



POSITION PAPER

Updating EU rules to combat late payments

Brussels, 07/12/2023

Key messages

FIEC is supportive of clear rules aimed at fostering and safeguarding prompt payments from clients to construction companies and between companies while also minimising the administrative burden for all parties involved in a commercial transaction. The current EU rules on late payments have been in place since 2011 but construction companies are still confronted with the problem of late payments. In some Member States, this is of particular concern for construction companies working with the public sector.

While FIEC is generally supportive of the Commission's proposal, it has reservations against the introduction of certain proposed provisions related to payments to subcontractors in public procurement, on enforcement authorities, complaints and confidentiality.

Why FIEC is dealing with this topic?

Despite the existing Directive 2011/7/EU the construction sector is still affected by the problem of late payments both from public and private clients. This is due to the characteristics of its value chain and the fact that construction companies usually have to bear the costs of the construction process (materials, machinery, labour, etc.) before they are paid. Late payments have the potential to threaten the very existence of a construction company, as a positive cash flow is essential to its day-to-day operations. Furthermore, payments are subject to a verification of the conformity of the works and their acceptance.

Besides the problem of late payments between B2B, another **main concern is that construction companies working with the public sector are still subject to late payment** even where payment periods and/or recovery measures are included in the provisions of the current Directive or national legislation. This is due to the fact that companies in this situation are often reluctant to take legal action against the party who has failed to pay them on time.

Ensuring that contracting authorities pay on time is not only essential for creating a prompt payment culture but has an impact on payments down the entire supply chain. All construction projects need upfront funding to some degree to initiate and mobilise the project. It is absolutely essential to the supply-chain, including the main contractor, that they are paid on time to cover the costs they are incurring. The legally enforceable principle should be that all clients pay on time – whether they are public or private contractual authorities.

In order to make the rules on late payment as efficient as possible, it is necessary to clarify the terminology used in the text. In its current version the proposal does not provide a definition of an "equivalent request for payment",¹ although this term is repeated several times in the text.

Finally, we welcome the fact that the proposed Regulation will create a level playing field in the EU and establish a better protection for construction companies by providing clear payment terms. However, FIEC also considers that it is crucial for the "contractual freedom" in business-to-business (B2B) transactions to be respected.

Specific comments

We would like to express our reservations against the introduction of the following provisions in the Commission's proposal, namely:

1. Payments to subcontractors in public procurement

FIEC understands that the new provisions proposed under Article 4 aim at ensuring that payments are passed down the supply chain in contracts for public works **but rejects it in its current form**. Our major concern is that the proposed provision implies that the main contractor will not be paid by the contracting authority until it has been demonstrated that the direct subcontractors have been paid. However, this **does not provide a solution for a strict mechanism ensuring that public authorities do effectively pay on time**.

In several countries, **late payment starts with public authorities failing to pay the main contractor within the stipulated payment periods. This prevents payments from being passed down the supply chain, as main contractors in this situation are then unable to pay their direct subcontractors.**

In addition, **if there is a requirement to verify payment, it needs to be clarified how this will be done and what the implications are for the main contractors in the event of non-compliance**, including in situations where there may be a legitimate reason to do so.² Furthermore, introducing a new requirement whereby the main contractor must prove that direct subcontractors have been paid, and which the client must subsequently check, **creates additional administrative, financial and time-consuming efforts for both the contractor and the client.**

Lastly, FIEC also considers that any such obligations related to public procurement, if introduced, must apply to all types of public procurement and **not only for public works**.

Article 4 of the proposal should therefore be redrafted taking into account the above concerns.

¹ Proposal for a Late Payment Regulation COM (2023) 533, Art. 2

² For example, a subcontractor has failed to perform its duties in accordance with the terms of a contract.



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2. Enforcement authorities, complaints and confidentiality

FIEC has also strong concerns regarding the proposed provisions requiring Member States to designate national authorities responsible for the enforcement of the Regulation and not explicitly requiring them, once/if designated, to take action with respect to public authorities. The provisions concerning the conditions under which creditors and associations of creditors can complain about late payments and the obligations of the enforcement authorities in relation to complaints also give cause for concern.

FIEC believes that there is a need to reinforce legislative provisions for an effective implementation of the proposed Regulation. However, depending on the national situation, this does not necessarily require the setting up or the designation of a dedicated authority.

Therefore, **the Regulation should leave it to Member States to decide whether or not to set up or designate authorities responsible for its enforcement or whether to use other legislative instruments**, as long as the system is consistent for public and private contracting authorities.

In any event, it is essential that such designated authorities or alternative instruments do provide an effective and enforceable remedy also in the event of late payment by public (and private) authorities. Where appropriate, administrative penalties imposed on late payers should, at least in part, benefit creditors in order to compensate them for their losses.

Articles 13 to 15 of the proposal should therefore be redrafted taking into account the above concerns. **We also reject the introduction of annual reporting obligations** only on companies' payment practices, as proposed in the draft report of the Committee on the Internal Market and Consumer Protection (IMCO),³ **as this would only increase the administrative burden for all parties involved.**

³ IMCO Draft Report on Proposal for a Late Payment Regulation COM (2023) 0533, Amendment 22



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