



EUROPEAN COMMISSION

Brussels, 29/10/2009
C/2009/8433

Dear Mr President,

Thank you for transmitting the Austrian Bundesrat's contribution to the proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) implementing the Small Business Act {COM(2009)126}.

In line with the Commission's decision to encourage national Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's response and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely

Margot WALLSTRÖM
Vice-President of the European Commission

Herrn Erwin Preiner
Präsident des Bundesrates
A-1017 WIEN



Brussels, October 2009

COMMENTS OF THE EUROPEAN COMMISSION ON AN OPINION FROM THE EU COMMITTEE OF THE AUSTRIAN FEDERAL COUNCIL

COM(2009)126 – PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS (RECAST) IMPLEMENTING THE SMALL BUSINESS ACT {SEC(2009)315} {SEC(2009)316} {SEC(2009)317}

The Commission would like to thank the EU Committee of the Austrian Federal Council (hereinafter, “the Committee”) for its comments on the Commission proposal for a directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) implementing the small Business Act¹.

The Commission welcomes the thorough analysis by, and the broad support of, the Committee for this proposal as well as the Committee's view that the proposal takes adequate account of the principles of subsidiarity and proportionality.

Commission's position on Articles 4, 5, 6 and 9 of its proposal following comments raised by the Committee:

The presumption of this proposal is that late payment always causes some kind of damage to the creditor. Late payment and the subsequent effects on cash flow are particularly problematic for small businesses that have limited financial resources. The impact of delayed payment could be devastating for some businesses. The financing costs and management time involved in slow or uncertain payment erodes the profitability of a sale and, when profit margins are tight, can eliminate it altogether. Uncertainties regarding the timing of trade payments make cash-flow management and banking relationships even more difficult. Chasing payment puts a strain on the owner-manager of many small businesses, whose attention and time is diverted away from business strategy, as well as on customer and supplier relations. Where slow payment progresses to protracted default and bad debt the whole viability and survival of the business can be at risk. Indeed surveys by insolvency practitioners indicate that problems with cash-flow or working capital management and bad debts are the primary reasons that small businesses fail. Late payments have a knock on effect through the small business sector, and late payments between small businesses are pervasive.

The Directive only applies in cases of late payment caused by the fault or the negligence of the debtor. One of the major challenges for creditors is how then to prove the damage caused

¹ COM(2009)126

by such late payment. How can they prove, under the current legal regime, the time and the effort spent on chasing payments and credit management in a case of late payment? The objective of Article 4 is exactly to avoid this question by fixing lump sum amounts covering the internal costs with respect to late payment and credit management.

Article 4 does not aim at replacing the Austrian general rules on damages. It will only serve as an additional tool with fixed amounts so that the thorny question of an equitable estimation of the damage can be avoided. In any event, the Commission appreciates that the Committee recognises that this Article would substantially simplify the process of making a claim.

The Commission takes note of the concerns raised by the Committee about the lump sum compensation equal to 5% of the amount due, which public authorities should pay in cases of late payment (Article 5 of the proposal). The aim of this compensation is to serve as a deterrent and to strongly encourage public authorities throughout the EU to honour their contractual payment obligations. There is no doubt that this deterrent will place sound financial management practices at the forefront within public administrations so that late payment by them can be eliminated at very short notice.

The Committee of the Federal Council questions the provision of Article 6, according to which a clause which excludes interest for late payment should always be considered as grossly unfair and hence unenforceable. The Commission considers that such a clause points to a contract in which the debtor is very likely to have abused his overwhelming economic or market position to liberate himself of any financial consequences connected with his own late payment. The Commission is of the opinion that such abuses should not be tolerated since they put the weakest party in a very difficult legal position in the case of late payment.

The Committee finds Article 9 problematic. This Article specifies that obtaining an enforceable title within 90 calendar days should always be possible. However, the Committee correctly argues that this might sometimes take longer because the procedure might be held up by periods for service of documents or periods devoted to correcting applications. Therefore, Article 9(3) expressly excludes the periods for service of documents as well as any delays caused by the creditor. Moreover, Article 9(1) requires that the debt or aspects of the procedure should not be disputed.

This proposal will have to be endorsed by the Council and the European Parliament under the co-decision procedure. The Commission wishes to emphasize that it will make use of the opinion of the EU Committee of the Federal Council as one of its reference documents during the forthcoming negotiations with the Council and the European Parliament on this proposal.