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Evaluation of the Late Payment Directive/ REFIT Evaluation

Accompanying the document

Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions

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1 INTRODUCTION

In 2014, the evaluation of the Late Payment Directive¹ (hereinafter the ‘Directive’) was linked to the Regulatory Fitness and Performance Programme of the Commission (REFIT),² for the reason that the Directive is a REFIT initiative whose implementation is monitored in the REFIT Scoreboard³ to ensure it delivers on its expected benefits. Reducing late payment in commercial transactions would bring about extensive and permanent improvements, not only for individual businesses, but for the European economy as a whole. Furthermore, in accordance with Article 11 of the Directive, the Commission is required to report to the European Parliament and to the Council on the implementation of the legislation by 16 March 2016.

In order to effectuate the twin reporting requirements, DG Internal Market, Industry, Entrepreneurship and SMEs contracted an external evaluation of the Directive in January 2015⁴. The purpose of this evaluation was to assess the functioning of the Directive and to determine whether it is on the right track – given its recent entry into force (15 March 2011) and transposition (16 March 2013) – to achieve its objectives. Specifically, the evaluation sought to assess if the Directive is fit-for-purpose in terms of effectiveness, efficiency, relevance, coherence and EU added value. With regards to scope, the Directive's initial impact on all sectors in all Member States was examined.

2 BACKGROUND TO THE INITIATIVE

2.1 BASELINE

Payments in commercial transactions between economic operators (business to business or **B2B**) or between public authorities and economic operators (**PA2B**) are frequently made later than initially agreed. Such late payment negatively affects the liquidity of enterprises thus complicating their financial management. In fact, late payment permeates all levels of a company's functioning from cash flow to access to finance to employment strategies. This in

¹ Directive 2011/7/EU available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:048:0001:0010:en:PDF>

² Commission communication ‘REFIT – results and next steps’ COM(2014) 910

³ SWD(2015)110 – the Directive was already an item tracked in the SME Scoreboard (SWD(2013)60) and listed on the Commission's rolling programme for update and simplification of the *acquis communautaire*.

⁴ Final report available at <http://bookshop.europa.eu/en/ex-post-evaluation-of-late-payment-directive-pbET0415875/>

turn has repercussions for the wider economy with growth, employment, financial stability and competitiveness severely impacted by the phenomenon.

Historically, EU Member States had different rules regulating, inter alia, payment terms, interest rates and sanctions for late payment. This plethora of laws and the associated uncertainty did not facilitate cross-border trading and acted as an obstacle to the smooth functioning of the single market. Moreover, excessive payment terms and late payment were placing heavy administrative and financial burdens on businesses, in particular SMEs, leading many into insolvency. In 2000, there was a first attempt to streamline the rules regulating late payment in the form of a directive⁵, which was adopted further to the Commission Recommendation of 1995⁶. Whilst this Directive set up a framework for a common approach to combat late payment, its provisions were frequently ruled as too vague. A study⁷ carried out in 2006 on the operation of the legislation in practice concluded that payment delays had stabilised rather than improved under the Directive and that the situation in certain Member States and sectors remained worrying. Public authorities in Southern Europe were taking on average between five and six months to pay for procured goods and services. In the same countries, figures showed that payments in the health sector often took up to one year to be completed. The Impact Assessment accompanying the original Commission proposal for the Directive, carried out in 2009⁸ confirmed that despite implementation of Directive 2000/35/EC in all Member States, late payment remained one of the biggest concerns for European businesses. Rather than stabilising, payment delays had increased on average from 16-17 days throughout Europe. The situation was worse for SMEs: 60% were regularly paid late for more than 30% of their turnover. It was evident that companies required stronger measures to tackle late payment, especially against the backdrop of a changing economic climate.

2.2 OBJECTIVES OF THE INITIATIVE

Directive 2000/35/EC was therefore recast and on 16 February 2011 Directive 2011/7/EU was adopted, with strengthened provisions, aiming to protect European businesses, in particular SMEs, against the negative effects of delayed payment in commercial transactions. The Impact Assessment identified a number of root causes of late payments in commercial transactions such as the market structure, the business cycle, the access to finance and

⁵ Directive 2000/35/EC

⁶ Commission Recommendation of 12 May 1995 on payment periods in commercial transactions (OJ EU L (95) 127)

⁷ Hoche study carried out by DEMOLIN, BRULARD, BARTHELEMY for DG Enterprise in 2006.

⁸ SEC (2009) 315

budgetary constraints, the financial management practice of debtors and the credit management practice of creditors as well as the absence of effective and efficient remedies. It was widely acknowledged that legislation alone could not be expected to tackle such elements that are firmly embedded in commercial societal structures. As explained in the twelfth recital of the recast Directive, *a decisive shift to a culture of prompt payment* is required to permanently eradicate the issue. Where a strengthened Directive was viewed to be helpful was in providing effective and efficient remedies that would discourage 1) late payment and 2) the establishment of excessively long contractual payment terms. Legislation could also provide creditors with measures that enable an effective exercise of rights in the event of late payment.

The Directive was therefore drawn up in a manner that would aim to achieve the aforementioned specific objectives, which would ultimately contribute to restoring a fair balance in commercial transactions. By establishing maximum payment periods, automatic entitlement to interest and compensation for late payment and defining unfair contractual terms/practices, the Directive aims to arm the creditor with stricter rights and prevent the debtor from taking advantage of a (possible) relatively more powerful position in the commercial relationship. These strengthened provisions were expected to lead to shorter contractual payment periods and the exercise of rights in the event of late payment, whilst also reducing costs to businesses. Long-term effects include improved liquidity and competitiveness and reduced risk of bankruptcy for individual companies.

By extension, the above positive outcomes of the new Directive should contribute to reducing administrative burdens on businesses, promoting their cash flow and facilitating the functioning of the internal market. When correctly implemented by Member States, this Directive will have a positive impact on employment and growth, which will promote entrepreneurship and lead to a smoother integration of the internal market. Overall, the Directive seeks to invigorate the European economy, restoring its competitiveness.⁹

2.3 DESCRIPTION OF THE INITIATIVE

2.3.1 Scope and definitions

The Directive (Article 1) applies to "all payments made as remuneration for commercial transactions" between private undertakings or between undertakings and public authorities. Business to consumer transactions are not regulated by the Directive as this domain is already

⁹ Intervention logic presented as a figure in Annex 1

covered, to a large extent and mostly with a different objective (namely consumer protection), under Union law.¹⁰

Key concepts including 'commercial transaction', 'undertaking' and 'amount due' are defined in the Directive (Article 2). An important definition is that of statutory interest for late payment, which is simple interest for late payment at a rate that is equal to **the sum of the reference rate** - the interest rate applied by the European Central Bank to its most recent main refinancing operations; or, for a Member State not in the Eurozone, the equivalent rate set by its national central bank - **plus at least eight percentage points**. Businesses can fix a different rate provided that it is expressly agreed in the contract and is not grossly unfair to the creditor.

2.3.2 Transactions between undertakings

According to the Directive (Article 3), B2B contractual payment periods should be limited, as a general rule, to **60 calendar days**. There may be circumstances in which longer payment terms are required and, for this reason, the Directive provides for continued contractual freedom in this domain. The legislation stipulates however, that any payment term of more than 60 calendar days must be expressly agreed between the parties and not grossly unfair¹¹ to the creditor.

Businesses are automatically (i.e. without the necessity of a reminder) entitled to claim interest for late payment from the day following the date or end of the payment term fixed in the contract. When no due date is fixed in the contract, the creditor is entitled to interest for late payment 30 calendar days following the date of receipt of the invoice or, if the invoice is received before the goods or the services, 30 calendar days after the date of receipt of the goods or services.

The Directive foresees a period for acceptance or verification of the goods or services, which is limited to 30 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor.

2.3.3 Transactions between undertakings and public authorities

The Impact Assessment highlighted that late payment occurs frequently in the public sector. In fact, in the past five years, public authorities have systematically sustained their position as

¹⁰ See Directive 2005/29/EC 'concerning unfair business-to-consumer practices in the internal market' and Directive 93/13/EEC 'on unfair terms in consumer contracts'

¹¹ Article 7 of the Directive, which will be dealt with later, provides guidance as to what constitutes grossly unfair

the worst payers in the EU, taking longer on average to pay an invoice compared to businesses.¹²

The Directive (Article 4) harmonises the period for payment, in commercial transactions, by public authorities to businesses: Public authorities have to pay for goods and services that they buy **within 30 days**. In very exceptional circumstances, the payment period can be extended to **a maximum of 60 days** providing that it is expressly agreed in the contract and objectively justified in the light of the particular nature or features of the contract. Public entities carrying out economic activities of an industrial or commercial nature and those providing healthcare are permitted to use a derogation to provide for a payment term of up to maximum 60 days.

Concerning interest for late payment, the same terms apply with respect to the deadlines as established for debtors which are private entities; however, public authorities are not allowed to set a rate below the statutory interest rate.

It is justified to implement stricter rules as regards commercial transactions for the supply of goods or services by businesses to public authorities for the following reasons: As explained in recital 23, *public authorities benefit from more secure, predictable and continuous revenue streams* than businesses. Furthermore, while enterprises are free to choose their commercial partners and must build stable commercial relationships, public authorities are bound by administrative and budgetary law. They must follow specific rules and procedures for their public procurement. Finally, obtaining external financing is also an easier activity for public authorities.

2.3.4 Payment schedules

Parties of a commercial transaction have the possibility to agree on **payment in instalments** rather than in one lump sum (Article 5). It follows that each instalment should be paid on the agreed terms and should be subject to the rules for late payment as set out in the Directive.

2.3.5 Compensation for recovery costs

Under the Directive, the creditor has the right to automatically obtain compensation from the debtor in the form of **a minimum fixed sum of EUR 40** in cases where interest for late payment becomes payable (Article 6). In addition, the creditor is entitled to claim reasonable compensation for all other costs incurred as a result of the late payment. Examples of such costs include the appointment of a lawyer or employment of a debt collection agency.

¹² Intrum Justitia European Payment reports 2010-2015

In both the public and private context, the Directive entitles creditors to make use of the rights described above but does not oblige them to do so. It is the creditor's choice to charge interest and claim compensation for recovery costs or not depending on the specific situation.

