



EUROPEAN COMMISSION

Brussels, 30 NOV. 2009
C/2009/ 9421

Ms Rodoula ZISSI
Chairwoman of the Special Standing
Committee on European Affairs of the
Hellenic Parliament

Dear Mrs Zissi,

The Commission would like to express its thanks to the Special Standing Committee on European Affairs and to the Standing Committee on Production and Trade for their opinion on 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 final}.

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 I hope you will find these a valuable contribution to your own deliberations.

I am looking forward to continuing this fruitful exchange of information.

Yours sincerely

Margot WALLSTRÖM
Vice-President of the European Commission





EUROPEAN COMMISSION

Brussels, November 2009

COMMENTS OF THE COMMISSION ON AN OPINION FROM THE SPECIAL STANDING COMMITTEE ON EUROPEAN AFFAIRS AND THE STANDING COMMITTEE ON PRODUCTION AND TRADE OF THE HELLENIC PARLIAMENT

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 Special Standing Committee on European Affairs and the Standing Committee on Production and Trade of the Hellenic Parliament (hereinafter “the Committees”) for their 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 of the proposal made by the Committees. It assumes that, for most parts of this proposal, it has the broad support of the Committees which did not express any concerns about the proportionality and subsidiarity of Articles 1 to 4 and Articles 6 and following of the proposal.

The opinion of the Committees focuses on the respect of the proportionality and subsidiarity principles with regard to Article 5 of the Commission proposal for which the Commission is invited to comment and provide some clarifications. In this regard, the Committees raise two main concerns, namely the payment period of 30 days for public authorities and the lump sum compensation of 5%.

The Commission wishes to shed some light on these points and hopes that the additional information provided hereafter will enable the Committees to re-examine their analysis of Article 5:

COM(2009)126

1. THE PAYMENT PERIOD OF 30 DAYS FOR PUBLIC AUTHORITIES

1.1. The principle of payment within 30 days

The Committees indicate that the proposal differentiates among economic actors on the basis of their legal personality. It accordingly differentiates the measures to combat late payment. The Committees argue, however, that the proposal does not provide the rationale for a causal relationship between the legal personality of the contracting parties and late payment practices, even if an empirical correlation has indeed been observed.

The Commission points out that this rationale is set out in the explanatory memorandum of the proposal and in the summary of the impact assessment. A more profound analysis can be found in the impact assessment [SEC(2009)315].

The fundamental reason for the differentiated treatment is the different status of public authorities procuring goods and services which is reflected in a difference in their commercial practices.

Indeed, the payment period is one of the negotiable items of a contract awarded by a public authority only in very exceptional cases. Thus, the competitive advantage of offering trade credit between enterprises and hence the need to maintain this possibility does not apply to contracts concluded by public authorities. The Committees will probably agree with the Commission that in most public procurement procedures the contracting authorities determine unilaterally the payment period in the call for tenders. As a general rule, there is no room for negotiation for tendering companies. Therefore, Article 5(4) aims at shortening payment periods by obliging public authorities to pay the goods and services that they procured as a rule within 30 days.

In addition, as undertakings are not bound by public procurement procedures or administrative rules when choosing their suppliers, creditors are reluctant to enforce their rights out of fear of retaliation by cutting the commercial relationship with the suppliers. This commercial freedom for businesses obviously has serious consequences when selecting a legislative option with regard to late payment.

The fear of damaging the commercial relationship with the client should not exist in contracts concluded with public authorities. The risk that a claim for interest for late payment would have a negative effect on the chance of winning a new contract in another procurement process should be minimal. The public procurement directives and the national rules on procurement procedures below the threshold already provide a number of procedural guarantees protecting economic operators from negative attitudes of the awarding authority. For the public contracts that are not, or are only partially, covered by the Directive, the principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency which, according to the case-law of the Court of Justice, "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed." (Judgment of 13 October 2005, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, Case C-458/03, European Court reports 2005, p. I-08585).

Another important factor is that public authorities are governed by administrative and budgetary law. The estimated revenues of public authorities constitute, as a general rule, one of the fundamental elements of the public budgets while the public expenditure is

usually subject to careful planning in accordance with budgetary rules. Undertakings are not governed by this stable budgetary framework. Revenues of undertakings are much more uncertain and depend on factors which profoundly differ from the elements which determine public revenues. Undertakings generate their revenues by selling goods or services to their clients, often by granting trade credit. Selling goods or services is the main objective of undertakings. Public authorities have objectives of general public interest which are determined by public law. Consequently, their role in the commercial process diverges fundamentally from the role that undertakings play in this process.

Therefore, the Commission takes the view that a differentiated treatment of public authorities and businesses is an effective way to achieve the objectives of the directive.

1.2. The proposal allows longer payment periods in particular circumstances

The Commission agrees with the statement of the Committees that cases can arise in which both contracting parties may have an interest in agreeing a longer payment term than 30 days. Therefore, Article 5(4) provides for a specific exception to the rule of 30 days. This exception takes into account some specific procurement procedures in which public authorities are allowed to negotiate with tenderers, as set out in Directive 2004/18/EC of the Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts². This Directive allows Member States, in the case of particularly complex contracts, to provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with Article 29 of the Directive. Under the competitive dialogue, contracting authorities open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue, the aim of which shall be to identify and define the means best suited to satisfying their needs. The Directive expressly permits contracting authorities to discuss all aspects of the contract with the chosen candidates during this dialogue.

Moreover, Directive 2004/18/EC specifies that contracting authorities may award their public contracts by negotiated procedure in exceptional cases, for example when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing, or when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator. A similar exceptional procedure without prior call for competition is laid down in Article 40(3) of Directive 2004/17/EC of the Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors³.

