

S.I. No. 388/2002: European Communities (Late Payment in Commercial Transactions) Regulations 2002

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I, Mary Harney; Minister for Enterprise, Trade and Employment, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive No. 2000/35/EC of the European Parliament and of the Council of 29 June 2000 ⁽¹⁾, hereby make the following regulations:

Citation and commencement.

1. (1) These Regulations may be cited as the European Communities (Late Payment in Commercial Transactions) Regulations 2002.

(2) These Regulations shall come into operation on 7 August 2002.

Interpretation.

2. (1) In these Regulations, except where the context otherwise requires -

"commercial transactions" means transactions between undertakings or between undertakings and public authorities for the purposes of providing goods or services for remuneration;

"Directive" means Directive No. 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions;

"invoice" means a written document, electronic transmission or equivalent request for payment provided by a supplier to a purchaser in respect of a commercial transaction;

"late payment" means exceeding the relevant payment date;

"late payment interest" has the meaning assigned to it by Regulation 4;

"local authority" means a county council, a city council or a town council for the purposes of the Local Government Act 2001 (No. 37 of 2001);

"Minister" means the Minister for Enterprise, Trade and Employment;

¹ OJ NO.L200, 8.8.2000, p.35

"public authority" means—

- (a) a Minister of the Government,
- (b) the Commissioners of Public Works in Ireland,
- (c) a local authority,
- (d) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (e)
 - (i) a health board, or
 - (ii) the Eastern Regional Health Authority, the Northern Area Health Board, the East Coast Area Health Board or the South-Western Area Health Board,
- (f) a board or other body (but not including a company under the Companies Acts 1963 to 2001) established by or under statute,
- (g) a company under the Companies Acts 1963 to 2001 in which all the shares are held -
 - (i) by or on behalf of a Minister of the Government,
 - (ii) by directors appointed by a Minister of the Government, or
 - (iii) by a board, company, or other body referred to in paragraph (f) or subparagraph (i) or (ii);

"purchaser" means -

- (a) an undertaking which contracts with a supplier for the supply of goods or services to or on the directions of the undertaking, or
- (b) an undertaking ("the main contractor") -
 - (i) which obtains goods or services from another undertaking to supply to, or
 - (ii) contracts with another undertaking for that undertaking to provide goods or services on behalf of the main contractor to an undertaking;

"relevant payment date", in relation to a commercial transaction, means—

- (a) the date or end of the period for payment specified in the contract,
- (b) where the contract does not specify the date or period for payment, 30 days after—
 - (i) the date of receipt by the purchaser of the invoice, or
 - (ii) the date of receipt of the goods or services where-
 - (I) the date of receipt of the invoice is uncertain, or
 - (II) the purchaser receives the invoice before the goods or services,

or

- (c) where the contract does not specify the date or period for payment, if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is

provided for by statute or in the contract and if the purchaser receives the invoice earlier or on the date on which such acceptance or verification takes place, 30 days after the date on which such acceptance or verification takes place;

"supplier" means an undertaking which provides goods or services to or on the directions of a purchaser under a contract between that undertaking and the purchaser;

"undertaking" means a person acting in the course of his or her independent economic or professional activity.

(2) For the purposes of these Regulations, an invoice sent by post or an electronic transmission comprising an invoice shall be taken to have been received in the normal course of the post or that transmission service, unless the contrary is shown.

(3) In these Regulations -

- (a) a reference to a Regulation is to a Regulation of these Regulations, unless it is indicated that a reference to some other enactment is intended, and
- (b) a reference to a paragraph or subparagraph is to the paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that a reference to some other provision is intended.

(4) A word or expression that is used in these Regulations and also in the Directive has, unless the context otherwise requires, the same meaning in these Regulations as it has in the Directive.

Application.

3. (1) These Regulations apply to payments made as remuneration for commercial transactions.

(2) These Regulations do not apply to -

- (a) contracts made before 7 August 2002,
- (b) claims for late payment interest of less than €5,
- (c) transactions with consumers,
- (d) subject to paragraph (3), a debt if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any Act or any instrument made under an Act (other than these Regulations), or
- (e) a debt if or to the extent that a right to demand interest on it, which exists by virtue of any rule of law, is exercised.

(3) Paragraph (1)(d) does not prevent late payment interest becoming payable by reason of the fact that a court or arbitrator would, apart from these Regulations, have power to award interest on it.

(4) The application of these Regulations is not affected by -

- (a) any change in the identity of the parties to the relevant commercial transaction, or

- (b) the passing of the right to receive the payment concerned or the obligation to make the payment concerned, in whole or in part, to a person other than the person who is the supplier or the purchaser when the payment becomes due,

by assignment, by operation of law or otherwise.

(5) In this Regulation "consumer" means a natural person acting outside his or her trade, business or profession.

Implied term as to late payment interest.

4. (1) It shall be an implied term of every commercial transaction that where the purchaser does not pay for the goods or services concerned by the relevant payment date, the supplier shall, subject to paragraph (4), be entitled to interest ("late payment interest") on the amount outstanding under the contract concerned at the rate specified in Regulation 5.

(2) The supplier shall be entitled to late payment interest for the period beginning on the day after the relevant payment date and ending on the date on which the payment of the amount due is made.

(3) Where the contract does not specify the date or period for payment late payment interest is payable without the necessity of a reminder.

(4) A supplier shall be entitled to late payment interest to the extent that the supplier—

- (a) has fulfilled his or her contractual and legal obligations, and
- (b) has not received the payment due by the relevant payment date, unless the purchaser is not responsible for the late payment.

Rate of late payment interest.

5. (1) Unless otherwise specified in the contract concerned, the late payment interest payable under Regulation 4 shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before 1 January and 1 July in each year (hereinafter in this Regulation referred to as "the reference rate") and published in the Official Journal of the European Communities plus 7 percentage points.