2.3.6 Unfair contractual terms and practices

It is the prerogative of a national judge to determine whether a contractual term or practice is grossly unfair by considering all circumstances of the case in question. The Directive defines certain parameters within which businesses could challenge grossly unfair contractual terms and practices before courts (Article 7), for example:

- any **gross deviation** from good commercial practice, contrary to good faith and fair dealing,
- the nature of the product/service,
- whether the debtor has any objective reason to deviate from the rules stated by the Directive (Article 7(1)c) and
- any contractual term that **excludes interest for late payment** is considered to be grossly unfair to the creditor and is either unenforceable or will give rise to a claim for damages; a contractual term that **excludes compensation for recovery costs** will also be presumed to be unfair.

2.3.7 Transparency and awareness raising

Member States are encouraged to ensure transparency regarding the rights and obligations stemming from the Directive, including, inter alia, running information campaigns and publishing the applicable rate of statutory interest for late payment (Article 8). Businesses should be made aware of their rights and the means by which they can be exercised.

2.3.8 Recovery procedures for unchallenged claims

In the case of undisputed debts, Member States must ensure that businesses can obtain an enforceable title, including through an expedited process, within 90 calendar days of the lodging of the creditor's action at a court or other competent authority (Article 10).

2.3.9 Transposition

By 16 March 2013, Member States were due to bring into force laws, regulations and administrative provisions necessary to comply with the Directive. Provisions which are more favourable to the creditor than those of the Directive could be maintained or adopted by Member States.

3 EVALUATION QUESTIONS

In order to assess the functioning of the Directive and to evaluate whether it is, in effect, on course to achieve its objectives, the following questions were used to guide the analysis:

- **Effectiveness**: To what extent has the Directive been effective in meeting, or moving towards, the defined objectives (ie. to what extent has the Directive contributed to a reduction in payment periods and in the average delays of late payments in commercial transactions? To what extent has it positively influenced liquidity/cash flow and facilitated cross-border trades? To what extent has the Directive raised awareness of the issue and to what extent is it being used to claim interest and compensation for late payment ? What are the factors influencing, positively or negatively, the achievements observed?
- **Efficiency**: To what extent are the regulatory costs (including administrative burden) proportionate to the benefits achieved? To what extent do the benefits of the Directive outweigh its costs? To what extent have costs been reduced through the implementation of the Directive? To what extent has the Directive delivered its results efficiently in terms of the resources used?
- **Coherence with other policies**: To what extent is the Directive consistent with other policy actions at EU and national level?
- **Relevance**: To what extent do the objectives of the legislation still correspond to the needs of the stakeholders? Is the Directive the right instrument to tackle this issue?
- **EU added value**: What is the EU added value of the Directive for stakeholders? What would be the most likely consequences of repealing this Directive?

4 METHOD

Assessing causality between the Directive and the results on the ground is not straightforward. Indeed, when it comes to the issue of late payment, a large number of intervening factors are at play, making the isolation of the Directive's impact a difficult exercise. Coupled with the added limitation of the relatively recent implementation of the Directive, it was evident that measuring its impact thus far would prove challenging. Furthermore, data is difficult to obtain. Both primary and secondary sources are scarce. Ministries in most Member States responsible for the transposition of the Directive do not collect any official data regarding the application of the legislation nor figures presenting changes in average payment periods. The lack of a compulsory and common monitoring system also makes it very difficult to verify any progress made as a result of the application of the Directive.

Data is collected by some private business organisations, one of the most cited in the literature being the information compiled by the Swedish credit management company, Intrum Justitia¹³. The methodology employed and the robust response rate to their survey make their findings representative and dependable. However, a lack of official comparable information can lead to an over-reliance on Intrum Justitia's data and renders a deeper analysis of the Directive's impact more challenging. There is also limited academic literature on the economic impact of late payment in general and on the subject of the Directive in particular.

Given the aforementioned challenges, it was clear from the outset that the methodology for this evaluation had to be designed in a way that would ensure collection of both quantitative and qualitative primary data from the target audience. A four-pronged approach to data collection was drawn up by the external consultant, which included: desk research, an online survey, interviews at Member State level and follow-up interviews.

4.1 DESK RESEARCH

Despite the limitations outlined above with respect to the availability of secondary sources, desk research was conducted in the initial data collection phase of this evaluation. National laws transposing the Directive and associated supporting soft measures implemented by Member States were scrutinised. In addition, national sources of information on average payment duration and delays, impacts on economic growth and employment were also assessed. Finally, cross-country data collected by private organizations such as Intrum Justitia, Atradius, EOS, Euler Hermes country reports and Grant Thornton's "European Business Survey" were examined. This phase took place over the course of three months.

4.2 COMPANY SURVEY

The scarcity of secondary data meant that the online company survey was a key element of this evaluation. The aim of the survey was to collect concrete evidence on the functioning of the Directive from a representative sample of companies¹⁴ across all Member States to enable an assessment of the legislation's progress in achieving its objectives. Questions pertaining to

¹³ Intrum Justitia is one of the market-leading credit management companies in Europe, who offer their clients risk reduction and financial services based on a strong debt collection foundation. Their mission is to ensure that payment flows function as they should. The company conducts a Europe-wide survey every year that tracks trends in payment behaviour in the public and the private sectors. The results are presented in European Payment Reports, which are available to download from their website at <http://www.intrum.com/Press-and-publications/European-Payment-Report/>.

¹⁴ The chosen methodology, described in the Annex, was formulated to ensure representativeness at EU level.

awareness of the Directive, usage of its provisions and its perceived impact on payment behaviour were formulated and sent to a representative sample of 26,000 companies.¹⁵

The survey was accessible online for a period of 10 weeks between April and June 2015. Difficulties were faced with respect to the response rate, which remained very low (below 1%) after one month. To solve this issue, two companies were sub-contracted to perform telephone interviews with the target group during which the questionnaires were completed. In total, **2,677 complete responses** were collected from all Member States, ensuring a fair representativeness across the EU. Over 90% of respondents were working in SMEs.

4.3 ADDITIONAL STAKEHOLDER CONSULTATION

Because of the initial low response rate, as a further mitigating measure, a version of the online survey was made available to the general public throughout the month of June 2015 in the form of a public consultation. In total, 273 responses were received. In order to maintain the integrity of the sample of survey respondents, the two sets of results were not merged. Nevertheless, the consultation did provide information that corroborated the findings of the survey.

The ensuing interviews organized by the external consultant with stakeholders from public authorities and businesses representatives (135 across EU) and follow-up interviews with companies that participated in the survey (31 across EU) took place as planned.

In the context of the 6th expert group meeting of 24 November 2015¹⁶ the Commission presented the results of this evaluation to experts from the Member States as well as to representatives of EU business organizations. There was a broad consensus between the participants that the most relevant issues were addressed in the report and that the recommendations were useful. Written feedback was also provided following the meeting and has been incorporated into the analysis of this report (section 6).

Additional details on the methodology and models used are provided in Annex 3.

¹⁵ The full survey and the list of targeted companies are included in the Annex.

¹⁶ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2710>

4.4 ASSESSMENT OF ROBUSTNESS OF FINDINGS

The wide range and high number of companies consulted thanks to the outlined methodology ensured a satisfactory level of reliability of the results. As previously mentioned, the lack of similar studies on this subject matter means that a comparative analysis is not straightforward. Intrum Justitia's European Payment Report 2015 contains some overlap with this evaluation, the results of which appear to coincide. It can therefore be concluded that the data collected during this evaluation is valid, robust and, for the most part, innovative.

5 IMPLEMENTATION STATE OF PLAY

5.1 COMMUNICATION ACTIVITIES ORGANISED BY THE COMMISSION

5.1.1 Late payment expert group

In order to assist Member States with a swift transposition of the Directive and to follow up on implementation measures, an Expert Group was set up in 2012. Representatives from the ministries responsible for the transposition of the Directive convene with Commission officials twice per year to exchange information about the implementation of the Directive. Further measures that Member States are devising to address outstanding debts, fight late payment and support SMEs are also discussed.

5.1.2 Late payment information campaign

At the request of the European Parliament, the Commission ran a pan-European information campaign from October 2012 until November 2014 in order to increase awareness among European stakeholders and among public authorities on the rights granted by the Directive. National seminars were held in the capital cities of all Member States. These events provided a forum for the exchange of best practices between businesses and allowed the Commission the opportunity to hear first hand experiences of the issues related to late payment faced by SMEs in particular. The campaign proved to be a successful means of consultation with over 3,000 relevant stakeholders directly reached across the 28 Member States and many more receiving the key messages through the extensive media coverage secured or through the multiplying efforts of organisations such as Enterprise Europe Network.

5.2 TRANSPOSITION

5.2.1 Communication and assessment of national measures

Despite a push from the Commission for Member States to undertake early transposition of the Directive, few countries heeded this advice. Some Member States even delayed communication of transposition measures, which, following reminders sent by the Commission, led to the launching of four infringement procedures for non-communication.

Complete national measures transposing the Directive were communicated to the Commission by all Member States by August 2014.

Initial assessments of the measures found a number of cases of non-conformity, often related to more than one article of the Directive. Investigations through an exchange of letters were instigated with the relevant national authorities and the majority of cases were swiftly closed. Infringement procedures for incorrect transposition of the Directive were opened against five Member States. As of May 2016, the Directive is fully and correctly transposed in the national laws of all Member States.

5.2.2 Stricter national provisions

According to Article 12(3), in transposing the Directive, Member States may maintain or bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with this Directive. This proved to be a pertinent addition to the legislation as, during the negotiations, some Member States argued that the payment periods specified in the Directive are longer than those currently in force at national level. This derogation allowed Member States to retain already established rules and regulations or to legislate more strictly than the Directive's requirements provided that the outcome is more advantageous to the creditor.

a) Payment periods

i B2B transactions

The Directive establishes that contractual payment periods in B2B transactions should be limited to 60 calendar days but allows for a more extensive payment period provided that it is expressly agreed in the contract and is not grossly unfair to the creditor. Some Member States went further than the Directive by setting up, by law or by court practice, maximum payment terms for transactions between businesses as shown in the following table:

Table 1: Examples of Member States' legislation measures stricter than the Directive's requirements

Country	Maximum payment term (calendar days)	Conditions
Austria	60	Longer payment terms, whilst legally possible, are likely to be considered unreasonable in case of a dispute
France	60 or 45 days end of month ¹⁷	None
Germany	30	Longer payment terms, whilst legally possible, are likely to be considered unreasonable in case of a dispute
Spain	60	None

ii PA2B transactions

The Directive establishes a period of 30 calendar days within which an invoice must be paid in a commercial transaction between a public authority and a business. An extension of this time limit is foreseen up to a maximum of 60 calendar days in exceptional circumstances and in the case of certain public entities such as those providing healthcare or those carrying out economic activities of an industrial or commercial nature.