In such cases, it cannot be excluded that particular circumstances could arise which could duly justify a payment period exceeding 30 days, as foreseen by Article 5(4) of the proposal.

² OJ L134, 30.4.2004

³ OJ L134, 30.4.2004

1.3. Freedom of contract

The Committees are of the opinion that the limitation of the room of manoeuvre of both public authorities and private enterprises to voluntarily agree on a payment period exceeding the 30-day provision violates the fundamental principle of contract between economic operators.

The Commission shares the view of the Committees that the freedom of contract is of fundamental importance for the internal market. Yet, one should not forget that, besides the arguments set out above, public procurement agencies are constrained by external regulations which have the force of law, such as administrative law and procurement rules. The constraints on public organisations set by the need to be able to explain and document every decision will always make the management of public procurement less agile than in the private sector. The small local public authority is subject to regulatory requirements which are, in principle, as elaborate as those imposed on a large public authority. Moreover, the suppliers to authorities have a right to fair treatment that suppliers to private companies have not. Any failure to comply with the regulations will render the authority liable to suit. Thus, these regulations already restrict the freedom of contract of public authorities in the light of other overriding requirements of general interest.

In this respect, the Commission refers, for example, to Directive 2007/66/EC which provides procedures for seeking redress in cases where bidders consider that contracts have been unfairly awarded and it is crucial to making sure contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair. The directive requires public authorities to wait a certain number of days, known as a 'standstill period', before concluding a public contract. This gives rejected bidders the opportunity to start an effective review procedure at a time when unfair decisions can still be corrected. If this standstill period has not been respected, the Directive requires national courts under certain conditions to set aside a signed contract, by rendering the contract "ineffective". The Directive also seeks to combat illegal direct awards of public contracts, which is the most serious infringement of EU procurement law. National courts will also be able to render these contracts ineffective if they have been illegally awarded without any transparency and prior competitive tendering. In these cases the contract will need to be tendered again, this time according to the appropriate rules.

Finally, the Commission wants to draw the attention of the Committees to the flexibility of the rule of 30 days. On the one hand, public authorities can agree a longer payment with their suppliers in the particular circumstances referred to above. On the other hand, public authorities can also agree a shorter payment period with their suppliers. Several Member States already oblige public authorities to pay their suppliers in a period much shorter than 30 days.

2. THE LUMP SUM COMPENSATION OF 5%

The Commission takes note of the concerns raised by the Committees 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 Committees raise three concerns about the proportionality of the proposed lump sum compensation of 5% on public authorities.

The first concern is that the compensation would discriminate against public authorities in commercial transactions, hence distorting competition, as it is safeguarded in article 81(1)(d) EC Treaty.

The Commission does not share this opinion. Firstly, Article 81 EC Treaty only applies to competition between undertakings. Secondly, there would be no discrimination among public authorities. The fact that public authorities and businesses are treated differently does not constitute discrimination. The reasons for the differentiated treatment are set out above. It should be recalled that, throughout the EC Treaty and EC law, public authorities and undertakings are treated differently. Thirdly, the Commission considers that the rule of 30 days and the compensation in case of late payment will enhance competition since it will encourage businesses to participate in procurement procedures. Hence, such enhanced competition should have a favourable effect on prices and correspondingly on public expenditure. Finally, public authorities and businesses very rarely compete with each other. The 30-day rule will only apply in public contracts for which businesses have competed.

The second concern relates to a possible distortion of competition, such that of competition on equal footing among economic actors while in transaction. The Commission, however, points out that competing tenderers will be informed about the payment period in the specifications for the call for tenders. By this information, the risk of distortion of competition will be avoided and undertakings will have the opportunity to submit the economically most advantageous tender.

The third concern is that the compensation would raise disproportionately intra-EU trade risk for public authorities. That could, according to the Committees, discourage intra-EU trade rather than enhancing it, as the proposed Directive aspires to do.

In this respect, the Commission can reassure the Committees. The Directive will apply to all procurement, both national and intra-EU. Therefore, the Commission takes the view that this Directive will not, as such, discourage intra-EU trade.

The Committees consider that the particular measure of 5% lump sum compensation violates the principle of subsidiarity. They argue that the introduction of a uniform and mandatory economic disincentive in the form of a lump sum compensation equal to the 5% of the amount due fails to distinguish between, on the one hand, financially stable public authorities, which might encounter a temporary liquidity problem and, on the other, commercially untrustworthy public authorities, systematically evading their payment obligations. The Committees fear that, if a uniform and mandatory additional lump sum compensation is applied indiscriminately, then it might further destabilize the financial position of those authorities unable to pay on time, hence reversing the expected effects. The a priori equalization of those unable to pay on the due date with

those who are unwilling to do so would be the result of an inherent asymmetry of information which renders the member-state into the appropriate level of intervention.

The Commission does not share this view. In practice, the harmful consequences of a late payment will be identical for businesses, regardless of the public authorities being unable or unwilling to pay. The underlying assumption of the compensation is that temporary liquidity problems and corresponding late payment are very often related to public expenditure management. The International Monetary Fund suggests several causes for late payments by public authorities. For example, the budget provision is unrealistic and line ministries are allowed to commit expenditure within that appropriation (i.e., budget provision), even though there is no cash available to liquidate the expenditure. Or the budget figures may be realistic, but the cash plan (and monthly cash limits) associated with the budget are not, or there is no in-year guidance on when expenditures can be committed. Commitments may not be recorded and therefore do not respect the budget ceilings or the timetable defined by the cash plan. Finally, the public authorities may not be efficiently organised. In such a context, the distinction between the public authorities unable to pay on the due date and those unwilling to do so would become entirely inoperable.