Our position

Late Payment Regulation

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Executive summary

While the proposed Late Payment Regulation is motivated by the commendable goal of supporting and protecting small and medium-sized enterprises (SMEs) in the area of payments, as currently drafted, it captures transactions where both parties are large companies and potentially prevents SMEs and large companies alike using supply chain financing. As the co-legislators consider the proposal, they should create an exemption for transactions between large businesses which do not require the same protections as SMEs and benefit from additional flexibility, as well as clarify the regulation's impact on supply chain financing.

Introduction

The proposed changes to the Late Payment Directive are driven by an overarching need to protect 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 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.

In accordance with these objectives, the co-legislators should exempt from the proposal's mandatory payment terms transactions the inclusion of which does not give additional benefit to SMEs, most notably those between large companies. This exemption would not impact the proposal's general objectives. Such an exemption is also in line with the existing position set out in the Unfair Trading Practices Directive that encourages contractual freedom whilst also protecting suppliers in the food and agriculture sector. For the exemption, the co-legislators can rely on existing definitions of 'big companies' in EU law.

Furthermore, the proposal does not appear to allow for supply chain finance or similar payables financing structures. Considering the benefits for both suppliers and buyers, policymakers should clarify how the text would apply to supply chain finance and provide exemptions to allow buyers and suppliers to agree on longer payment terms in the case of supply chain finance.

Why exempt large-to-large company transactions

Freedom of contract

Freedom to negotiate is at the core of every business relationship. Where there is equal bargaining power, freedom of contract should be protected. The co-legislators should seek to balance the freedom of contract with the proposal's overall objective, and an exemption from __ for large-to-large company transaction would achieve this equilibrium. The Commission provides that freedom of contract is preserved since parties can negotiate any term up to 30 days. However, it is unlikely that parties would consider shorter terms than 30 days as a significant advantage on either a debtor or creditor side, and this cap would curtail freedom of contract. Capping the payment term at 30 days prevents shorter payment terms that offer discounts or longer payment terms which can help working capital and supply chain risks and be set off by supply chain financing. The cap would also likely result in the potential renegotiation of existing contracts, creating an unnecessary burden on all companies with no added value.

Consistent application of rules

As mentioned above, Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the Unfair Trading Practices Directive) recognises differences in the size of operators across the supply chain and bargaining power. It also provides for a dynamic approach based on the relative size of the supplier and the buyer in terms of annual turnover to provide better protection against unfair trading practices for operators that need it most.

The Commission should consider the same approach for those big-to-big transactions as has been applied in the Unfair Trading Practices Directive. Such an approach would allow for the consistent application of rules but also ensure that SMEs remain protected in commercial transactions.

Late payment vs long payment terms

It should be recognised that a shift to shorter payment terms does not necessarily mean prompt payment and overall culture shift to prompt payment is an objective of the Proposal. Long payment is not late payment and where freely negotiated, it can enable parties to manage cash flow and share risks across the supply chain.

Existing directive and national laws require payment within certain terms, but prompt payment still does not occur. Paying late is a breach of contract and a breach of the current rules, and therefore equipping SMEs with skills and knowledge in terms of enforcement and dispute resolution would more likely support a culture shift to prompt payment than applying a cap across all companies. Including a big-to-big exemption within the final regulation would not negatively impact SMEs, as they remain protected by its terms.

Other considerations

Buyers usually offer longer credit days to their suppliers to improve the buyers' working capital. Although the average figures may be different between industries, in some cases they might reach 120 or even 180 days of credit. Should the proposal be adopted as is, the parties to such contracts would need to decrease credit days from, for example, 120 days to 30 to comply with the new regulation. To compensate for the economic losses and protect the existing status quo, these buyers would have to renegotiate all their existing agreements to ask their suppliers to provide additional economic benefits (for example, seeking more discounts, price reductions or other economic mechanisms). This would not change the existing status quo but would instead significantly increase administrative workload for businesses across the EU. In addition, companies' costs might increase to create additional liquidity in order to pay suppliers on time, which in turn may be passed on as price increases.

