

consultation

JUNE 2009

NO. 2

Are you paying your bills on time?

New EU proposals aim to tackle late payments in the public sector

Key questions for NHS organisations

In order to shape an NHS response to this proposal, the NHS European Office requests feedback from NHS organisations on the following key questions:

- What would be the impact of placing restrictions on contracts between the NHS and its suppliers with regard to payment dates?
- Is the requirement for any contractual agreement with a public authority to extend a payment period to be 'duly justified' too ambiguous or does it give rise to any concerns?
- Is the proposed 5 per cent flat-rate late payment fee the right approach to further encourage good payment practice within the NHS.
- Is 5 per cent of the amount due an appropriate level at which to set the proposed deterrent to late payment?

Although the UK has been a leader in adopting measures to tackle late payments, new proposals from the European Commission would considerably strengthen the existing rules. The proposed revision of EU rules on late payment in commercial transactions¹ would introduce tough new measures to penalise public authorities that do not pay their bills on time. This *Consultation* sets out why change is needed, what changes are proposed and invites feedback on key questions from NHS organisations.

Introduction

The EU proposal is set against the background of the current economic crisis and is intended to help companies – in particular small and medium-sized enterprises which are particularly vulnerable to insolvency – to better exercise their rights to redress in cases of late payment.

An impact assessment done for the European Commission shows that a culture of late payment exists within the public sector. An additional study undertaken for the Commission highlights that this is particularly true

within the healthcare sector in some EU countries. The focus of the revision is therefore on measures that effectively discourage public authorities from paying late.

Key changes to the current law, proposed by the European Commission, include measures to shorten payment periods by public authorities, mainly by limiting contractual agreements for payment to 30 days unless longer delays are explicitly agreed and can be duly

1. See: ec.europa.eu/enterprise/regulation/late_payments/index.htm

'Businesses, and particularly small and medium-sized enterprises, are not exercising their rights under the current EU late payment regime'

justified. Additional tools for tackling late payments have been proposed, including the automatic right of creditors to obtain fixed sum compensation for recovery costs, strengthened provisions for tackling grossly unfair contract clauses and a compensatory flat-rate late payment fee of 5 per cent of the amount due. The proposals will be subject to changes and negotiations at EU level over the coming months with the new rules expected to take effect in 2010.

What are the current EU rules on late payments?

EU legislation which aims to tackle late payments in commercial transactions entered into force in 2002 and applies to contracts between businesses, and between businesses and public authorities, which involve the provision of goods and services for payment. The main provisions of the current legislation include:

- a statutory interest rate to be paid on late payments after 30 days unless otherwise provided for in the contract
- measures to tackle grossly unfair contract clauses and long payment periods – that is, if contract clauses unreasonably extend payment periods or lower interest rates a legal challenge could lead to these clauses being considered unenforceable and/or to claims for damages
- a requirement for the reimbursement of relevant recovery costs

- the right of creditors to retain title to goods until these are fully paid for
- the right of creditors to have quick access to legal recourse and in the case of undisputed claims, to obtain an enforceable title within 90 days for late payments.

Why is change needed?

Although key concepts like statutory interest on late payments and recovery procedures for unchallenged late payments are already part of the current legal framework, an impact assessment undertaken by the European Commission reveals overwhelming evidence that late payments are still a generalised problem within the EU.

The Commission highlights a number of reasons why this problem persists, despite some improvement since the introduction of the 2002 late payments rules. Mainly, it appears that businesses, and particularly small and medium-sized enterprises, are not exercising their rights under the current late payments regime. The Commission suggests that many businesses do not claim interest on late payments or pursue recovery costs, out of fear of harming commercial relationships or the realisation that in many cases the cost of chasing a late payment is simply not justified by the financial benefits.

By failing to exercise their rights, creditors may be unwittingly encouraging debtors to adopt poor financial management practices. For example, the Commission has found that many debtor enterprises consider late payment to be an efficient and cheap way to finance their business activities, while the public sector may

see postponing payments to the next budgetary period as an easy way to overcome their budgetary constraints.

However, late payment can seriously affect the cash flow and financial management of companies, even leading to the bankruptcy of otherwise viable enterprises. According to the Commission, the public sector is not subject to the same financing constraints as businesses and should be able to avoid late payments. Moreover, given the considerable importance of public procurement in the EU, late payments made by public authorities have a negative impact on companies and require particular attention.

The current financial crisis exacerbates the consequences of late payments and the Commission has determined that a swift policy response is necessary to avoid further bankruptcies, promote business cash flow and ensure the long-term competitiveness of EU companies. For these reasons the Commission seeks to introduce measures which more severely sanction late payments made by public authorities.

The healthcare sector: is it particularly prone to late payments?

It should be borne in mind that the UK has been a pioneer in adopting measures to tackle late payments and these were already part of the UK legal framework before the original EU rules were introduced in 2002. The late payment regime in the UK extends of course to the NHS, which has contributed to a UK payment culture where 30-day payment periods and appropriate late payment penalties are accepted as part of good business practice.

However, a study done for the Commission in 2006 highlights that overall the European healthcare sector is particularly prone to late payments². Notwithstanding the good performance of the healthcare sector in certain EU Member States, the statistics for a number of other EU health systems considerably skew the performance for the public sector overall. For example, the study shows that the average payment period for the Italian National Health Service exceeds 300 days and in certain Italian regions this average exceeds 600 days. Other EU health systems highlighted in the report include Greece and the Czech Republic with average payment periods of over 300 days. Portugal followed with 200 days and Malta with 150 days.

