



**European Commission's proposal:
Recast of Directive 2000/35/EC on combating late payment in commercial transactions**

FIEC comments and amendments' proposals

FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 28 countries (26 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.

Preliminary remarks:

Irrespective of size, it is important for **all** construction enterprises that their clients – and in particular public clients, which are supposed to show the good example – are paying invoices in due time. The respect of fair payment period rules should then be ensured **all over the payment chain**.

Especially during the current economic crisis, no construction enterprise can afford that clients are paying invoices with delay and hereby use construction enterprises as a cheap credit source, i. e. as a replacement of banks, which would grant credit to the client (loans) only in return for paying an adequate fee.

Considering this background, we welcome that the European Commission intends to improve the provisions of Directive 2000/35/EC in order to prevent a delayed payment of invoices.

It is in particular to welcome that the current exemption, which authorizes a maximum payment period of up to 60 calendar days, shall be deleted from the Directive.

As a complement, it should be avoided by all means that a deletion of this maximum period could lead to even longer payment periods and/or the introduction of new exemptions, which would make the current payment situation even worse, instead of improving it.

In order to complement the important proposal of the European Commission and for the purpose of improving the current payment situation, the following would be necessary:

- Include public utility authorities, as defined by Directive 2004/17/EC
- Include utility undertakings, as defined by Directive 2004/17/EC, and treat them like public authorities
- Address time limits in calendar days
- Restrict exceptions for public authorities (i. e. all contracting authorities) and utility undertakings
- Shorten acceptance/verification period for public authorities (i. e. all contracting authorities) and utility undertakings
- Improve rules concerning unfair contractual clauses (i.e. distinction between B2B and business to public authorities or utility undertakings)



Proposals for amendments:

Proposed amendment 1:

**Proposal for a Directive – amending act
Article 2 paragraph 2**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>“public authority” means any contracting authority, as defined by Directive 2004/18/EC;</p>	<p>“public authority” means any contracting authority, as defined by the Directives 2004/18/EC and 2004/17/EC, irrespective of subject matter or value of the contract;</p>

Justification:

The current version of Directive 2000/35/EC refers to the definition of “contracting authority or entity”, which is used in the previous four Directives regarding public procurement (92/ 50/EC, 93/36/EEC, 93/37/EEC and 93/38/ EEC). These four Directives have in the meantime been replaced by the two Directives 2004/18/EC and 2004/17/EC.

If Directive 2000/35/EC would in the future only refer to Directive 2004/18/EC, it could lead to the incorrect conclusion that contracting authorities according to Directive 2004/17/EC would no longer be covered. Such a misunderstanding is prevented by the proposed complement.

Since Directives 2004/18/EC and 2004/17/EC only apply to specific subject matters of contract and beyond a certain “threshold value”, it would need to be clarified that these restrictions do not apply to Directive 2000/35/EC. Otherwise, Directive 2000/35/EC would not cover a large number of public contracts.

Proposed amendment 2:

**Proposal for a Directive – amending act
Article 2 paragraph 3 bis new**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
	<p>“Utility undertaking” means any undertaking which operates water or energy supply, respectively transport infrastructure, as defined by the Directive 2004/17/ EC, irrespective of value of the contract;</p>

Justification:

“Utility undertakings” have a specific position on the market, which distinguishes them from other undertakings.



They are either “public undertakings” or private undertakings, which have been granted special or exclusive rights by public authorities for providing the public with water and energy supply, respectively transport infrastructure.

Due to their “special or exclusive rights”, utility undertakings are particularly strong on the market. In the area of infrastructure for water and energy supply, respectively transport they are the only providers and are not exposed to effective competition.

Due to such lack of effective competition regarding the infrastructure, utility undertakings are to a large extent in a position to fix their “purchasing conditions” – and at the same time the payment periods – unilaterally, i. e. impose them on their contractual partners. Real “negotiations” do not take place.

As Article 86 of the EC Treaty clarifies, the Member States have a specific responsibility to safeguard on the market that utility undertakings do not misuse their powerful position, which the State has granted them. For this reason, the Directive 2004/17/EC treats utility undertakings like public utility authorities. This approach must also be valid for Directive 2000/ 35/EC.

In order to avoid that a large number of contracts are not covered by Directive 2000/35/ EC, the “threshold value” which Directive 2004/ 17/EC provides for its specific purposes should not be transferred to Directive 2000/35/EC.

Proposed amendment 3:

**Proposal for a Directive – amending act
Article 4 paragraph 1**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
Member States shall ensure that, when interest for late payment becomes payable in commercial transactions in accordance with Articles 3 and 5 and, unless otherwise specified in the contract, the creditor is entitled to obtain from the debtor any of the following amounts:	Member States shall ensure that, when interest for late payment becomes payable in commercial transactions in accordance with Articles 3 and 5, the creditor is entitled to obtain from the debtor any of the following amounts:

Justification:

The exemption to the compensation for recovery costs “and, unless otherwise specified in the contract” should be deleted. Otherwise, especially public authorities and utility undertakings – which as a rule provide the contractual contents unilaterally – could generally deviate from this provision and hereby render it inapplicable.



