

**European Commission**

**Proposal for a Directive of the European Parliament**

**and of the Council**

**on combating late payment in commercial transactions**

**- COM(2009) 126 -**

**Joint Position Paper**

**of the European Social Insurance Platform (ESIP)**

**23 February 2010**

### **About the *European Social Insurance Platform* (ESIP)**

The *European Social Insurance Platform* (ESIP) represents over 40 national social security organisations in 15 EU Member States and Switzerland, active in the field of health insurance, pensions, family benefits, occupational safety and accident insurance and unemployment insurance. The aims of ESIP and its members are to preserve high-profile social security for Europe; to reinforce solidarity-based social insurance systems and to maintain European social protection quality. ESIP builds strategic alliances for developing common positions to influence the European decision-making process and is a consultation forum for the European institutions and other multinational bodies active in the field of social security.

**Statement regarding positions submitted by ESIP:** *ESIP members support this position in so far as the subject matter lies within their field of competence* (in accordance with the bylaws referring to Art 16 of the ESIP statutes).

For more information please visit the ESIP website at: [www.esip.org](http://www.esip.org)

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**Summary**

- 1. ESIP calls to delete Article 5 of the proposal on the grounds that it is discriminatory and refers to compensation of a punitive nature**
- 2. ESIP proposes that the flat rate compensation for recovery costs (Article 4, paragraph 1a) is set at 20 euros independent of the level of debt**

## 1. General Remarks

The European Commission proposal for a Directive recasting Directive 2000/35/EC on combating late payment in commercial transactions (COM(2009) 126 final) published on 8 April 2009 aims to improve the effectiveness and efficiency of remedies for late payment. Included under the scope of the proposed Directive are so-called “public authorities” (“contracting authorities”, as defined by the Directive 2004/18/EC) which includes the statutory health-, pensions-, occupational disease and accident insurance organisations.

A central aspect of the Directive as proposed is the obligation under Article 5 (new) specifically addressed at public authorities to settle any invoices within 30 days of receipt. In the case of non-payment within 30 days the public authority has to pay lost interest (Article 3), compensation for recovery costs (Article 4) and a lump sum compensation equal to 5% of the amount due (Article 5). The compensation referred to in Article 5 does not apply to private undertakings.

In general, ESIP welcomes the initiative of the European Commission to strengthen the functioning of the internal market by taking action to regulate payment practice as long as the same rules apply to public and private entities. We do not share the opinion of the European Commission that public authorities across the board face lighter financial constraints than private undertakings and can therefore fulfil the terms of payments more easily than private undertakings (cf. recital 17 of the Directive proposal). In particular, the social insurers have the obligation to manage the contributions of their members both responsibly and economically. This requires that invoices received, for example, from care providers are conscientiously examined to avoid exaggerated payments and abuse of the contributions paid by the statutory insured.

## 2. Detailed remarks

### Flat rate compensation for recovery costs, Article 4, paragraph 1

Article 4 states that in case of delayed payment a legal claim can be made for compensation for costs in addition to lost interest. The compensation should be paid in the form of a lump sum at a level of 40 euros for a debt of less than 1,000 euros and 70 euros for a debt of 1,000 to 10,000 euros; for a debt of more than 10,000 euros, 1% of the sum (on which lost interest is also charged) has to be paid – to which there is no ceiling!

ESIP considers that a flat rate compensation, as proposed in Article 4, is in principle reasonable, if it is seen as an instrument for alleviating the burden of proof and if the sum realistically reflects the level of damage. However, it is not justified to graduate the level of compensation since the recovery costs are the same whatever the level of debt. In addition, the proposed rates of compensation are too high; in its impact assessment document from 8 April 2009 (Sec[2009] 315, p. 38) the European Commission makes the assumption that recovery costs are only 20 euros.

ESIP therefore proposes that the lump sum compensation referred to in Article 4, paragraph 1a is set at **20 euros**, unless a creditor can satisfactorily prove that higher costs have been incurred. It should also be possible for the debtor to provide evidence that the actual damage to the creditor is less than this lump sum and therefore reduce the compensation.

### **Lump sum compensation equal to 5% of the amount due, Article 5**

According to Article 5 of the Commission proposal, public authorities will be obliged as a general rule to pay invoices for commercial transactions leading to the delivery of goods or the provision of services within 30 days. After the expiry of this date the creditor (provider) can claim compensation to the amount of 5% of the sum owed in addition to interest on the late payment and to compensation for recovery costs. While the conditions under Article 5 are obligatory for public authorities, they can be waived by private enterprises.

