

# LEASING AND LATE PAYMENTS IN THE EU

## Introduction

The European Parliament's Internal Market and Consumer Protection Committee (IMCO) are set to debate this week the report of Barbara Weiler. She has been examining the proposals published in April this year on late payment in commercial transactions. In this article we will look at the implications of this proposal for lessors – especially those who are involved in the public sector.

## Existing EU Directive

The UK was one of the first countries to have legislation tackling late payment. From 1<sup>st</sup> November 1998, small businesses have been able to charge statutory interest on late payments – in theory – at the rate of 8% over Bank of England Base Rate.

In 2000 the European Commission finalised a Directive applicable throughout the EU on late payments. In the UK, these rules took effect from 7 August 2002. The table below sets out the rates. Unless the contract provides otherwise, these penalties can be charged by business when a payment is more than 30 days over due.

Amount overdue	2002 Regulations (UK)
Up to £1000	£40
Between £1000 - £10,000	£70
Over £10,000	£100

## Commission's Proposed Changes

In April 2009, DG Enterprise and Industry of the European Commission published its proposals to change the existing late payment rules. It singled out in particular late payment by the public sector for undermining the credibility of the late payments regime by itself not making payments on time. The Commission sees that there are 5 inter-related problems with late payments:

- Market structure,
- The recession,
- Access to finance and budget constraints,
- Debtor's financial management, and
- Absence of effective remedies on late payment.

The Commission carried out a public consultation over the summer of 2008 to which over 500 organisations responded to. It has not sought any external expert advice on its proposals.

The proposals include an uprating of the existing late payment charges and the table below sets out the proposed changes:

<b>Amount overdue</b>	<b>2009 Proposals</b>
Up to €1000	€40
Between €1000 - €10,000	€70
Over €10,000	1% of amount due

As can be seen, the most striking change is the proposal that payments over €10,000 that are 30 days overdue incur a late payment penalty of 1% of the amount due – and this will be on top of any interest that may also be payable under the terms of any contract.

For the public sector, the Commission proposes in Article 5 that a penalty of 5% of the overdue amount be paid where any payment goes past 30 days. Again, this penalty is on top of any interest that may be due under a contract.

## **European Parliament’s Concerns**

Barbara Weiler, a German member of the Socialist & Democrat grouping in the European Parliament (to which the UK Labour MEPs belong) has produced her report on this proposal on 26<sup>th</sup> October 2009. At the beginning of her report she says that not all the problems of late payment can be addressed at the European level. She says that the: “absence of efficient and effective remedies is only one of the causes for late payment in the internal market”.

She notes that many businesses hold back from charging interest on late payments for: “fear that the customer would be lost”. On the Commission’s consultation, she observes that no company gives as a reason for not claiming late payments a lack of awareness of their right to do so. Surprisingly she is in favour of a naming and shaming regime for late payers.

On the substance of the Commission’s revised financial proposals. She questions whether a payment equivalent to 1% for debts of €10,000 or more is justified. She says that there needs to be discussion within IMCO of the thresholds from the point of view of proportionality. IMCO will be starting its discussions on these on November 4 and 5, 2009.

As to the proposed late payment charge of 5% where a public authority is late in paying, Mrs Weiler wants IMCO to examine whether what is proposed is an appropriate solution – but she does not propose any alternative of her own.

## **Council of Ministers**

The proposal will also need agreement within the Council of Ministers – and will need to be discussed by the Competitiveness Council and its next scheduled meeting is December 3, 2009. The individual EU member states will need to decide their own positions on this.

## **UK view from BIS**

In the UK, the Department for Business and Skills (BIS) has produced its Summary: Interventions & Options paper which the Trade Minister, Lord Davies of Abersoch has

signed off on October 12, 2009. BIS says that in 2008 the total cost of public procurement was £175Billion in the UK and €1,943Billion in the EU. BIS claims that 93% of all invoices across all UK central government departments, local councils and the NHS are paid on time. BIS quantifies that the public sector is responsible for over £12Billion of late payments.

BIS agrees with the European Parliament's Rapporteur that the proposed late payment charge of 1% for overdue invoices of over €10,000 is disproportionate and would prefer the EU to adopt a flat rate charge instead – as is presently the case in the UK.

Having had a number of other government departments run their slide rule over the sums, not surprisingly BIS is also vehemently opposed to the proposed 5% flat rate charge where a public authority is late in paying. It says this is disproportionate and introduces an uneven handed approach. BIS estimates this would cost the UK public sector nearly £180million a year. BIS do not suggest any alternatives of their own.

## **Industry views**

The Institute of Directors wants to see more resources channelled into tackling late payment and says that late payment is a real inhibitor of business growth. Both the CBI and the Forum of Private Business share the concerns about treating the public and business sectors differently. The Professional Contractors Group - adopting a more extreme position - wants directors to be made personally liable for paying the late payment compensation!

## **Impact for lessors in the EU**

There is still some way to go before final agreement is reached in the EU on this. At the moment, the 2000 Directive permits late payment charges of at least 7% above the European Central Bank rate. If the 2009 proposals are adopted – lessors who are owed more than €10,000 will be able to charge a late payment charge of 1% - but it looks like there will be a compromise on this at a flat rate sum.

For lessors who engaged in providing asset finance to the public sector such as councils, the NHS or central government – it will be interesting to see how the proposals play out. Although being able to charge a public sector lessee a late payment fee of 5% of the amount over due looks attractive – it is likely that this will be watered down – but it looks unlikely that these proposals will be entirely jettisoned. Last year 4000 companies who became insolvent in the UK cited late payment as the main cause.

## **Conclusion**

Lessors will welcome any workable proposals to speed up payments and improve their cashflow. It will be interesting to see how the discussions in the European Parliament and Council turn out on this. Once agreement is reached, lessors will need to look at updating their terms of business to incorporate any new late payment rules. For high value payments or public sector leasing – the stakes on this remain high.