

REPUBLIC OF AUSTRIA

President of the Federal
Council

To:

Mr Jose Manuel Barroso
President of the European Commission
1049 Brussels
Belgium

Vienna, 28 July 2009

Dear Mr Barroso

As part of its deliberations on the Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) (COM(2009) 126 final) at its meeting of 21 July 2009, the EU Committee adopted the following resolution:

"Opinion addressed to the European Commission

The Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) takes adequate account¹ of the principles of subsidiarity.

The Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) takes adequate account of the principles of subsidiarity and proportionality. The reasons why Community rules are needed are presented in a basically clear and comprehensible fashion, and the EU Committee of the Federal Council therefore broadly supports this proposal.

The EU Committee of the Federal Council broadly welcomes the aim of the Directive – i.e. to strengthen SMEs and protect them against insolvency – since late payment can cause otherwise thoroughly sound businesses to go bankrupt, and in the worst cases this can trigger a chain reaction through the entire supply chain. The following points strike the Committee as problematic, however:

The EU Committee of the Federal Council thinks that the title of Article 3 should be reconsidered, as it is imprecise. A better formulation would be "Late payment in commercial transactions between undertakings" [*Zahlungsverzug im Geschäftsverkehr zwischen Unternehmen*]. It should also be made clear in paragraph 1(a) that the contractual and legal obligations that the creditor must have fulfilled in order to be entitled to interest for late payment without the necessity of a reminder is really in effect an obligation on the part of the debtor. This should be clarified. Nor is it clear why [in the German version] paragraph 1 mentions [only] "*Zinsen*" while the term "*Verzugszinsen*" is used elsewhere.²

The Committee also notes that, for the purpose of clarification in Articles 3 and 5, the first sentence of paragraph 1 should read: "... late-payment interest is payable in accordance with Article 3 or Article 5 ... [*... sind gemäß Art. 3 oder Art. 5 Verzugszinsen zu zahlen...*]".

¹ *Translator's note*

The phrase in the original in this and the almost identical following sentence would more normally be translated as "provides for an adequate evaluation" [*sieht eine ausreichende Bewertung ... vor*]. My translation reflects what I take to be the intended meaning.

² *Translator's note*

The simple reason for this is that the German version reads "*bei Zahlungsverzug Zinsen*" [interest in the event of late payment]. If the term "*Verzugszinsen*" were used here too the phrase would mean "late-payment interest in the event of late payment".

In the new version, Article 4 provides for establishment of the recovery costs as a fixed sum in cases in which debtors must pay interest for late payment. The debtor should obviously pay this fixed sum even if no specific damage has been incurred (and in addition to the interest for late payment). We would add that it is unclear how these fixed sums are arrived at and they seem unusually large in some cases. Creditors are to be entitled to additional recovery costs resulting from late payment unless the debtor was not responsible for the delay. In Austrian law, compensation for recovery costs is, in accordance with the general rules on damages, dependent on a fault on the part of the debtor. It should be made clear that this is also the case in the proposal for a Directive. For Austria, making entitlement to the amounts specified independent of a fault or specific damage would constitute a departure from existing practice. The EU Committee of the Federal Council is in no doubt, however, that this would substantially simplify the process of making a claim, although this advantage for the creditor is not, in the Committee's view, such as to justify this marked departure from the Austrian legal system in respect of compensating damages.

An entirely new Article 5 should contain special provisions for public authorities, and the term "public authorities" should be defined in Article 2(4) of the Commission proposal as "contracting authorities within the meaning of Directive 2004/18/EC". Article 5 gives public authorities too a 30-days' payment deadline that may be exceeded only if this is justified in the light of particular circumstances (it does not specify when the period starts!). If interest is payable because of late payment, the creditor is also to be entitled to a lump sum compensation equal to 5% of the amount due – over and above the recovery costs. The Committee regards ensuring prompt payment by public authorities as important for safeguarding the liquidity of businesses and SMEs in particular. It is regrettable that public authorities throughout Europe set such a poor example where payments are concerned, which is probably why the proposal provides for special measures. The EU Committee of the Federal Council would, however, point out that further thought should be given to the question of an additional 5% in damages. Quite apart from the burden on the budget and the disadvantage compared with private businesses, account must also be taken here of the fact that as a rule the creditor runs no risk of the public authority it is dealing with becoming insolvent. On the other hand, public authorities are not under the same financial constraints as private businesses and it is easier for them to avoid late payment. As a separate point, the EU Committee of the Federal Council would point out that the possibility for extending the payment deadline has not been formulated clearly.

Austrian law on obligations recognises the invalidity of contractual clauses that are in infringement of the law or contrary to accepted principles of morality. Grossly unfair contractual clauses are null and void. EU Committee of the Federal Council does not, however, understand why a clause which excludes interest for late payment should always be considered as grossly unfair and hence unenforceable – as stipulated in Article 6.

The Committee also finds Article 9 problematic. The rule has hitherto been that an enforceable title can normally be obtained for an undisputed claim within 90 calendar days of the lodging of the creditor's action. The proposal for a Directive now states that obtaining an enforceable title within 90 calendar days should always be possible. However, this might sometimes take longer because the procedure might be held up by periods for service of documents or periods devoted to correcting applications.

The proposal appears to be in accordance with the principle of subsidiarity, which applies in so far as the proposal does not fall under the exclusive competence of the Community. The reasons why the objectives of the proposal cannot be sufficiently achieved by the Member States seem reasonable and clear. The recast will be of particular benefit to businesses that sell goods and services to businesses in other Member States and are hence exposed to a higher risk of late payment. In the past, this risk has repeatedly deterred business from offering their products and services in other Member States, as this led to increased uncertainty and higher costs.

The proposal complies with the proportionality principle in that the Directive remains an optional

instrument in so far as it does not oblige economic operators to claim interest for late payment or to claim compensation for recovery costs. Nor does it prevent businesses from agreeing upon other contractual provisions regarding payment. Moreover, Member States may maintain provisions of their own that are more favourable to the creditor than the provisions necessary to comply with the Directive."

Yours sincerely,

[signature]

Erwin Preiner