ESIP understands that public authorities above all should behave in an exemplary manner and therefore should aim to settle outstanding accounts on time. However, to create a specific law in this context which is applicable to public authorities and not to private enterprises is **discriminatory**. Further, to differentiate in a law governing late payments according to whether it is more or less easy for a certain groups of debtors to fulfil their contractual obligations is clearly arbitrary. The same rules must apply to private and to public enterprises. In addition, the need to create such a specific law exclusively for the public authorities is not empirically proven. The few data presented in the impact assessment document of the European Commission are not significant: in particular, if you consider that more *public authorities* are recorded as “never” causing problems of late payment than *other businesses* (see Sec(2009) 315, Annex 1 8.1 b) 3 and 4; on page 46). We also point out here that the circumstances for late payments listed in the consultation procedure are not accessible.<sup>1</sup>

ESIP questions whether in fact the proposed Directive will increase the efficiency of business. If, for example, the reason for late payment is due to a debtor's temporary lack of funds, increased sanctions will not lead to more punctual payment. In addition, the impact assessment report (Sec(2009) 315, page 9) notes that the fear of losing customers would inhibit some creditors (in particular SMEs) from taking legal action at all.

At this juncture, ESIP stresses in particular the situation of the social security institutions which have the legal obligation to manage the contributions of their members responsibly and economically. In some sectors of social insurance, for example health insurance, this requires a very thorough examination of the costs and invoices received from the service providers, to avoid overcharging and the possible abuse of insurance funds. The social security insurers are legally obligated to obtain the optimum return on the contributions of their members. However, the liquidity of the social insurers is dependant at times on external circumstances.

Finally, ESIP objects to the lump sum compensation equal to 5% of the amount due payable by public authorities under Article 5 of the draft Directive. The sanctioning of payment delays by public authorities only cannot be justified from an objective point of view. Cumulative to the additional requirements (lost interest, recovery costs), this lump sum compensation has to be viewed as **punitive** rather than as a damage adjustment. Sanctions aimed at punishing or deterring, go beyond the objective of this proposal, which is damage reconciliation. Further we should avoid an “*Americanisation* of European legislation”: compensation claims of a punitive nature should not be supported in the European Union. We refer here to the fact that

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<sup>1</sup> Consultation by the European Commission from 29 May 2008 to 31 August 2008 on Your Voice on Europa. 510 Responses were received and should build the basis for the impact assessment. Consultation results under: [http://ec.europa.eu/enterprise/regulation/late\\_payments/index.htm](http://ec.europa.eu/enterprise/regulation/late_payments/index.htm)

the European Commission itself has elsewhere rejected punitive compensation in principle.<sup>2</sup> Currently, contracts that social insurers sign are subject to civil law at national level. Under these national regulations, debtors are already entitled to claims for damages and lost interest as a result of delayed payments.

ESIP therefore calls for the **deletion of Article 5** from the European Commission proposal by introducing the following amendment:

Amendment to

Proposal for a Directive – recasting Directive 2000/35/EC

Article 5 (new)

Commission proposal	Amendment
<p><b>Article 5</b>  <b>Payment by public authorities</b>  <b>1. 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:</b>  <b>(a) the creditor has fulfilled its contractual and legal obligations;</b>  <b>(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.</b>  <b>2. Where the conditions set out in paragraph 1 are fulfilled, Member States shall ensure the following:</b>  <b>(a) interest for late payment shall become payable from the day following the date or the end of the period for payment fixed in the contract;</b>  <b>(b) 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:</b>  <b>(i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment;</b>  <b>(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;</b>  <b>(iii) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be</b></p>	<p><b>Deleted</b></p>

<sup>2</sup> Green paper of the European Commission On Consumer Collective Redress [COM(2008)794]; Page 7: "At the same time, the necessary safeguards have to be taken not to burden business with unmeritorious claims, punitive damages, or excessive costs."

*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.*

*3. 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.*

*4. 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.*

*5. 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.*

*6. 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:*

*(a) for the first semester of the year concerned shall be the rate in force on 1 January of that year;*

*(b) for the second semester of the year concerned shall be the rate in force on 1 July of that year.*