

European Commission
GROW Unit A2 “SMEs

17 March 2023

The Danish Chamber of Commerce’s consultation response regarding the Commissions call for evidence on the revision of the Late Payment Directive

The Danish Chamber of Commerce welcomes the opportunity offered by the European Commission to provide comments on the Commissions call for evidence (“*Call for Evidence*”) on the revision of the Late Payment Directive published on 12 January 2023.

General remarks

The Danish Chamber of Commerce strongly believe that all companies, regardless of size, should respect the contractual terms they have agreed to with their contractual partners, including ensuring payment in accordance with agreed payment terms.

The Danish Chamber of Commerce also strongly believe in the freedom of contract being the cornerstone of B2B relationship in the EU market economy and that companies should be able to design contracts that best suit their needs. A point that the European Commission itself has made on previous occasions.

It is our firm belief that the freedom of contract is the basis for a healthy and strong competition in the internal market, which is imperative for European companies’ ability to compete internationally. At the same time, the internal market and increased competitiveness are a prerequisite for growth and job creation in member states and the EU. It is therefore crucial that the EU's internal market works as efficiently as possible with a minimum of barriers.

Regulating European companies’ ability to freely design contracts that best suit their needs, is a move in the wrong direction towards protectionism and national barriers, and thus less trade.

The Call for Evidence makes reference to the statement that “*1 in 4 bankruptcies are due to invoices not being paid on time*”. The statement was also included in the FIT FOR FUTURE Platform Opinion from December 2021, referring to the EU Commission ‘SME Strategy’, 2020. While there are undoubtedly several reasons why companies go bankrupt, the Danish Chamber of Commerce has been unable to find the origin or any other documentation supporting this statement.

Most B2B-transactions are based on good, solid, long-term relationships, where trust is a key factor and where contract terms, including payment terms, are respected. The EU market economy has no need for the adoption of mandatory European regulation in the field of payment terms.

The Danish Chamber of Commerce is therefore very concerned that the Commission is open to propose mandatory measures which de facto could undermine the fundamental principle of the freedom of contract and consequently, a free market. The Danish Chamber of Commerce is furthermore unconvinced about the need to further regulate B2B transactions.

The Danish Chamber of Commerce acknowledge that there are situations where companies do not act in an optimal way, but the answer to “unfair behaviour” in individual cases is not more legislation in all cases. Contract regulation and introduction of complex schemes will only lead to increased administrative and financial burdens for European companies.

Existing law, including general competition law and contract law – and even the existing rules of the late payment directive, if enforced – addresses many of the issues raised in the Call of Evidence. The Danish Chamber of Commerce is worried that increased regulation may have unwanted negative consequences on contractual freedom and make an otherwise well-functioning market more rigid.

Freedom of contract provides the contracting parties with a great extent of flexibility, which is especially important in a time of crisis. Limiting contractual freedom, by e.g., imposing maximum payment terms, risks aggravating a crisis, as companies with financial difficulties for whatever reason, e.g., Covid-19, high energy prices, inflation and/or rising interest rates, will no longer be able to agree to a credit from its suppliers.

If the EU introduces legislation, according to which European companies are subject to "stricter" contractual terms, including payment deadlines, than non-European companies, it can be an incentive for both European and non-European companies to contract with non-European suppliers who is not subject to the "stricter" EU rules. Consequently, a market could be created where it is more attractive to contract with non-European companies than with European companies.

The Danish Chamber of Commerce supports initiatives that will improve cross border trade and the general focus of the European Commission on providing an appropriate framework for efficient B2B-transactions. As such, the Danish Chamber of Commerce can support the establishment of a code of conduct with the purpose of discussing concrete actions to improve conditions for small and medium-sized companies, as well as address concerns that may exist in specific markets, and the use of mediation to deal with payments disputes faster, while protecting business relationships.

The Danish Chamber of Commerce therefore encourage the European Commission to:

- Not introduce legislation that restricts the contractual freedom of European companies as regards payment terms.
- Not introduce legislation that allows for the use of anonymous complaints, with is contrary to basic legal principles.

- Thoroughly assess and analyse whether existing legislation in the EU that can be used to address the issues mentioned in the Call for Evidence (e.g., the rules of abuse of dominant position and ordinary contract).
- Thoroughly assess and analyse whether existing legal action works effectively in the Member States, that have introduced rules in the field.

