



Commissioner Mrs. Elżbieta Bieńkowska
European Commission
**Directorate-General Internal Market, Industry,
Entrepreneurship and SMEs**

The Hague, 25 June 2018
Our reference: RK/HvS/18-007

RE: ECMA CALLS THE COMMISSION TO ACTION TO COMBAT LATE PAYMENTS

Dear Mrs. Bieńkowska,

The entire European economy is negatively affected by late payment. Unfortunately this is also the case for many companies in the folding carton industry which are supplying cartonboard packaging solutions to their customers (mainly brand owners and retail). For many years now our industry had to face increasing payment terms. Although the initiatives to reduce these payment terms are very much appreciated, so far the effect has been marginal.

By this letter we would like to express our concerns and call on the European Commission to take further action to combat excessive payment terms.

Late Payment Directive 2011/7/EU

To protect European businesses, particularly SMEs, against late payment, the EU adopted Directive 2011/7/EU on combating late payment in commercial transactions in February 2011 (Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (hereafter 'the Directive')). On 28 August 2016 the Commission published a report of the Commission on the implementation of the Directive (hereafter 'the report').

Objectives Late Payment Directive

The specific objectives of the Directive are:

- To provide creditors with timely payments and measures that enable them to fully and effectively exercise their rights when paid late
- To confront debtors with strict measures that discourage them from paying late or from establishing excessively long contractual payment terms

The Directive also pursues the following general objectives:

- To facilitate the functioning of the internal market by streamlining payment practices across the EU
- To develop a legal and business environment supportive of timely payments in commercial transactions in order to facilitate access to finance for SMEs

Late Payment: Part of our Business?

ECMA has noticed that the terms of payment in its industry are still increasing in spite of the EU Late Payment Directive and specific national measures. This is being supported by the report, which stated that: *'Approximately half of all creditors do not exercise their rights to claim late payment interest, compensation and recovery costs as provided for by the Directive for fear of damaging their commercial relationships.'*

The external evaluation also revealed that many SMEs continue to accept long payment terms imposed by larger companies for the same reason. This is an inherent aspect of business culture brought about by the different position 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.' Some companies have also proven to be able to bypass the sometimes more strict national measures, and have been able to enforce payment terms on their suppliers exceeding to 180 days, or even worse. Unfortunately, this is not an exception in our industry.





Tenders

Especially worrying are some of the tenders to which our members are invited, which stipulate (impose) before entering payment terms exceeding the general rule of maximum 60 calendar days. Companies entering the tender will have to agree first with the terms and conditions (which are non-negotiable), including longer payment terms, before even having the right to participate in the tender process and having the opportunity to win the business. In such tenders parties do not 'expressly agree' to longer payment terms, since in practice they are simply imposed on suppliers by their customers ('take it or leave it').

Moreover, in such tenders there is no room for parties to freely take into account the 'specific circumstances' as prescribed by the Directive, which could perhaps require more extensive payment terms. There is no way parties are discussing whether or not there are circumstances which could make such extensive payment terms 'objectively justified in the light of the particular nature or features of the contract' to extent the payment term and hence whether an extension of the payment period of 60 calendar days would be 'grossly unfair to the creditor'. And in most of not all cases an objective justification for extension seems to be absent.

This means the whole tender process is violating the general rule that business-to-business contractual payment periods should be limited to 60 calendar days, and does not fulfil the two cumulative requirements set by the Directive for a deviation from this general rule: (i) express agreement and (ii) the existence of an objective justification.

Evaluation of the Late Payment Directive by the Commission

The report also acknowledges that: *'Because the Directive maintains a certain amount of flexibility in business to business transactions, this is being exploited in a number of cases by larger companies that take advantage of their stronger market position by dictating often unfair contractual terms to smaller suppliers. Furthermore, (...), in the event of late payment smaller companies do not exercise their rights for fear of damaging the commercial relationship.'* The report also mentions that: *'The evaluation indicated that stakeholders need clarity on how to interpret several key concepts of the Directive such as "grossly unfair", "expressly", and "objectively justified in the light of the particular nature or features of the contract." The starting point in the calculation of payment periods was also considered unclear.'*

With the foreseen rise of interest rates this situation cannot be expected to continue. Individual companies and our industry as a whole are being seriously threatened by the (excessive) payment terms imposed on our industry by some customers. Therefore ECMA calls on the European Commission to take action against the excessive payment terms which are threatening our industry.

Sincerely yours,

Hans van Schaik
Managing Director ECMA

About ECMA

ECMA, the European Carton Makers Association, is the official organisation for carton businesses, national carton associations and suppliers to the carton industry. ECMA provides the European folding carton industry a dynamic business network. With its seat in The Hague, The Netherlands, and an office in Brussels, ECMA represents around 500 carton producers in nearly all countries in the European Economic Area. ECMA members account for around 70% of the total carton market volume in Europe, and a current workforce of about 45.000 people.