Proposed amendment 4:

**Proposal for a Directive – amending act
Article 5 paragraph 1**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>Member States shall ensure that, in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities, the creditor is entitled, without the necessity of a reminder, to interest for late payment equal to statutory interest if the following conditions are satisfied:</p>	<p>Member States shall ensure that, in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities or to utility undertakings, the creditor is entitled, without the necessity of a reminder, to interest for late payment equal to statutory interest if the following conditions are satisfied:</p>

Justification:

For the reasons specified above, it is indispensable to include utility undertakings in the proposed provision for public authorities.

Proposed amendment 5:

**Proposal for a Directive – amending act
Article 5 paragraph 2 (b)**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>if the date or period for payment is not fixed in the contract, interest for late payment shall become payable automatically within any of the following time limits:</p> <ul style="list-style-type: none"> (i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; (ii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services; (iii) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 days after that date. 	<p>if no earlier date or shorter period for payment is fixed in the contract, interest for late payment shall become payable automatically latest upon expiry of any of the following time limits:</p> <ul style="list-style-type: none"> (i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment; (ii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the receipt of the goods or services; (iii) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days after that date.



Justification:

The proposal of the European Commission refers to „calendar days“ (Article 9), as well as “days“ (Articles 3 and 5). In order to avoid misunderstandings, “calendar days” should consistently be referred to throughout the text.

*Moreover, an adjustment to the introductory sentence should clarify that public authorities and utility undertakings may not deviate from the general payment period of 30 calendar days, **except for shortening this period.***

Proposed amendment 6:

**Proposal for a Directive – amending act
Article 5 paragraph 3**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>Member States shall ensure that the maximum duration of a procedure of acceptance or verification referred to in paragraph 2(b)(iii) shall not exceed 30 days, unless otherwise specified and duly justified in the tender documents and the contract.</p>	<p>Member States shall ensure that a procedure of acceptance or verification referred to in paragraph 2(b)(iii)</p> <p>(a) shall be performed without delay,</p> <p>(b) shall not exceed 10 calendar days, and</p> <p>(c) shall shorten the payment period specified in paragraph 2(b)(iii) by the length of the acceptance or verification procedure.</p>

Justification:

A period for acceptance and/or verification of up to 30 calendar days, which the European Commission proposes in addition to the payment period of 30 calendar days, should also be rejected. Such an additional period would have the effect that invoices would need to be paid only after 60 calendar days! This would not improve the current payment situation, but make it considerably worse!

Even more aggravating is the proposal of the European Commission that the restriction of up to 30 calendar days for acceptance and/or verification may even be extended, if “otherwise specified and duly justified in the tender documents and the contract”.

Completely open is, what specific reason could “duly justify” the exemption. Also this exemption should therefore be deleted, since it would authorize payment periods even beyond 60 calendar days without any upper limit!



Proposed amendment 7:

Proposal for a Directive – amending act

Article 5 paragraph 4

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
Member States shall ensure that the period for payment fixed in the contract shall not exceed the time limits provided for in paragraph 2(b), unless it is specifically agreed between the debtor and the creditor and is duly justified in the light of particular circumstances such as an objective need to schedule payment over a longer period.	Member States shall ensure that the period for payment fixed in the contract shall not exceed the time limits provided for in paragraph 2(b).

Justification:

In order to improve the current contents of Directive 2000/35/EC, it should be clarified that public authorities and utility undertakings may shorten the general payment period of 30 calendar days, but not extend it. We do not see any relevant objective reason, which could justify public authorities or utility undertakings to require a longer payment period.

Rejected should therefore be the European Commission`s proposal to accept a longer payment period as an exemption, if “it is specifically agreed between the debtor and the creditor and is duly justified in the light of particular circumstances such as an objective need to schedule payment over a longer period”.

On the one hand, public authorities and utility undertakings usually fix their contractual clauses unilaterally; i. e. real negotiations do not take place. On the other hand, it is completely open, which “particular circumstances” could justify a longer payment period. Why is an “objective need” not a requirement, but only an example? Should, for example, a lack of money be accepted? Does “over a longer” period contain any upper limit, in other words how long is “longer”?

Proposed amendment 8:

Proposal for a Directive – amending act

Article 5 paragraph 5

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
Member States shall ensure that when interest for late payment becomes payable, the creditor is entitled to a lump sum compensation equal to 5 % of the amount due. This compensation shall be additional to the interest for late payment.	Member States shall ensure that when interest for late payment becomes payable, the creditor is entitled to a lump sum compensation equal to 5 % of the amount due. This compensation shall be additional to the interest for late payment and the compensation for recovery costs.