While such long payment periods are unacceptable, the study drew on the conclusions reached by the European Investment Bank and the World Health Organisation, which point to the increasing demands on health and social care systems from ageing populations and decreasing working populations. The study went on to highlight that without fundamental reforms and adequate financing there are likely to be further increases in late payments in the health sector in the years to come regardless of EU late payment rules.

In addition to this study, the Commission has undertaken a full impact assessment³ which underpins the proposed revision of EU rules on late payments. Although the impact

assessment does not specifically address the healthcare sector, the Commission maintains that payment periods within the public sector as a whole remain excessive and need to be addressed.

What key changes are being proposed?

The proposed measures aim to keep European companies viable and competitive by helping them to exercise their rights and, in particular, by ensuring that public authorities are more effectively discouraged from paying late. These measures are described below.

Ensuring public sector bills are paid in 30 days

It is the Commission's aim to ensure that it becomes the norm for public authorities to pay for the delivery of goods or provision of services within 30 days of receipt of the invoice⁴. Therefore limits are proposed on contractual agreements with public authorities, so that payment is made within 30 days unless a longer delay is explicitly agreed *and* is duly justified (for example, there is an objective need to schedule a payment over a longer period). In addition, if a period of acceptance or verification of the goods or services is required then this must be limited to 30 days, unless explicitly agreed in the contract and duly justified.

Compensation for late payments: 5 per cent of the amount due

To encourage a more prompt payment culture within the public sector, late payments would be

'The NHS has contributed to a payment culture in the UK where 30-day payment periods and appropriate late payment penalties are accepted as part of good business practice'

subject to a compensatory flat rate of 5 per cent of the amount due. This amount would be in addition to the interest for late payment and the compensation for recovery costs.

Compensation for recovery costs

Where late payments occur, creditors would be entitled (unless otherwise stated in the contract), to a fixed sum for internal recovery costs related to the amount paid late⁵. The amounts due would apply without the necessity of a reminder being sent. The creditor would also be able to obtain *reasonable* compensation for any of the remaining recovery costs.

Grossly unfair contract clauses

The proposal strengthens provisions on unfair contract clauses by clarifying that a clause which excludes the creditor's right to obtain interest for late payment will always be considered grossly unfair. The proposal specifies that clauses related to recovery costs may also be considered grossly unfair. With regard to reducing long payment periods, national governments would no longer have the possibility to extend the period before statutory interest kicks in – that is, from 30 to 60 days – on certain categories of contracts.

2. *Review of the effectiveness of European Community legislation in combating late payments.* See ec.europa.eu/enterprise/regulation/late_payments/doc/finalreport_en.pdf

3. See ec.europa.eu/enterprise/regulation/late_payments/doc/8_april_2009/impact_assessment_en.pdf

4. If the invoice is received before the goods or services then the 30 days starts after the receipt of the goods or services.

5. The proposed fixed rates are similar to current UK requirements. The rates are as follows: less than €1000 = €40, greater than €1000 but less than €10,000 = €70, and greater than €10,000 = 1 per cent of the amount on which interest is due.

'An opportunity exists for the NHS to inform decision-makers of its views'

Claims for interest on small amounts

The proposal removes the possibility for Member States to exclude claims for interest under €5. This would particularly help small and medium-sized enterprises claim for interest on smaller transactions where interest amounts to only a small sum. This means that businesses can claim interest on late payments from the first day of late payment without having to wait for interest to accrue.

Implications for the NHS

The proposed changes are mostly already part of the current UK late

payment regime⁶ and will therefore have minimal impact on current NHS payment practices. Current UK rules already set a 30-day late payment default date after which interest and fixed rates for recovery costs apply in addition to any other *reasonable* debt recovery costs. Provision has also already been made to prohibit grossly unfair contract terms which prevent a creditor from exercising the right to claim statutory interest on late payments.

However, the proposal that contractual agreements providing for longer payment periods between the public sector and its suppliers must be duly justified (rather than simply agreed upon by both parties) and the introduction of a

5 per cent flat-rate late payment fee are new developments which will considerably strengthen the current rules.

Next steps

The proposal will now be considered by European MPs and ministers from all EU Member States, and an opportunity exists for the NHS to inform decision-makers of its views and press for changes where this might be appropriate.

In order to shape an NHS response to this proposal, we are seeking views from NHS organisations on the points raised in this *Consultation*. To share your views please contact Tracy Cook, European Policy Manager, NHS European Office, email tracy.cook@nhsconfed.org tel 0032 02 227 6444.

6. This refers to the amended UK Late Payment of Commercial Debts (Interest) Act 1998 and Late Payment of Commercial Debts Regulations 2002.

The NHS European Office

The NHS European Office has been established to represent NHS organisations in England to EU decision-makers. The office is funded by the Strategic Health Authorities and is part of the NHS Confederation.

EU policy and legislation have an increasing impact on the NHS as a provider and commissioner of services, as a business and as a major employer in the EU.

Our work includes:

- monitoring EU developments which have an impact on the NHS
- informing NHS organisations of EU affairs
- promoting the priorities and interests of the NHS to European institutions
- advising NHS organisations of EU funding opportunities.

NHS European Office

Rue Marie Thérèse, 21, B-1000 Brussels
Tel 0032 (0)2 227 6440 Fax 0032 (0)2 227 6441
Email european.office@nhsconfed.org
www.nhsconfed.org/europe

This document is available in pdf format at www.nhsconfed.org/publications

© NHS Confederation 2009. Registered Charity no: 1090329

EUR00501