However, Ireland, the Netherlands and the United Kingdom opted not to include this extension possibility in their legislation. France limited the payment period for public entities providing healthcare to 50 rather than 60 calendar days.

b) Interest for late payment

According to the Directive, statutory interest for late payment is the sum of the reference rate and at least eight percentage points. Some Member States opted for calculations of the statutory interest rate which would result more favourably for the creditor.

¹⁷ 45 days following the end of the month that the invoice was issued. For example, an invoice issued on 15 December 2015 would have to be paid by 14 February 2016.

Table 2: Penalty interest for late payment in selected Member States

Country	Penalty interest for late payment (in percentage points above central bank reference rate)
Austria	9
Bulgaria	10
France	10
Germany	9
Hungary	10
Romania	9
Slovakia	Dual system: 9 for fixed interest rates, 8 for variable interest rates

Overall, there are a limited number of Member States that transposed more strict provisions than the minima set out in the Directive. This demonstrates that the terms of the legislation are generally deemed to be adequate in relation to their appropriateness to combat late payment.

5.3 IMPLEMENTATION

The Directive encourages Member States to set up prompt payment codes or any other initiatives that would contribute to tackling the issue of late payment and developing a culture of prompt payment in the public and the private sectors¹⁸. In implementing the Directive, several Member States advanced such measures.

5.3.1 Prompt payment codes

The British and Irish authorities have set up policies to support the implementation of the Directive, which aim to ensure that central government departments pay their suppliers within 5 and 15 days respectively. In 2011, this non-binding government requirement was extended to all public bodies in Ireland.¹⁹ Statistics from both countries indicate that these prompt payment policies are being respected.

¹⁸ Article 8

¹⁹ At the end of 2015, the Irish authorities are examining the possibility, through a public consultation, of incorporating the government decision into national legislation, which would oblige all public bodies to pay suppliers within 15 days

In the field of B2B transactions, the UK and Ireland have introduced similar initiatives in the form of prompt payment codes (joint public-industry initiatives), which are accompanied by a prompt payment portal (Ireland) and a fair payment campaign (UK). These codes include clearly defined time limits for payment in addition to well defined responsibilities for the debtor in case of late payment. Sign up to the code is on a voluntary basis and the authorities conduct awareness raising campaigns to encourage participation.

5.3.2 Electronic invoicing

Measures implementing electronic invoicing are gradually being devised by European governments for public authority contracts under procurement legislation. At the end of the year 2015, the use of electronic invoicing is mandatory in Sweden, Italy and Spain for public authorities. In the case of Sweden, the same obligation applies to companies of more than 50 employees. France is putting measures in place to introduce a similar obligation for companies in the near future. Such an investment should prove worthy in terms of simplifying, inter alia, the administrative follow up of invoices.

5.3.3 Penalties/fines

Whereas the initial proposal by the Commission for this Directive included penalties to be foreseen and imposed by Member States in the case of late payment, this suggestion was finally not adopted. This has not prevented Member States from setting up such initiatives at national level as, for example, France did in the transport sector. In road transport of goods, failure to comply with a 30 day payment term carries fines up to EUR 15,000. Similarly, in Italy, a system of administrative sanctions in cases of late payment by public authorities has been introduced through legislation in 2014.

5.3.4 Transparency measures

Arrangements to monitor payment behaviour have been put in place in some Member States:

- The observatory for payment periods in France examines payment behaviour in B2B transactions once a year.
- The Prompt payment indicator in Italy is available for all government departments to calculate the exact time they are taking to pay their creditors.
- The Spanish Federation of Small and Medium Enterprises (CEPYME), together with the department for enterprise and SMEs (DGPYME), publishes a quarterly bulletin on late payment in B2B transactions with an analysis into the reasons behind this issue.
- Monthly monitoring research is in place in Poland to monitor the debt of Polish enterprises and the level of obligations paid by Polish companies.
- The Danish Ministry of Finance issued an administrative order in 2015 concerning transparency measures for late payment by public authorities.

5.4 APPLICATION OF THE DIRECTIVE

Despite correctly transposing the Directive into national law, there is proof that some Member States are not correctly applying the legislation. The Commission performs continual horizontal screening of the situation in all Member States as regards the application of the Directive. Where data indicates non-respect of the payment periods as established by the Directive, the Commission investigates the evidence with the concerned Member States via a structured dialogue between the Commission and the Member State(s) and, in parallel, conducts research of other publicly available material such as studies, reports and surveys as well as complaints received from the concerned Member States and information communicated via other institutions such as the European Parliament. In some instances, visits to Member States were undertaken to facilitate an open dialogue with the authorities and to better understand the context of a particular case. When the gravity of the situation is such that it cannot be promptly resolved, and this fact is acknowledged by the concerned Member State, infringement proceedings for bad application of the Directive are launched. Thus far, proceedings have been launched against three Member States. These cases remain open in August 2016.

5.5 UNEXPECTED RESULTS FOLLOWING IMPLEMENTATION OF THE DIRECTIVE

In this evaluation, across the consulted stakeholders in the Member States, there was little evidence of unintended consequences of the Directive. It is possible that, given the limited time to measure the impact of the Directive since its adoption, unexpected results may not yet have materialized or at least, are not yet clearly identifiable.

However, one negative outcome that surfaced was the fact that in some Member States that have traditionally had a prompt payment culture, the Directive is perceived to have normalised longer payment periods. Some stakeholders argue that the Directive may have given larger companies more leverage to demand longer payment periods. This point is supported by other industry sources, who alleged that some public entities known for being ‘good payers’ have reportedly extended their payment terms to reach the maximum allowed under the Directive. It should be noted that prolongations of payment terms can be due to a number of different factors and are not necessarily directly attributable to the introduction of the Directive.

6 ANSWERS TO THE EVALUATION QUESTIONS

6.1 EFFECTIVENESS: MEASURING THE EXTENT TO WHICH THE DIRECTIVE IS ACCOMPLISHING ITS OBJECTIVES

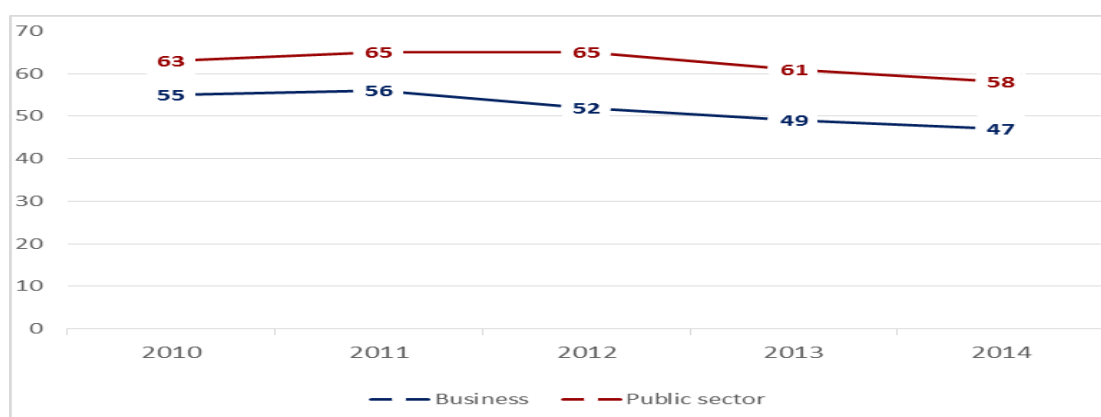
6.1.1 Reduction in average payment periods²⁰

One of the main objectives of the Directive is to shorten payment periods. Excessively long payment periods unnecessarily strain businesses' liquidity and can lead to a range of problems as described earlier. According to the Directive, the payment period for PA2B transactions should not exceed 30 days²¹ and for B2B transactions should not exceed 60 days.²²

a) *To what extent has the Directive contributed to a reduction in payment periods?*

The following graph depicts changes in the average payment period in PA2B as well as B2B transactions since the adoption of the Directive (baseline - 2010 - is also provided).

Figure 1: Average payment period in the EU 2010-2014. Source: based on Intrum Justitia, EPI (2010-2014)



As the graph clearly illustrates, reductions in average payment periods have been minimal since the entry into force of the Directive but the trend is decreasing, which is a positive sign. The somewhat stable situation could be explained by the lack of time that has passed since the implementation of the Directive. Indeed data collected in 2015 by Intrum Justitia, through a

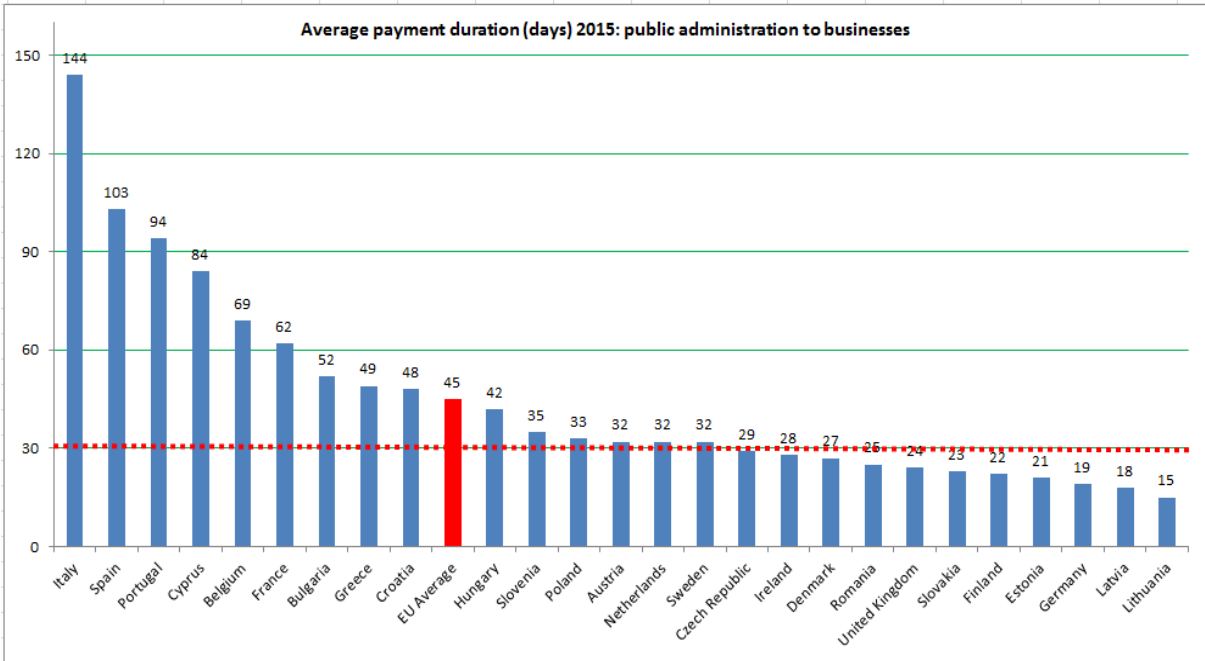
²⁰ Payment period is the actual duration for payment incurred by the debtor between receipt of the invoice until the payment of the goods or services. This is not to be confused with the payment delay, which is the difference between the payment period and the agreed contractual terms.