Justification:

In the interest of clarity it should be added that compensation for recovery costs (Article 4) would need to be paid in addition to the lump sum compensation (Article 5).



Proposed amendment 9:

Proposal for a Directive – amending act

Article 5 paragraph 6

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
Member States shall ensure that the applicable reference rate in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities:	Member States shall ensure that the applicable reference rate in commercial transactions leading to the delivery of goods or the provision of services for remuneration to public authorities or to utility undertakings:

Justification:

For the reasons specified above, it is indispensable to include utility undertakings in the proposed provision for public authorities.

Proposed amendment 10:

Proposal for a Directive – amending act

Article 6 paragraph 1

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>Member States shall provide that a clause in a contract relating to the date for payment, the rate of interest for late payment or recovery costs shall either be unenforceable or shall give rise to a claim for damages if it is grossly unfair to the creditor.</p> <p>In determining whether a clause is grossly unfair to the creditor, all circumstances of the case shall be considered, including good commercial practice and the nature of the product or the service.</p> <p>Account shall also be taken of whether the debtor has any objective reason to deviate from the statutory rate of interest or from Article 3(2)(b), Article 4(1) or Article 5(2)(b).</p> <p>For the purpose of the first subparagraph, a clause which excludes interest for late payment shall always be considered as grossly unfair.</p>	<p>Member States shall provide that in a contract between undertakings, where the debtor to the remuneration is not a utility undertaking, a clause (i. e. term or agreement) relating to the date or period for payment, the rate of interest for late payment or recovery costs shall be unenforceable and give rise to a claim for damages if it is unfair to the creditor. Instead of the unenforceable contractual clause the statutory provisions of Article 2 (5), Article 3 and Article 4 shall apply.</p> <p>In determining whether a clause is unfair to the creditor, all circumstances of the case shall be considered, including good commercial practice and the nature of the product or the service.</p> <p>Account shall also be taken of whether the debtor has any objective reason to deviate from the statutory rate of interest or from Article 3(2)(b) or Article 4(1).</p> <p>For the purpose of the first subparagraph, a clause which excludes interest for late payment or compensation for recovery costs shall always be considered as unfair.</p>

Justification:

While the current version of Directive 2000/35/ EC addresses “agreements”, the proposal of the European Commission addresses “contractual clauses”. In order to avoid misunderstandings, “contractual clause” should be explained and consistently used throughout the text.



A restriction to “grossly unfair” contractual clauses may cover only a few extraordinary situations. Such a restriction would be unsuitable to improve the current payment situation. In the interest of an effective rule, “grossly” should be deleted.

Proposed amendment 11:

**Proposal for a Directive – amending act
Article 6 paragraph 1 bis new**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
	<p>Member States shall provide for contracts of undertakings <u>with public authorities or with utility undertakings</u>, where the creditor to the remuneration is the undertaking, that a clause (i. e. term or agreement), which to the disadvantage of the creditor is deviating from Article 5 of this Directive, shall be unenforceable and give rise to a claim for damages. Instead of the unenforceable contractual clause the statutory provisions of Article 5 shall apply.</p>

Justification:

*In order to improve the legal situation of the creditor, it should be clarified that an “unfair” clause cannot be enforced **and** gives rise to a claim for damages. In addition, it would be important to clarify that instead of the clause, which is not enforceable, the provisions of the Directive shall apply.*

Beside the exclusion of interest for late payment, also an exclusion of compensation for recovery costs should always be considered as unfair. Otherwise, this additional incentive for the payment of invoices on time could always be excluded.

In order to prevent utility undertakings and public authorities from misunderstandings, it should be clarified that the provision of Article 5 of the Directive cannot be excluded and has the same consequences as “unfair” contractual clauses between undertakings.

Proposed amendment 12:

**Proposal for a Directive – amending act
Article 6 paragraph 2**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>Member States shall ensure that, in the interest of creditors and competitors, adequate and effective means exist to prevent the continued use of clauses which are grossly unfair to the creditor within the meaning of paragraph 1.</p>	<p>Member States shall ensure that, in the interest of creditors and competitors, adequate and effective means exist to prevent the continued use of clauses which within the meaning of paragraph 1 or paragraph 1 bis are unenforceable towards the creditor.</p>



Justification:

See above.

Proposed amendment 13:

**Proposal for a Directive – amending act
Article 6 paragraph 3**

<i>Text proposed by the Commission:</i>	<i>Amendment:</i>
<p>The means referred to in paragraph 2 shall include provisions whereby representative organisations may take action according to the national law concerned before the courts or before competent administrative bodies on the grounds that clauses are grossly unfair, so that they can apply appropriate and effective means to prevent their continued use.</p>	<p>The means referred to in paragraph 2 shall include provisions whereby representative organisations may take action according to the national law concerned before the courts or before competent administrative bodies on the grounds that clauses are unenforceable, so that they can apply appropriate and effective means to prevent their continued use.</p>

Justification:

See above.