(2)(a) The reference rate in force on 1 July 2002 shall apply for the period from the commencement of these Regulations and ending on 31 December 2002.

- (b) In each subsequent year after the commencement of these Regulations, the reference rate in force on 1 January and 1 July shall apply for the period ending 30 June and 31 December respectively in each year.

Grossly unfair terms - application by supplier to Circuit Court or arbitrator.

6. (1) Where a contract between a purchaser and a supplier purports to waive or vary -

- (a) the relevant payment date where the contract does not specify the date or period for payment, or
- (b) the implied term referred to in Regulation 4,

and the supplier considers that the waiver or variation is grossly unfair, the supplier may apply to the Circuit Court or, under Regulation 7, to an arbitrator, for an order under this Regulation.

(2) Subject to paragraph (3), the Circuit Court or arbitrator, as the case may be, may make an order-

- (a) that the terms concerned are grossly unfair to the supplier,
- (b) that the terms concerned are unenforceable,
- (c) varying the terms by substituting for those terms the relevant payment date in accordance with these Regulations or the provisions of Regulation 4 or such terms as appear to the Court to be appropriate, or
- (d) directing the purchaser to pay to the supplier such compensation, costs and expenses, if any, as appears to the Court or arbitrator to be appropriate having regard to any loss, costs and expenses incurred by the supplier by reason of the terms concerned,

including such order as to costs as the Court or arbitrator thinks fit.

(3) In making an order under paragraph (2), a Court or arbitrator shall take into account all the circumstances of the case, including the following:

- (a) good commercial practice;
- (b) the nature of the goods or services concerned;
- (c) whether the purchaser has any objective reason to deviate from these Regulations;
- (d) the strength of the bargaining positions of the supplier and purchaser relative to each other;
- (e) whether the supplier received an inducement to agree to the term or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (f) whether the supplier knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

Application under Regulation 6 to arbitrator.

7. Subject to any written contract, the supplier may make an application under Regulation 6 to an arbitrator appointed by agreement between the supplier and the purchaser or, in the absence of such agreement, within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator and the Arbitration Acts 1954 to 1998 shall apply to an arbitration under this Regulation.

Applications to Circuit Court by representative bodies.

8. (1) In this Regulation-

"representative body" means an organisation which has a legitimate interest in representing small and medium-sized enterprises generally or in a specific sector of the economy or geographical area;

"small and medium-sized enterprise" has the same meaning as in Commission Recommendation No. 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽²⁾.

(2) Where contractual terms drawn up for general use purport to waive or vary -

- (a) the relevant payment date where the contract does not specify the date or period for payment, or
- (b) the implied term referred to in Regulation 4,

a representative body may, on its own initiative or at the request of a small or medium-sized enterprise that it represents, apply to the Circuit Court for an order under this Regulation.

(3) Subject to paragraph (6), the Circuit Court may make an order -

- (a) that the terms concerned are grossly unfair and are unenforceable, and
- (b) prohibiting the use or, as may be appropriate, the continued use of the contractual terms concerned, on such terms as appear to the court to be appropriate,

including such order as to costs as the Court thinks fit.

(4) The organisation concerned shall cause to be published notice of intention to apply to the Circuit Court for an order under paragraph (3) in at least 2 daily newspapers published and circulating in the State and in such further or other manner as the Court may direct.

(5) Every person claiming to have an interest in any such application shall be entitled to appear before and be heard by the Court on the hearing of the application.

(6) In making an order under paragraph (3), the Court shall take into account all the circumstances of the case, including the matters specified in Regulation 6(3).

Implied term as to compensation.

9. (1) It shall be an implied term of every commercial transaction that where late payment interest becomes payable under Regulation 4, the supplier shall be entitled, in addition to the late payment interest, to the amount specified in the Schedule to these Regulations as compensation towards the relevant recovery costs incurred by the supplier as a consequence of late payment.

² OJ No. L107, 30.4.1996, p.4

(2) The supplier shall not be required to adduce evidence of having incurred the relevant recovery costs referred to in paragraph (1).

Amendment of Prompt Payment of Accounts Act 1997.

10. The Prompt Payment of Accounts Act 1997 (No. 31 of 1997) is amended by repealing sections 4 to 11.

Transitional provisions.

11. Sections 4 to 11 of the Prompt Payment of Accounts Act 1997 shall continue to apply to a contract for the supply of goods and services to which that Act applies made before, and still in force after, the commencement of these Regulations notwithstanding the repeal of those sections by Regulation 10.

SCHEDULE Amount of compensation payable under Regulation 9

Regulation 9

Amount of late payment

Compensation

Not exceeding €1000

€40

Exceeding €1000 but not exceeding €10,000

€70

Exceeding €10,000

€100

Given under my Official Seal

This 26th day of July 2002



Mary Harney

Minister for Enterprise, Trade and Employment

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to give legal effect to Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.

The Regulations will, with some exceptions, apply to commercial transactions in both the public and private sectors and amend the Prompt Payment of Accounts Act 1997.

The Regulations provide that interest shall be payable in respect of a late payment. In addition, it will be an implied term of every contract that interest is payable if debts are not paid on time. A payment is regarded as late when 30 days have elapsed unless an alternative payment period is specified in an agreed contract. The interest rate chargeable for late payment is the European Central Bank main refinancing rate plus 7 percentage points unless otherwise agreed.

The Regulations provide that; compensation may be claimed for debt recovery costs, the use of terms that are grossly unfair may be unenforceable and such terms may be challenged in Court. Grossly unfair trading terms may also be challenged by organisations representing small and medium sized enterprises.

The Regulations come into effect on 7 August 2002.

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