²¹ Aside from in exceptional circumstances when it can be extended to a maximum of 60 days

²² Unless both parties expressly agree and provided the terms are not grossly unfair to the creditor

slightly modified methodology, shows improving figures throughout the EU. A direct comparison is not possible due to the change of methodology that year but it is safe to say that the overall picture is improving. A detailed breakdown of the average payment period per country²³ in PA2B and B2B is provided in the following graphs and shows that it is the excessively long average payment periods in some Member States that drive up the EU average, particularly in the case of PA2B transactions. This indicates that despite the good political intention in the same Member States to eradicate late payment through legislative measures, the results are still not being transmitted on the ground. For now there remains a tension between the overarching laws and the day-to-day practices when it comes to payment behaviour in these Member States.

Figure 3: Average payment period in PA2B transactions by country in 2015²⁴ (Source: based on Intrum Justitia, EPR (2015))



This graph shows that public sector payment periods are, on average, far from the limit of 30 days as specified by the Directive (red dotted line). Less than half of all Member States are

²³ Data from Malta and Luxembourg is not included because Intrum Justitia does not collect data from these countries.

²⁴ This graph also includes data about contracts that used the derogation rule of up to 60 days maximum payment term; a fact that should be taken into account when interpreting the figures. (See section 2.3.3 for more details about the use of this derogation).

paying within the Directive's time limit of 30 calendar days on average and several are not even respecting the 60 day maximum, which should be used only on an exceptional basis²⁵. It should be noted nevertheless that public authorities in Member States that pay with a large delay are in a decreasing trend:

Table 3: Changes in payment duration PA2B transactions (2011 to 2014, in days). Source: based on Intrum Justitia, EPI (2011-2014)

Large decrease	Small decrease	Stable	Small increase	Large increase
Italy (-15)	Lithuania (-4)	Hungary (-2)	n/a	Slovenia (+9)
Greece (-13)	Belgium (-4)	Denmark (-2)		Bulgaria (+5)
Portugal (-10)		The Netherlands (-1)		Latvia (+5)
Austria (-9)		Finland (0)		
United Kingdom (-7)		Germany (0)		
France (-5)		Poland (0)		
Ireland (-5)		Sweden (0)		
		Spain (+1)		
		Romania (+1)		
		Slovakia (+1)		
		Cyprus (+1)		
		Croatia (+2) ²⁶		
		Czech Republic (+1)		
		Estonia (+1)		

As mentioned earlier, the decrease observed in average payment periods since the introduction of the Directive is moderate. Stakeholders in several countries (AT, BG, DK, FI, SE, SK, ES, RO, UK) indicated that the Directive has, to date, only had minor effects on

²⁵ The figures from Greece are noteworthy as there appears to be a significant reduction in the average payment period compared to recent previous years when public entities were taking over 100 days to pay their invoices. This marked improvement is due to the reduced number of suppliers on the market and the fact that those still operating are tending to request for payment in advance.

²⁶ Data available 2013-2014

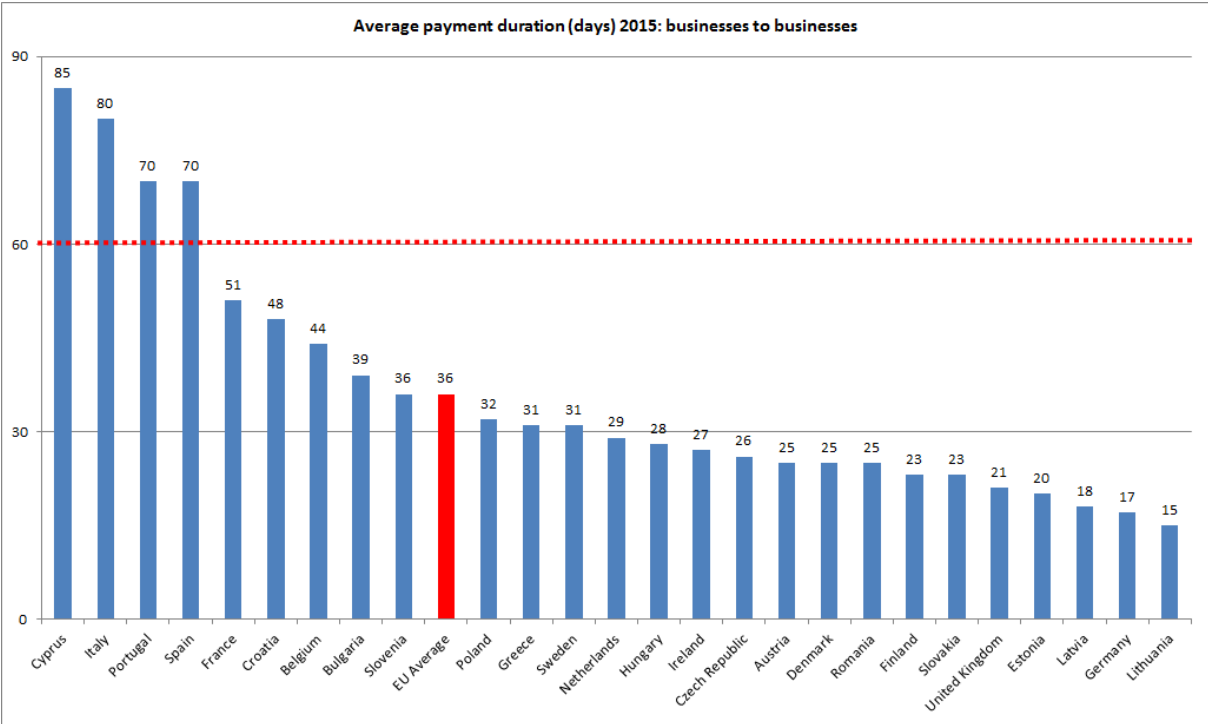
payment behaviour and late payment practice in their Member State. However, at least two key aspects must be taken into consideration:

- 1) the severe impact and prolonged repercussions of the financial crisis on commercial transactions and
- 2) the fact that modifying legislation does not lead to immediate changes in payment behaviour and that this legislation is just one driver of the change

In the following detailed breakdown of the average payment periods in B2B transactions, there is a clear correlation emerging: Countries that have a low average payment duration in B2B transactions also tend to have relatively low payment durations in PA2B transactions.

This suggests that payment behaviour is something that is deeply rooted in culture and will therefore take time to change. On a positive note, the below graph shows that, on average, businesses in the majority of all Member States are respecting the 60 calendar days general rule as specified by the Directive.

Figure 5: Average payment period in B2B transactions by country in 2015 (Source: based on Intrum Justitia, EPR (2015))



Overall, the trend is positive when it comes to average payment periods in the EU. The situation of most Member States is stable, with many improvements noted also. Whilst it is not possible to single out the Directive as the sole factor contributing to this outcome due to other external influences such as the emergence from the financial crisis and an increasing number of companies familiarising themselves with their rights in the face of late payment,

nevertheless Member States have made concerted efforts to correctly apply the Directive. The improving trend is therefore expected to continue. A similar evaluation in a few years time would provide more clarity on the above assumptions.

b) *To what extent has the Directive contributed to a reduction in the average delays²⁷ of late payments in commercial transactions?*

The Directive aims to eliminate payment delays by establishing strengthened rights for the creditor in the event of late payment, thus encouraging the debtor to pay within the contractually agreed terms. It is important to note that companies and public authorities have, in many cases, had to substantially reduce their contractually agreed payment terms to align with the rules of the Directive. Under the previous regime, contractual terms over 30/60 days were acceptable and therefore, delays may not have been so pronounced. It is in this context that results of a pan-European study²⁸ should be analysed: data shows a very small decrease in payment delays in both PA2B and B2B transactions of 1.8 days and 1.2 days respectively in the years since the adoption of the Directive. The results of the external evaluation show that the perceived change is in line with reality: half of all respondents perceived no change in average payment delays in the last three years. 34% perceived a deterioration in payment delays in B2B transactions, whereas 21% provided similar feedback in PA2B transactions. Before the adoption of the Directive a company could, in theory, apply a very long contractual payment term and pay within the pre-decided deadline. This same company should now apply a contractual term of 60 days and, even if the invoice is not paid on time, the creditor may still receive the payment in a shorter timeframe despite the non-respect by the debtor of the due date. For this reason, the overall payment period is a key indicator of the effectiveness of the Directive.

It is however, very difficult to ascertain that the decreasing trend in both payment periods and payment delays is attributable to the Directive. Other factors such as national level initiatives and the emergence from the financial crisis may also have contributed to improving results. However, the former efforts most likely stemmed from a need to comply with the rules of the Directive. While isolating the direct impact of the Directive is challenging, the knock-on effect following its adoption in the form of changes in attitude towards late payment is a clear achievement.

6.1.2 *Raising Awareness*

The Impact Assessment identified awareness raising activities as an important policy option to accompany legislation. Furthermore, Article 8 of the Directive also lays down obligations

²⁷ Reminder: Delay is the difference between the payment period and the agreed contractual terms

²⁸ Intrum Justitia

to this end. Many owners of small businesses were unfamiliar with the rules regulating late payment and therefore a concerted effort to spread information about the Directive was deemed essential in order that they are aware of their rights when faced with late payment. Whilst the indicators already presented require a certain degree of supposition with respect to the influence of the Directive²⁹, there is an important success that can be attributed to the introduction of the legislation. A recurring theme that emerges from the evaluation is that the overall awareness of the rules regulating late payment is relatively high. Almost two thirds of companies are aware of the Directive's provisions and 86% of companies at least know about their right to claim compensation and/or interest in the event of late payment. A significant contributor to this high level of awareness (almost 30%) was the EU-wide information campaign run by the Commission (See section 5.1 for more details). It must be recognized that legislation regulating such rights existed prior to the introduction of the Directive, but the laws were not harmonised. The results of the evaluation show that:

1. SMEs and companies in their early years of business are less likely to be aware of the rules regulating late payment.
2. Companies that are closest to the public sector (utilities, public administration) are most aware of late payment rules.
3. Companies that are aware of the rules related to late payment are less likely to have experienced a deterioration of average payment delays over the last three years (odds ratio of 0.78%).

