Our position

Late Payments Directive (Revision): Proposal for a Regulation

Position on proposed amendments – April 2024

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Executive summary

On 20 March 2024, the European Parliament Committee on the Internal Market and Consumer Protection (IMCO) adopted its draft Report on the Late Payments Directive (Revision): Proposal for a Regulation COM(2023) 533 (LPR) file. The IMCO Report will be considered by the plenary of the European Parliament on 23 April. During that meeting, co-legislators should consider amendments that reflect:

- **Need for a differentiated approach**: The LPR must distinguish between small and medium-sized enterprises (SMEs) and large companies, based on their roles as creditors or debtors, as well as their relative bargaining powers. This would tailor the LPR more closely to the realities of different types of commercial relationships.

- **Flexible payment deadlines:** It is critical to allow more flexible payment terms beyond the 60-day mark for certain transactions, with safeguards to prevent abuse and ensure fairness towards creditors. This flexibility is particularly necessary in three contexts: SME-to-SME payments, large business-to-SME payments and large business-to-large business payments.

- **Elimination of notification requirement**: A requirement for businesses to notify national authorities when negotiating payment terms that extend beyond 60 days would impose an unnecessary regulatory burden.

- **Introduction of a 'grandfather' clause:** To prevent the retroactive impact of the directive on existing transactions, the LPR should only apply to transactions under contracts concluded after its entry into force. This would safeguard the interests of businesses with pre-existing agreements.

Introduction

The proposed changes to the Late Payment Directive are driven by an overarching need to protect small and medium-sized enterprises (SMEs) in Europe. Large companies working with SMEs have a strong interest in supporting additional safeguards to enable stable and long-term relationships.

The general objectives of the LPR proposal are to:

1. Strengthen companies' competitiveness and growth by improving the payment discipline of public authorities, large businesses and SMEs; and

2. Protect SMEs against the negative effects of late payment by setting rules that promote fair and timely payment in commercial transactions.

On 20 March 2024, the European Parliament Committee on the Internal Market and Consumer Protection (IMCO) adopted its draft Report on the LPR file, and the IMCO Report will be considered by the plenary of the European Parliament on 23 April. However, the adopted IMCO report sets strict payment terms of maximum 60 days for all business transactions, which disproportionately interferes with the contractual freedom of businesses to negotiate commercial terms on payment deadlines. Most importantly, this strict 60-day term would have a negative impact on the cash flow of SMEs when they are in debt.

In accordance with the stated objectives of the legislative proposal, the co-legislators should allow a differentiated approach between SMEs and large companies, depending on whether they are a creditor or debtor and taking into account the balance of bargaining power between them in different transactions.

The proposal would benefit also from further adjustments such as applying the Regulation only to new transactions after its entry into force.

A differentiated approach between SMEs and large companies

MEPs should co-sign a plenary amendment that closely mirrors the alternative IMCO CA 2A and advocates for a **differentiated approach between SMEs and large companies, taking into account differences in bargaining power between them**, which is largely in line with several amendments which MEPs previously tabled.

Fair and flexible payment deadlines, without the obligation to notify national authorities

It is critical to permit **more flexible payment deadlines going beyond 60 days** for specific types of transactions, provided that (a) this is expressly agreed by parties in the contract and (b) it is not grossly unfair to the creditor. Specifically:

- **SME-to-SME payments**: The regulation should preserve SMEs' contractual freedom vis-à-vis their counterparts of comparable size, while limiting potential abuses by conditions (a) and (b).
- **Large business-to-SMEs payment:** SMEs should be allowed to benefit from longer payment deadlines where they are in debt towards large businesses, as the imbalance of bargaining power between them is not problematic.
- **Large business-to-large business payments**: This would allow the necessary flexibility in transactions between large businesses and preserve contractual freedom, while potential abuses would be limited by conditions (a) and (b) in IMCO CA 2A.

However, it is important to remove the third condition (c) of alternative CA 2A requiring businesses to **notify national enforcement authorities** when they negotiate payment deadlines in their contracts exceeding 30 (or 60) days. A requirement for businesses to notify national enforcement authorities about part of their commercial contracts would create a new regulatory burden for both companies and enforcement authorities. **The European Commission has committed to reducing the burden of reporting requirements on businesses in Europe by 25%, and creating such a new reporting requirement would go directly against this commitment.**

It is important to take a balanced approach to address any potential concerns about the complexity and potential audit implications that a differentiated approach for large corporations and SMEs could introduce. For example, it may be worthwhile to consider enhanced supervision and monitoring of payment dynamics across the EU (without additional reporting requirements) and generally encouraging all businesses to use electronic invoicing systems. This can streamline processes and mitigate the need for the blanket imposition of mandatory payment terms, thereby ensuring better protection for SMEs while also not negatively impacting businesses' freedom to contract and disrupting sensitive supply chain financing dynamics.

A 'grandfather' clause to protect against retroactive impact on transactions

It is also **important that co-legislators add a 'grandfather' clause** (see AM 405 for instance) to the Commission's proposal in plenary, foreseeing that the LPR should apply to business transactions carried out after its entry into application only if the underlying contract has been concluded after that date.

Given the complexity of supply chains and the payment terms that have already been agreed in current contracts, the regulation should apply to new contracts going forward and should not apply retroactively to existing contracts from its date of entry into application

Conclusion

The indicated amendments can help to mitigate the impact of the proposed LPR on large businesses, while still delivering the overarching aim of the legislation, namely, to protect SMEs.

AmCham EU's engagement with co-legislators to date about the proposed Late Payment Regulation reflects a deep commitment to fostering a healthy European business ecosystem where SMEs and large corporations can all thrive. Further to AmCham EU's earlier position paper, it is once again recommended that co-legislators take a nuanced approach to the proposed Regulation and its proposed amendments.