all other pertinent expenditures due a debtor’s deferral, in addition to a special compensation in a fixed amount whereto he/she has a right due to a debtor’s delay and legally prescribed consequences concerning obligatory relations.<sup>30</sup>

#### **4. Conclusion**

The research made by Intrum justitia in 2012 showed that when it comes to liquidity problems being suffered as a result of late payments, 96% of respondents in Greece reported difficulty, followed by 81% in Portugal, 80% in Spain, 75% in Cyprus, 72% in Slovenia and 70% in Italy. The least

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<sup>29</sup> A “business transaction“ denotes the one between entrepreneurs or between entrepreneurs and public law persons resulting in a monetarily compensated merchandise procurement or service rendition.

<sup>30</sup> E.g., enumerated hereby are an expenditure inflicted by a forced payment procedure and all actions he/she effectuated to vouchsafe the payment.

impacted with liquidity problems resulted by late payments were Switzerland with 38%, Finland 37%, Norway 41%, Germany 43% and Austria 44%

According to the 2014 European Payment Index data, entrepreneurs from Southern Europe still wait nearly twice as long as the law's stipulated 30 day maximum for public administrations to pay their bills and the highest risk of late payment in the future is still expected in Portugal, Greece, Spain, Romania and Italy.

After the revision of the Late Payment Directive, about 69% of entrepreneurs do not still feel that their government helps to protect them from the risk of late payment and the public administration remains the slowest payer. Very few of the European business leaders surveyed in the 2014 European Payment Index see the signs of recovery. The lack of positive signs goes for Hungary, two per cent, and Serbia, three per cent, where business managers said that they had not felt any positive impact.

With the public sector as the slowest payer in the EU, there isn't much to be done to avoid the risk of non-payment. They can start from closely profiling the identity of customers, writing a clear contract with a customer, and maybe implementing swift reminders and charge default interest if possible.

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## ***Borba protiv zakasnelih plaćanja u trgovačkim transakcijama u Evropskoj uniji***

REZIME: Nedostatak finansijske discipline kod plaćanja u privrednim transakcijama između preduzetnika i subjekata javnog prava višegodišnji je problem evropske privrede. Plaćanja u docnji uzrokuju nelikvidnost i komplikuju upravljanje i finansijsko poslovanje privrednih društava, što u velikoj meri smanjuje njihovu konkurentnost i profitabilnost na tržištu. Rizik od tih štetnih efekata dodatno je povećan u periodu ekonomske krize. U radu se prikazuje pravna i ekonomska analiza evropskog zakonodavstva u borbi protiv plaćanja u docnji kod privrednih transakcija s posebnim akcentom na hrvatsko zakonodavstvo, kao najmlađe evropske države članice.

*Ključne reči: privredne transakcije, plaćanja, nacionalno zakonodavstvo, Evropska unija*

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