At first glance, these results appear not to be in line with the findings of Intrum Justitia, who found that only 30% of respondents to their survey are aware of the Directive. The inference here is that while there is a high level of awareness of the rules regulating late payment, there is not necessarily knowledge that these rules have now been harmonised by EU legislation. Regardless of the source of the rules, the important fact is that, overall, creditors are aware of the norms when it comes to payment periods and their rights when faced with late payment.

Perhaps one of the biggest achievements of the Directive is that it has raised the issue of late payment in commercial transactions high in the political agenda. Although this was not a goal in and of itself, it is through political pressure, media attention and societal debate that the culture of late payment can start to change. Excessively long payment terms and delays are no longer being accepted as the norm in Member States where creditors were accustomed to waiting months for payments. Thanks to the light shone on this deep-rooted issue in commercial relations, a perception of shame is now being associated with the practice of late

²⁹ Due to influencing external factor, a reduction in average payment periods cannot be ascribed solely to Directive. See section 6.1(a).

payment. Add to this the strengthened provisions governed by law, and businesses are better supported to claim their rights, either informally or through the procedures provided.

6.1.3 Usage of the Directive's rights to claim interest and compensation for late payment

Whilst awareness of rights stemming from the Directive is fairly high, the evaluation found that exercise of its provisions is not widespread. The act of claiming interest and compensation is a deterrent to the debtor to pay late again in the future, which suggests that incidences of late payment should decrease with increased usage of the rights conferred by the Directive. Exercise of the Directive's provisions is therefore an indication of the effectiveness of the legislation in terms of reaching its objectives. The external evaluation found that:

1. 60% of survey respondents indicated that their company never claims compensation and/or interest in the event of late payment.
2. SMEs are much less likely to exercise their rights under the Directive than larger companies.
3. Creditors in countries that traditionally have a prompt payment culture are more likely to apply their rights.

Creditors gave as the main reason for not exercising their rights the need to maintain good commercial relationships with their customers. Claiming compensation or interest is not a simple case of exercising one's rights but often involves a complex calculation of multiple clashing interests. The risk to lose future business by tarnishing a relationship with a customer is very often too costly. This outcome was also seen in the evaluation of the previous late payment Directive, which proves that a change of legislation will not necessarily effectively address this problem.

Findings show that when a payment is excessively delayed, the creditor will often invest time and energy in recovering the debt and will not insist on receiving interest and compensation also. The notion is that requesting interest and compensation would be viewed as 'pushing their luck' and an invoice is more likely to be paid by the debtor when there is no threat of additional fees.

In the case of unpaid debts, stakeholders noted that a lack of efficient national remedy procedures in many countries and in particular in those where late payment is a serious problem is another barrier preventing creditors from exercising their rights. Despite the expedited recovery procedure for unchallenged claims laid down in Article 10 of the Directive, the evaluation found that creditors are still discouraged from taking a debtor to court due to the length of time and the costs involved in particular in cases of small sums where they risk spending more money than they would recover. Consequently, creditors prefer to write off unpaid bills rather than go to court and sue for a bad debt. Indeed,

according to the results of the evaluation, more than half of all companies surveyed never engage in litigation or use alternative dispute resolution methods to recover unpaid invoices.

6.1.4 To what extent has the Directive positively influenced liquidity/cash flow?

Receiving payment in a shorter period of time should lead to increased cash flow, which is particularly important for SMEs. However, a comparison of recent Pan-European data shows that the number of companies with liquidity problems has risen by 10% since 2011.³⁰ This deterioration is not necessarily an indication that the Directive is not having an impact but is most likely linked to the restricted access to finance for companies as a result of the financial crisis. It is fair to conclude that due to its recent entry into force, the Directive has not yet achieved its full impact on payment behaviour. For this reason the wider objectives - such as improved liquidity - have yet to materialise before being measurable. Increased cash flow is a goal of the Directive that will undoubtedly take more time to achieve. Moreover, as with other objectives, ascribing any future positive changes in liquidity/cash flow of businesses directly with the Directive is a challenge that will remain regardless of the passage of time.

With respect to the effect of late payment on EU firms' exit rates, simulation performed by the Commission's services³¹ found that if average delays in commercial transactions were reduced to zero (i.e. compliance with the Directive), exit rates of companies in a Member State particularly impacted by late payment would decrease to 6.18% in the case of B2B transactions and 5.37% in the case of PA2B transactions. This equates to the survival of 41,451 companies. Likewise, in another Member State where late payment is a common problem, a reduction of payment delays to zero would reduce the exit rate of firms to 7.52% for B2B transactions and 7.39% for PA2B transactions, meaning that 31,747 firms would remain operational. The findings are in line with the Directive's rationale that late payment in commercial transactions in the public and private sectors have detrimental effects on the business environment. Solving this issue through a correct implementation of the Directive can therefore have far-reaching positive effects.

6.1.5 To what extent has the Directive facilitated cross-border trades? To what extent do businesses feel more confident/encouraged to trade across European borders?

The streamlining of payment practices across the EU should lead to increased intra-Europe trading. Businesses are now aware of the rules regulating late payment in other countries and

³⁰ Intrum Justitia

³¹ Full study can be found at http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp531_en.pdf

thus, greater opportunities for cross-border trading should be available. The evaluation did not find any clear data to support this hypothesis. Stakeholders were unable to quantify the impact of the Directive on facilitating cross-border trading at this early stage. Feedback indicated that the financial crisis and current economic situation of some Member States are bigger deterrents to intra-EU trading than lack of knowledge of the rules regulating late payment in other Member States. It therefore appears that the Directive has not yet been able to play a crucial role in this domain due to the overbearance of these critical issues.

6.1.6 Analysing factors influencing an effective application of the Directive and the achievements observed

i) Factors preventing an effective application of the Directive

There are different factors preventing an effective application of the Directive in the public and private sectors but there is also a factor common to both. All these elements are described below:

In the public sector, Member States under adjustment programmes are facing difficulties to adhere to the rules of the Directive because prompt payment of current invoices has to be balanced against accumulated debt repayment. This conflict of interest has no easy solution other than strict and careful management of funds until the slate is wiped clean. Some Member States have implemented laws to facilitate the swift repayment of debts and inject vital liquidity to companies. These laws sometimes contain provisions that pose questions as to their full compliance with the Directive.³² (See section 5.4 above)

In B2B transactions, the biggest obstacle to an effective application of the Directive is the existence of an inherent power struggle between (generally) large and small businesses. This power imbalance means that larger companies often dictate the terms of the contract to the smaller supplier, imposing, inter alia, long payment terms and low interest rates. Since businesses do not want to strain their commercial relationship with a large customer, unfair contractual terms, which Member States should prevent under Article 7 of the Directive, are nevertheless often accepted and subsequently the rights of the Directive are not exercised either.

In all cases, the external evaluation found that the ambiguity or vagueness of certain concepts of the Directive is an obstacle to an effective application of its provisions. One of the most problematic notions is 'grossly unfair,' which is judged to be unclear and open to a wide range

³² See ECFIN report "*Market Reforms at work in Italy, Spain, Portugal and Greece*" European Economy 5/2014 for an explanation of the measures taken by Spain, Portugal and Italy against late payment of commercial debt by the public administration, as well as some figures of the impact of such measures.

of interpretation. This central concept of the Directive is used to guide commercial relations. The Directive permits derogations from its guidelines in relation to payment terms and the verification period provided that the resulting terms are 'expressly agreed in the contract and not grossly unfair to the creditor.' In the opinion of stakeholders, the notion is difficult to streamline as what is grossly unfair in one country/sector/commercial relationship may not be easily transferable to another. The Directive provides some guidance as to what constitutes grossly unfair (see section 2.3.6 above) but clearly, more clarity is required. Likewise the word 'expressly' causes confusion throughout the Member States. The legislator's intention in using this word was to mean 'in writing' but this is not evident in many cases. Stakeholders are also unsure of the start point in the calculation of payment periods.

ii) Factors contributing to a more effective application of the Directive

Voluntary measures such as the creation of prompt payment codes and the introduction of incentives such as positive naming and shaming for parties who respect the terms of their contracts are proving to contribute towards an effective application of the Directive in the UK and Ireland.

Facilitating the exchange of best practices between Member States helps increase the effectiveness of the Directive. Forums such as the late payment expert group in which tips for tackling late payment are discussed encourage a speedier resolution of outstanding issues and create long-lasting solutions.

The Commission clarifies concepts of the legislation through discussions in the context of the expert group meetings and through correspondence with Member States via a structured dialogue between the Commission and the Member State(s). A Frequently Asked Questions document³³ is also available on the website as a form of general guidance in order to help reach a common understanding of the concepts

Finally, maintaining awareness of the repercussions of late payment and presenting the Directive as a remedy is essential to keep the momentum going. Whenever possible, the Commission participates in national awareness raising campaigns on this issue and provides expertise when approached.

6.2 EFFICIENCY: EVALUATING THE COST EFFECTIVENESS OF THE INITIATIVE

This section is central to the objectives of the REFIT programme, which aims to make EU law simple - one common rule to apply in all Member States - and to reduce regulatory costs. This

³³ http://ec.europa.eu/growth/smes/support/late-payment/index_en.htm

refers specifically to the costs associated with reporting and administrative burden, costs to public authorities related to the transposition and implementation of the Directive, costs to the public purse associated with voluntary measures that are linked to the Directive and costs to businesses of any activities that result directly from the Directive (i.e. the exercise of rights granted by the Directive). Measuring the efficiency of the Directive means evaluating to which extent the costs implicated by the usage of the legislation are proportionate to the benefits achieved. Stakeholders consulted throughout the evaluation were unable to quantify the cost-saving brought about by the introduction of the Directive. This presents a limitation in evaluating the efficiency of the Directive in a measureable way. Qualitative feedback was however provided and points towards the assessment that overall, the Directive is an efficient instrument.