The challenges of increased administration, and subsequent reduction in EU market liquidity as local providers retrench / withdraw financial product offerings, could force buyers and suppliers to seek solutions in markets outside of the EU. This could reduce market competitiveness, prompt parties to seek alternative and potentially more expensive financing and increase costs to consumers within the EU and beyond.

SME sellers themselves rely extensively on solutions of this type to function effectively with their own suppliers within a supply chain ecosystem. Without appropriate access to and availability of financial resources, this may be arguably more detrimental to their free cash flow than the directive's intended positive effects. The co-legislators should carefully analyse the value of existing solutions in the market in combination with the tightening of late payments in the EU.

Level playing field internationally

The proposed 30-day restriction of payment days could be detrimental to the competitiveness of EU suppliers and buyers operating outside the EU. Typically, payment terms are longer in an international setting, which means that restricting payment terms might lead to a competitive disadvantage for companies operating from within the EU. While freedom of contract would be maintained in business-to-business transactions outside the EU, EU-based companies operating internationally would be pushed to require shorter payment terms, making them less attractive compared to non-EU suppliers.

Why exempt supply chain finance

As written, the proposal lacks clarity regarding supply chain financing. It does not contain exclusions to allow for supply chain finance, which may decrease the availability of such financing, to the detriment of companies that struggle to find alternative form of financing.

These concerns also arise within the trade credit insurance sector, where policies are sold directly to businesses and banks to mitigate their credit risk exposure. Restricting the ability of two parties to freely negotiate extended payment terms is likely to have a disproportionate impact on industries with complex supply chains and prolonged capital cycles, with a likely disproportionate impact on SMEs. Even SMEs derive advantages from extended payment terms when they are the debtor when they align with their specific needs. This is particularly evident for sectors with longer production cycles and complex, global and fragmented supply chains. In such scenarios, the flexibility to agree on extended payment terms proves advantageous for all businesses, including SMEs. Imposing a uniform 30-day limit on payment terms could potentially create a funding gap, further exacerbating the challenges faced by businesses in these sectors.

Supply chain finance lowers financing costs and improves business efficiency for both sellers and buyers and allows for the release of the commercial tension between suppliers (that want to be paid quickly) and buyers (that may choose to delay payments) by disintermediating the transaction. In supply chain finance, buyers agree to approve suppliers' invoices for financing by a bank, aiding uninterrupted supply flow while also supporting suppliers' working capital needs. It carries a number of advantages for both suppliers and buyers. Suppliers/creditors are paid early, and it helps provide liquidity and reduces financing costs. Buyers/debtors can choose how to manage their overall supply chain and cash flow, unlocking working capital and reducing the risks associated with buying goods in bulk, while also maintaining a good relationship with their suppliers.

Co-legislators should provide clarity in the proposal on the role of supply chain financing, particularly allowing buyers and suppliers to agree on longer payments terms in case of supply chain finance.

Conclusion

The Commission's proposal for the Late Payment Regulation correctly identifies an opportunity to increase competitiveness by improving payment discipline and thereby also support SMEs in the Single Market. However, at present the proposal potentially precludes the use of tools such as supply chain financing, which offers flexibility to buyers and certainty to sellers to benefit companies of all sizes. This flexibility in payment terms does not indicate an abuse of power. The proposal also currently captures transactions between large businesses which nominally are out of the scope of the regulation's ambition to support SMEs. Larger businesses are better placed to manage the existing risks on long payment terms and if allowed continued flexibility in dealings with fellow large enterprises, would be more efficient than if required to adhere to the measures designed for SMEs. By including the appropriate exemptions and clarifications outlined above, the co-legislators can optimise the regulation for businesses of all sizes, enhancing the competitiveness of Europe's economy.