6.2.1 Costs to businesses

The external evaluation³⁴ found that, for businesses, the benefits reaped from using the Directive with regards to clear rules regulating late payment and strengthened rights generally outweigh the associated regulatory costs.³⁵

The main direct cost to business as a result from the Directive is that companies have to become familiar with the provisions of the Directive, possibly align their contracts with these rules and follow up on delayed payment. This cost is largely perceived as negligible by stakeholders. The Directive has not resulted in any specific additional requirement that companies need to adjust to. Furthermore, there are no administrative or reporting burdens resulting directly from the Directive. The Directive provides two important legal tools that can be applied by companies in case of late payment, i.e. the possibility of claiming interest and a compensation fee for recovery costs. In line with the fact that there are no costs directly associated with them, companies consider these provisions as generally quite efficient.

Costs are in fact coming from chasing late payments in terms of effective credit management, which was likely to have already been part of the everyday business before the introduction of the Directive. With its clarified provisions and strengthened rights, the legislation provides companies with more chances of successfully recovering their debts. However, it is noteworthy to remember that external debt recovery in the form of alternative dispute resolutions and litigation is governed by national law and therefore, success rates vary across

³⁴ See paragraph “9.1. Costs for businesses as a result of the Directive”, 59, of the quoted “Ex-post evaluation of Late Payment Directive” available at <http://bookshop.europa.eu/en/ex-post-evaluation-of-late-payment-directive-pbET0415875/>

³⁵ Earlier, this document examined businesses' usage of the Directive and the cost in terms of risk associated with possibly damaging a commercial relationship. Here, only regulatory costs are considered.

the EU. This factor does touch on the efficiency of court procedures but this issue is out of the scope of the Directive.

Costs associated with correctly *applying* the Directive are more relevant for businesses than public authorities. Businesses that were previously paying according to long payment terms, should now pay in 60 days. The cash transfer resulting from shorter payment terms amounts to large sums of money that have to be released.

Overall, businesses view the Directive as efficient and, in the best case scenario involving a full functioning of the Directive, rate the costs as even negligible compared to the possible benefits achieved. The results of the external evaluation indicated that even a moderate reduction in payment delays could lead to substantial benefits. The Directive's Impact Assessment estimated that a total of EUR 1,864 billion in company turnover is paid late each year. If companies use overdraft facilities offered by their financial institutions, this would lead to a total cost of about EUR 158 million per day³⁶. In other words, for each day of reduction in payment delays, EUR 158 million is saved by European companies in finance costs. These savings are very much worth the relatively negligible costs incurred.

6.2.2 Costs to public authorities

The transposition of the Directive by the relevant national authorities was a standard legislative procedure and thus did not incur any out of the ordinary costs. The external evaluation concluded that costs for public authorities mainly pertain to awareness raising campaigns and adoption of supplementary measures to support the Directive such as electronic invoicing. Any technological advancements entail an initial investment, which should in the long term lead to cost reductions, in particular related to time management. As these initiatives are voluntary, the costs associated with transposition of the Directive remain minimal. This is confirmed by the national authorities themselves that consider such costs as marginal.

Public authorities also feel the squeeze of the shortened payment terms. The more regular release of funds inevitably necessitates a careful cash management and costs will likely be incurred where structural reorganisation is needed. However, businesses that supply public authorities will ultimately benefit from these reduced payment terms.

³⁶ Figure calculated by external consultant. It should be noted that these estimates are based on a large number of assumptions, they need to be interpreted with caution and they should only be seen as an indication of the order of magnitude of costs related to late payments.

6.2.3 Comparing costs and benefits

There are very little administrative or regulatory costs resulting directly from the Directive. For public authorities, since the Directive was transposed using the normal, existing legal procedures in the Member States, there were no extraordinary costs involved. All costs to public authorities and to businesses alike result from the application of the Directive. Businesses, especially SMEs who are the key target group of this Directive, should benefit most from a correct application of this Directive as, in principle, payments should be made promptly, avoiding the need to use overdraft facilities. Set against these negligible costs, the Directive has the potential to deliver significant benefits.

6.3 COHERENCE: FITTING IN THE INITIATIVE WITH OTHER EU POLICIES

This section is also highly relevant with regards to REFIT's aims as EU laws should be consistent with other policies and avoid creating overlaps that would lead to inefficiencies or barriers to reaching the policy objectives.

To what extent are there contradictions/overlaps/complementarities between the Directive and any other Community action?

The evaluation found that there is little evidence of contradiction between the Directive and other EU policies for combating late payment. In fact, the legislation complements and is coherent with a number of EU initiatives such as the Single Market Strategy³⁷ and the Entrepreneurship 2020 Action Plan³⁸. The objectives of these policies - to provide an impetus to overcome the effects of the financial crisis, create a level and competitive playing field for SMEs and develop and improve the single market - are carefully interlaced, with each initiative supporting but not usurping the other.

With respect to debt recovery, which is dealt with under Article 10 of the Directive, there are some EU Regulations already in place such as:

- European Payment Order (EOP)³⁹

³⁷ Commission Staff Working Document, SWD(2015) 202, “A Single Market Strategy for Europe - Analysis and Evidence”, http://ec.europa.eu/growth/single-market/index_en.htm

³⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 795, “Entrepreneurship 2020 action plan”, http://ec.europa.eu/growth/smes/promoting-entrepreneurship/action-plan/index_en.htm

³⁹ Regulation (EC) N°1896/2006, https://e-justice.europa.eu/content_order_for_payment_procedures-41-en.do

- European Enforcement Order (**EEO**)⁴⁰
- European Small Claims Procedure (**ESCP**)⁴¹

As a reminder, Article 10 of the Directive establishes a right for businesses to obtain an enforceable title through an expedited process in the case of an undisputed debt. This duty should be carried out in accordance with the Member States' "respective national laws, regulations and administrative provisions". On the contrary, the EOP and the ESCP are used only in the case of cross-border trades (i.e. when at least one party is domiciled in a MS other than that of the competent court) as an alternative to domestic payment orders or domestic claims procedures. The EOP is a simple written procedure that allows creditors to recover uncontested civil and commercial claims according to a uniform procedure available in 27⁴² Member States. As expressly foreseen in Article 10, the provisions of the Directive shall be without prejudice to the provisions of the EOP Regulation, which therefore acts as "lex specialis" in so far as its procedures and deadlines are concerned. The ESCP is a written procedure that allows creditors to contest claims of up to €2,000 without the need to go through formal mutual recognition of the judgements. Feedback from stakeholders indicated that SMEs in particular find the ESCP to be of high importance and welcome an increase of the threshold.

Whereas the external evaluation found that there could be an overlap between the Directive and the EOP, the Commission, following a detailed analysis with the relevant services, believes that this is not entirely accurate for the reasons described above. There is a synergy that can be observed in the interaction between these EU laws. The EEO works as a checklist for the national civil proceedings; if the conditions are fulfilled, the certificate must be issued upon the request. In conclusion, from the internal analysis performed by the Commission, there is no overlap between Article 10 and the aforementioned instruments: EOP and ESCP contain own deadlines that are fully coherent with Article 10 and the EEO works in conjunction with the Directive.

Stakeholders consulted throughout the evaluation suggested exploiting potential synergies between the late payment Directive and the public procurement Directives. Every year, over 250,000 public authorities in the EU spend around 18% of GDP on the purchase of services, works and supplies, yet there is little or not enough follow up to ensure that enterprises engaging with this process are paid on time. A closer collaboration between these files could only be beneficial for companies competing for state contracts.

⁴⁰ Regulation (EC) N°805/2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133190>

⁴¹ Regulation (EC) N°861/2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A116028>

⁴² Denmark not included

Overall, the Directive is found to be coherent with other EU initiatives and emphatically not surplus to requirements.

6.4 RELEVANCE: MEASURING THE CONTINUED NEED FOR THE INITIATIVE

a) To what extent do the objectives of the legislation still correspond to the needs of the stakeholders?

The findings of the external evaluation clearly demonstrate that late payment remains a very relevant issue for companies across the EU. The survey showed that four out of five companies experienced incidences of late payment in the last three years, i.e. since the adoption of the Directive. This result is backed up by Intrum Justitia's European Payment Report 2015, which concluded that 49% of companies experience a liquidity squeeze as a result of late payment. These statistics alone should be enough to justify continued and concerted efforts to eradicate late payment from commercial transactions once and for all. It is recognized that the extent of the problem varies across countries, with Member States in the south of Europe particularly hard hit. Vast differences between sectors are also cited with entities working in construction and health experiencing excessive payment delays. The external evaluation results, however, showed no statistically significant differences in the likelihood of experiencing late payment depending on the sector. The size of the business and the country in which it operates are much more likely indicators of late payment possibilities. However, business organisations representing Member States that traditionally pay promptly, confirm that late payment exists in their countries and therefore initiatives to find solutions at EU level must be pursued.

b) Is the Directive the right instrument to tackle this issue?

Whilst there remains support for a legislative instrument in the form of a Directive to combat late payment⁴³, stakeholders are not under the illusion that a solution will be found solely through this route. Late payment is a multi-faceted problem and thus there cannot be a one size fits all solution. That late payment is a norm and accepted as part of the culture of certain Member States will take time and further efforts to change. Furthermore, there is a school of thought that claims that late payment as trade credit is an innate part of business relationships, which can benefit both the debtor and the creditor. The advantages of trade credit to a debtor are obvious, but the acceptance of unfair contractual terms and delayed payment can also put the creditor in a position of power vis-à-vis the debtor. In accepting to turn a blind eye to long payment terms and delayed payment, the creditor can demand from the debtor in return the guarantee of future business. In conclusion, using legislation to tackle a problem that is in many ways driven by the nature of business negotiations is unlikely to find a swift solution. Instead, focusing on ways to instil the idea of prompt payment as a norm in society must also

⁴³ No respondent to the survey was in favour of repealing the Directive

be part of tackling the problem. Legislation most certainly has its place amongst the remedies but it must be supported by other 'softer' initiatives as well.

6.5 EU ADDED VALUE: ASSESSING WHAT THE INITIATIVE BRINGS TO THE EU

What is the EU added value of the Directive for stakeholders? What would be the most likely consequences of repealing this Directive?

There is a general consensus among stakeholders that the Directive generates significant added value to the EU. With very few exceptions, payment terms are now streamlined across Europe. The Directive has removed uncertainty with regards to payment practices and created a level playing field for businesses operating in the single market. It is widely acknowledged that these objectives could not have been achieved by Member States acting individually.

A significant added value of the implementation of the Directive is that it has catapulted the issue of late payment high in Europe's political agenda. Member States are making concerted efforts to tackle this phenomenon so as to ensure, in many cases, the survival of their SMEs. Indeed, the President of the Commission has set a new boost for jobs, growth and investment amongst his 10 priorities. Ridding Europe of late payment will help achieve this goal. The Commission will therefore continue to communicate to Member States why a correct implementation of this Directive is a vital contribution for Europe's future.

Throughout the consultation process, stakeholders were almost unanimous in their call to maintain the Directive in its current form and to allow more time to pass in order for its effects to come to fruition. Despite the moderate effect the Directive has had thus far on payment behaviour, repealing it at this stage would be hasty and would likely have a destabilising effect on Europe's economy. The Directive has its place in the fight against late payment and another evaluation in the near future would indicate much more clearly where, if any, legislative changes should be made.

7 CONCLUSIONS

Several factors render a definitive assessment of the Directive's achievements a challenge. The first factor concerns the timing of this evaluation: the Directive was adopted on 16 February 2011, with a transposition deadline of 16 March 2013. However, the last Member State to communicate their national measures transposing the Directive did so on 6 August 2014. Therefore, more time is required before being able to decisively assess the effects of the Directive. The second factor, which will remain despite the passage of time, is that it is difficult to isolate the role of the Directive in any changes seen on the ground. There are other elements such as the financial crisis and the economic situation of certain Member States that may be more dominant drivers. A third factor is the lack of data collection systems in place, which means that any progress or diminishment in average payment periods is not recorded

and assessments must therefore be made on the basis of a compilation of different data and a number of assumptions. These factors hinder a conclusive assessment of the effectiveness of the Directive.

Despite these limitations in assessing the impact of the Directive, there are already results available at this early stage that make for encouraging analysis.

With respect to the specific objective of reducing contractual payment periods and delays, moderate progress is noted in both the public and private sectors. On average, public entities appear to be paying in consistently shorter timeframes but approximately half of all Member States are still not respecting the 30-day deadline. In the private sector, with the exception of a handful of Member States that record poor figures in this area, the periods established in the Directive appear to be broadly respected. It can be posited that the Directive had a role to play in these observable positive trends.

In relation to the specific objectives of enabling creditors to exercise their rights when paid late, there is still work to be done. Although the Directive provides the means to claim interest for late payment and compensation for recovery costs, around half of all creditors do not exercise these rights when paid late for fear of damaging the commercial relationship. Many SMEs continue to have long payment terms imposed on them by larger companies. This is an inherent aspect of business culture brought about by the different place of companies in the supply chain, their size and degree of dependency on each other, as well as other factors such as the market sector specificities. This matter cannot be fully addressed by legislative actions alone because SMEs tend not to exercise their rights established by law nor would they consider taking legal action against an important customer. A more systematic use of soft measures and out of court settlement procedures such as mediation and alternative dispute mechanisms would prove useful.

With respect to the wider objectives of the Directive of increasing the liquidity of businesses and reducing barriers to cross-border transactions, due to the modest changes in payment behaviour, there was not enough data available at this early stage to draw clear conclusions.

When it comes to the effective application of the Directive, the external evaluation identified certain barriers. Member States experiencing significant public debt have difficulties in correctly applying the Directive. From a political stance, debt repayment may take precedence over the payment of current invoices but the Directive does not foresee any such interpretation. Another factor preventing an effective application of the Directive is the ambiguity of certain key concepts of the legislation such as 'grossly unfair' and 'expressly'. Despite Commission guidance on these notions, stakeholders' feedback indicates continued difficulty with these terms.

Factors contributing to an effective application of the Directive include the implementation of supporting measures at national level by Member States (i.e. prompt payment codes), which complement the objectives of the Directive. Forums that enable the exchange of best practices between Member States on how to tackle late payment also facilitate the application of the Directive. Finally, continued awareness raising and expertise-sharing by the Commission and by national experts prove beneficial.

Overall, the external evaluation found that the Directive is an efficient instrument and that it does not create unnecessary administrative burden nor regulatory costs. For each day of reduction in payment delays, an estimated EUR 158 million is saved by European companies in finance costs. Initial costs of correctly applying the Directive (i.e. shortening payment terms to align with the Directive's deadlines) may squeeze the budgets of public authorities and businesses but in the long run the benefits including increased liquidity and a more secure business environment will outweigh the costs.

The Directive is coherent with other EU policies and has a key place in commercial relations and company liquidity. The harmonisation provided by the Directive establishes a basis on which it should be easier for companies trading throughout EU to understand their rights and be able to act on them. In the area of debt repayment, the legislation is complemented by a number of EU regulations such as the European Payment Order, the Small Claims Procedure and the European Enforcement Order. Overall, such legislation promotes different fundamental rights, including in particular freedom to conduct a business laid out in Article 16 of the Charter of Fundamental Rights and freedom to property mentioned in Article 17 of the Charter of Fundamental Rights.

The Directive's objectives of combating late payment remain largely relevant. The external evaluation found that four out of five companies consulted have experienced late payment in the past three years. The Directive is playing its part in the fight against late payment but, due to the multi-faceted nature of the phenomenon, 'softer' initiatives are also needed.

Overall the Directive has added value to the EU: the rules regulating payment practices are largely streamlined across Europe. Combating late payment is now a key priority for European governments. The timely introduction of the legislation during the financial crisis created an impetus for governments to come up with further national measures that, together with the Directive, aim to permanently eradicate late payment in commercial transactions.

The Directive appears to be on track to reaching its objectives. European governments have acknowledged the critical need to address the issue of late payment, not only to safeguard SMEs, but also to ensure the continued recovery of the economy and restoration of its competitiveness. Whilst there remains work to be done, the future already looks brighter.

ANNEX 1 – PROCEDURAL INFORMATION

In January 2015, DG Internal Market, Industry, Entrepreneurship and SMEs launched an evaluation of the Late Payment Directive. The evaluation of the Directive is part of the Commission's Agenda Planning (2016/GROW/026) and Work Programme (COM(2014) 910 final – Annex 3⁴⁴). It was decided that the evaluation would be supported by an external study which was initially planned for a period of 9 months, ending in September 2015. However, due to a data collection issue, which will be elaborated in Annex 3, the external evaluation was extended by two months until November 2015.

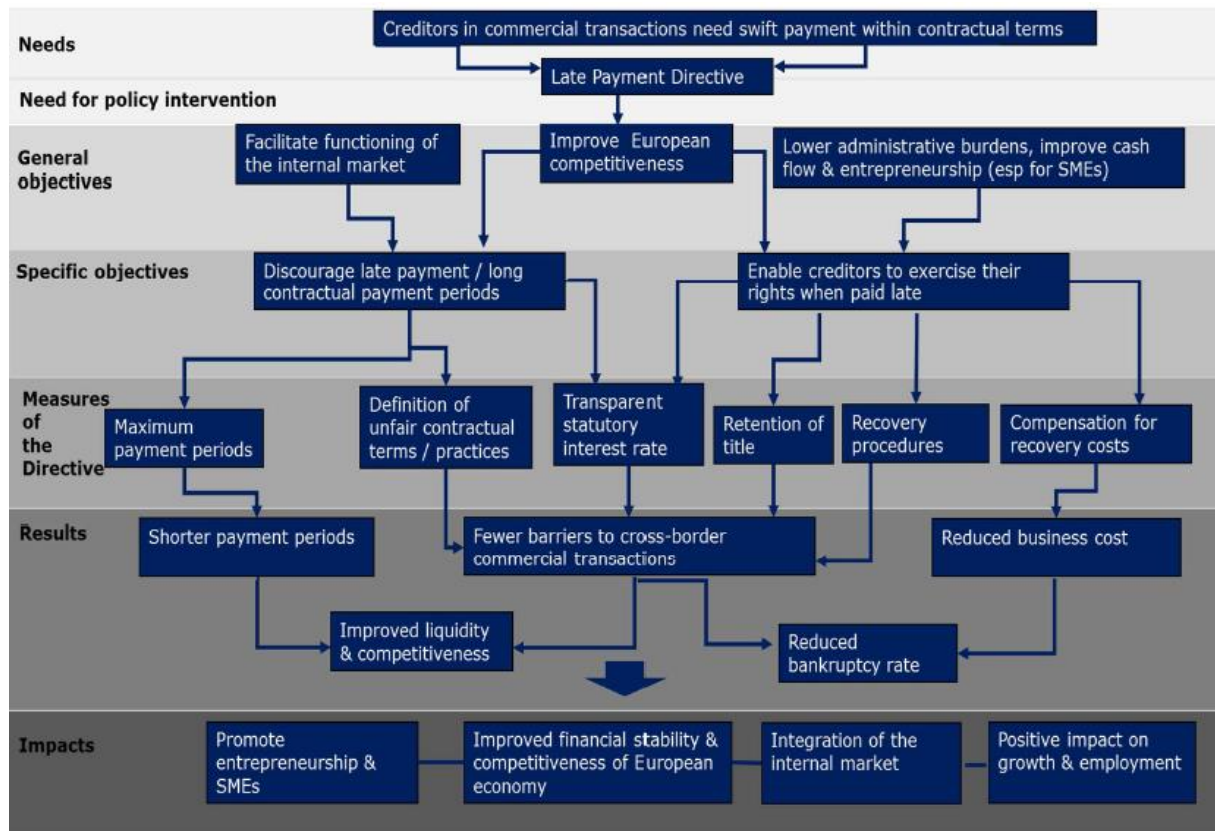
An inter-service group steering group was set up at the launch of the evaluation. The Secretariat-General, then DG Markt (now DG Internal Market, Industry, Entrepreneurship and SMEs) and DG Internal Market, Industry, Entrepreneurship and SMEs participated in the group. The group met four times during the evaluation process (22 January 2015, 27 February 2015, 19 May and 20 October 2015.)

The evaluation was carried out by an external consultant – Technopolis Group. Their results were counter-checked with national experts and business organisations during an expert group meeting held by the Commission on 24 November 2015.

⁴⁴ http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf

ANNEX 2: INTERVENTION LOGIC

The following figure presents the intervention logic:



ANNEX 3: STAKEHOLDER CONSULTATION

Stakeholders were consulted through the following means:

- a) Online survey
- b) Public consultation
- c) Interviews
- d) Expert group meetings

THE ONLINE SURVEY

The online survey of companies was a key element of the evaluation. The objective of the survey was to collect primary data from a representative sample of companies across all Member States regarding:

- awareness of late payment regulations;
- payment terms applied by companies;
- experience of delays by other companies/public authorities;
- awareness and exercise of the provisions in the directive; and
- impact of late payments on companies.

The questions have been discussed, reviewed and agreed with the consultants following a meeting held in Brussels and subsequent exchanges of mails.

The sample of targeted companies was developed, by the consultant, to ensure representativeness in terms of the European industrial structure (different strata were created for company size and country group). 26,000 companies were contacted and 2,677 complete responses were received. More details on the survey including the sample, list of questions and results can be found in the evaluation report⁴⁵.

THE PUBLIC CONSULTATION

A version of the online survey was made available to the general public from June 2 to July 19 in the form of a public consultation. European and national industry associations were

⁴⁵ <http://bookshop.europa.eu/en/ex-post-evaluation-of-late-payment-directive-pbET0415875/>

provided links to this consultation to be shared with their members. 273 responses were received in this open consultation. Due to the representative nature of the company survey, it was important to maintain the integrity of the sample of survey respondents. Hence it was not possible to merge survey and consultation results. However, the consultation provided interesting corroborating information to the survey and its results are described in the evaluation report⁴⁶.

INTERVIEWS

a) Interviews at Member State level:

The objective of the interviews was to gain a richer, in-depth qualitative understanding of the issues faced by businesses in terms of late payment.

Overall 135 telephone interviews with companies, industry and sector associations, agreed between the Commission and consultants, were conducted:

- 111 business representatives were interviewed, including chambers of commerce, sector associations, SME associations, European Enterprise Network members, or general business associations. Given the focus of the study on construction, public health and food sector, the team focused on these three sectoral associations.
- Interviews with 22 public authorities collected key information regarding transposition measures.
- In 2 cases (in Croatia and in Spain) individual experts on late payment were interviewed.

These interviews included 2 round table discussions - one in London and one in Brussels. 18 organisations (11 national industry associations and 7 companies) were present at these meetings with the consultants.

The names of the organisations that were consulted during the study as well as a breakdown of stakeholders by country and type of organisation are available in the evaluation report⁴⁷.

b) Follow-up interviews

Finally, following closure of the survey, 31 follow-up interviews between the consultants and volunteering companies took place between June and September 2015. The follow up interviews focused on the responses provided in the questionnaire and the study team aimed at discussing the costs incurred by

⁴⁶ idem

⁴⁷ idem

companies due to late payment. For this reason, the consultants contacted companies which indicated awareness of the possibility to claim interest and compensation (Q17 of the survey), experience with claiming interest or compensation (Q18 of the survey) and other activities undertaken in case of late payment (Q20 of the survey). The list of companies that participated in follow-up interviews is available in the evaluation report⁴⁸.

EXPERT GROUP MEETINGS

One expert group meeting took place throughout the consultation phase on 13 April 2015 and the second meeting occurred following the completion of the final report of the evaluation on 24 November 2015. Participants in the latter meeting included representatives of EU level business associations who were consulted, along with the experts, on the results of the evaluation. The former meeting was a standard expert group meeting in which the evaluation and its objectives and methodology were presented.

SUMMARY

The Commission's minimum standards are considered to have been met in this evaluation. The proof of this assertion came through the stakeholder consultation at the end of the process during which participants agreed that the evaluation covered all pertinent elements of the topic and were satisfied with the results.

Overall, stakeholders agree on the main conclusion of the evaluation: that the Directive, in its current form, is a useful tool to combat late payment and that more time should be given to allow the full effects to come to light. There were some contradictory views by a minority of representatives of SMEs who would prefer to see legislative change that properly remedy the power imbalance between big and small businesses. Suggestions to harmonize payment terms in B2B transactions were made in this respect. This idea was refuted by other business organizations who argued that it would be impossible to impose one maximum payment term across all sectors. Sector specificities are too important and this idea would most likely not work in practice.

⁴⁸ idem

ANNEX 4. METHODS AND ANALYTICAL MODELS USED IN PREPARING THE EVALUATION OVERVIEW OF DATA COLLECTION ACTIVITIES

As already mentioned, the data collection activities included:

- Desk research
- Online survey
- Interviews at Member State level
- Follow up interviews

These activities have been elaborated in Annexes 1 and 2 above.

OVERVIEW OF THE ANALYTICAL APPROACH

It was difficult to directly attribute changes in payment duration, terms or delay over time to the Directive. There were indeed a large number of intervening factors, such as the impact of the financial crisis, national and sectoral differences, business culture and social norms, which make it impossible to quantify the direct impact of the Directive on payment behaviour. In addition, the Directive was only implemented recently and its effects have not yet fully materialised.

The evaluation was therefore a first step to establish the *état des lieux* regarding payment behaviour following the implementation of the Directive, to understand the direction of travel in the key variables that the Directive aims to influence and to identify key drivers and obstacles with respect to improving payment behaviour in B2B and PA2B transactions.

No single analytical method could have delivered all of the objectives of the evaluation. Hence, in addition to a descriptive survey analysis (i.e. cross-tabs) and extensive qualitative analysis of interview findings, a multivariate regression analysis based on survey data was conducted, by the consultants, to identify explanatory factors related to different dimensions of late payment. Regression analysis allows to examine the statistical significance and the *relative magnitude* of the impact of different factors on a dependent variable or on the probability of occurrence of an event.

As a result, though it stops short of enabling the study to directly attribute impacts to the Directive, the regression complements and – indeed - adds significant value to the descriptive bi-variate survey analysis and the qualitative information gathered through interviews.

Different regression model specifications were estimated to identify inter alia:

- what factors explain awareness of the rules regulating late payments across European countries;
- which types of companies are more likely to experience late payments;
- which types of companies are more likely to exercise their rights under the Directive;
- what factors increase the probability of companies facing difficulties to pay within contractually agreed terms; and
- what factors explain payment terms applied by companies?

Age, size, turnover of the company (% in own country) and type of customer were used as explanatory factors when performing the analysis. Dummy variables for each country and sector were also included to control for country specific impacts (business culture, regulatory framework, etc.) and sector heterogeneity.

Results and conclusions should be approached with some caution as self-reporting of late payment experiences and behaviours related to late payment can be subject to mis-reporting, particularly since the survey questionnaire asked for late payment experiences over a period of three years. Furthermore, additional non-observed factors are not taken into account in the model. However, non-observed factors that are related to country or sector characteristics are captured by the corresponding fixed-effect variables.

Full details of the regression methods are available in the evaluation report ⁴⁹.

Hard economic data on the subject (average payment periods/quantitative impact of the Directive) is scarce and when available, the different methodologies used in the calculations do not allow for direct comparisons across the board. Data collected by the Swedish company, Intrum Justitia is the most cited in this evaluation. At European level, the data collected by this credit management company and presented in the European Payment Reports ⁵⁰ is the most comprehensive to date. The consultant acknowledged the following caveats in relation to the usage of this data, namely:

- Intrum Justitia's results up to 2014 were based on the responses of 6,000-10,000 companies across Europe. Since the sample can vary from year to year, this could have affected findings on the potential scope of late payment trends in some Member States. The Payment Index is calculated from eight differently weighted sub-indices, which are based on a total of 21 individual values.

⁴⁹ idem

⁵⁰ Named European Payment Index up to 2014

- Not all EU Member States were covered in the Index. Data from Luxembourg and Malta were missing and some Member States such as Bulgaria, Croatia, Romania and Slovenia were only covered from 2012 or 2013 onwards.
- Pan-European average figures available in the Index report were not (entirely) relevant for the evaluation. These figures were based on data from 26 EU Member States and other countries including Bosnia-Herzegovina, Norway, Russia, Serbia, Switzerland and Turkey.
- EPI 2015 followed a different methodology than previous years making a historical comparison impossible. Changes included adjustments and improvements to the weighting of data and sample size was increased by about 10 percent in 2015. As a result of these changes, no historical comparison could be drawn between 2015 and previous years.

In addition to Intrum Justitia, other cross-country data used in the evaluation included:

- EOS - “European Payment Practices” asked 2,600 companies in 12 European countries about payment practices in their respective countries. 200 companies in each of the following countries UK, Spain, France, Austria, Greece, Romania, Russia, Slovakia, Bulgaria, Poland and Belgium, and 400 companies from Germany, answered questions about their own payment experiences, economic developments in their countries and on issues relating to risk and receivables management. These results were used throughout the evaluation report, but it should be noted that EOS averages included non-EU countries.
- Atradius - Atradius conducts annual reviews of international corporate payment practices through a survey called the “Atradius Payment Practices Barometer”. The evaluation report presented the results of the survey’s 2015 edition conducted in 13 countries across Western Europe based on a sample of 2,713 interview respondents. Due to a change in research methodology no year-on-year comparison was feasible.
- Euler Hermes Country Reports present economic profiles of individual countries, including sections on economic strengths and weaknesses, country rating based on country grade and country risk level, main activity sectors and trade partners, economic forecasts and more. Relevant information from these reports, was used throughout the evaluation.
- Grant Thornton's "European Business Survey" is a survey of 6,000 European companies, which provides a comparative analysis of the opinions of small and medium-sized enterprises in 17 European countries on a wide range of issues relevant to their competitiveness. The Grant Thornton survey results were derived from: Conway L. (1997): Late Payment of Commercial Debt, Research Paper 97/25, 12 February 1997.

To the greatest extent possible, national sources of information on average payment duration and delays, impacts on economic growth and employment were also assessed by the consultant during the desk research phase.

There is also limited academic literature on the subject of the Directive. Whilst numerous dissertations on the subject of late payment exist, few deal with the topic from the viewpoint of the Directive as the central and/or unique variable. Nevertheless, the available literature allowed for a greater understanding of how the Directive coincides with established business practices and, by extension, the legislation's impact on business culture.

Evidence in the form of complaints received by the Commission in relation to bad payment practices in Member States was incorporated into the analysis. The findings of the evaluation justify the open infringements, and thus corroborate the information communicated through the complaints received.

External expertise in the form of the Commission's expert group on late payment was used in the process. The experts collaborated with the consultants to direct them to the key national business organisations and available data. In this way, the main target groups were guaranteed to be reached and consulted.