Specific remarks

Re. impact of maximum payment terms in B2B transactions

Contrary to payments in G2B-transactions, where the late payment directive sets a fixed maximum payment term of 30 days (with few exemptions), the late payment directive does not fix a maximum payment term in B2B-transactions, but only a “reference” of 30 days.

In the Call for Evidence, the Commission concludes that this lack of a maximum payment term in B2B-transactions, has resulted in excessively long payment terms, imposed on weaker or smaller economic operators by larger companies, and that by setting up excessively or unfairly long payment terms, debtors can easily circumvent the obligation of paying on time. The Danish Chamber of Commerce strongly disagree with this the conclusion.

Firstly, according to the European Payment Report 2020, both SME’s and large corporations, has been asked to accept longer payment terms than they feel comfortable with, from large/multinational corporations, SMEs and public sector companies. As such, there appear to be very little difference between the size of the companies asking for longer payment terms or the size of companies being asked.

Secondly, if legislative maximum payment terms would solve the issue of long payment terms and late payment – as concluded in the Call for Evidence – there should be no issue with long payment terms or delayed payment in B2G-transactions, which, looking at the data provided by the European Payment Reports, is clearly not the case.

The conclusion based on the findings of the European Payment Reports would then be, that the lack of maximum payments terms, has not resulted in excessively long or unfair payment terms – or payment delays.

According to the European Payment Report 2022, the payment deadlines in B2B transactions are going down, from an average of 46 days in 2020, to 40 days in 2021 and 39 days in 2022. This despite the economic uncertainty of the past few years.

On this basis, the Danish Chamber of Commerce do not see a documented general need for fixed maximum payment terms in B2B transactions.

Payment terms constitute one of the parameters on which the companies compete. Legislation imposing maximum payments terms in B2B transactions not only significantly limits the compa-

nies' freedom of contract, but also involves a latent risk to the competitiveness of European companies. Fixed maximum payment terms also risk aggravating a crisis-situation, as companies with financial difficulties for whatever reason, e.g., Covid-19, high energy prices, inflation and/or rising interest rates, will be unable to negotiate longer payment terms with its willing suppliers, risking more companies going bankrupt or needing government financial assistance (where available).

The importance of contractual freedom in a crisis, is highlighted in the European Payment Report 2022, where 58% of the respondents answered that due to inflation, they were finding it increasingly difficult to pay their suppliers on time. In 2021, 28 % of SMEs and 21% of the large corporations had asked their suppliers to give them longer than normal payment terms in response to the Covid-19 crises. In 2020 and 2021, challenges to debtors' liquidity due to the impact of Covid-19, debtors' financial difficulties and the risk of a pan-European recession where the highest-ranking reasons facing customers paying on time and in full, in the coming 12 months. Intentional ignorance was ranked 4th in 2020 and 7th in 2021.

The same trend is shown when asking about the main causes of late payment of your own customers, where the European average believing intentional late payment to be the cause, has gone down from 63% in 2016 to 50% in 2019, noting however that debtors in financial difficulties is the highest-ranking cause of late payment of own customers in that 4-year period, going from 72% in 2016 to 54% in 2019.

The Danish Chamber of Commerce further believe that imposing maximum payment terms in B2B-transactins by means of a directive risk resulting in significant harm to the internal market. Member states will most likely implement very differently creating situations where a company in member state A is in competition with a company from another member state B (which may have less strict rules than member state A) risks be rejected in favour of the company from member state B, because that company may offer more attractive payment terms. Whilst this cherry-picking effect may be solved by choosing regulation instead of a directive, it does not solve the issue to competition with companies from third countries.

If the EU introduces legislation, according to which European companies are subject to "stricter" contractual terms, including payment deadlines, than non-European companies, it can be an incentive for both European and non-European companies to contract with non-European suppliers who is not subject the "stricter" EU rules. Consequently, a market could be created where it is much more attractive to contract with non-European companies than with European companies.

[Re. the definition of “unfair” practices or clauses](#)

The Danish Chamber of Commerce believe that making a clear and precise definition of such an unclear concept as an “unfair” practice or clause will be extremely difficult, as there is a fine line between fair and unfair practices in almost all transactions. Making a general definition of what is “unfair” that can apply to all business relationships across all sectors, is very nearly impossible as there are many markets and sub-markets that work very differently. As such, extreme caution should be taken before practices that are a normal part of cooperation between trading partners are labelled as “unfair”.

Many trading practices may, under certain circumstances and in a specific relationship, potentially be deemed unfair, also under existing law, whereas the exact same trading practice may, under slightly different circumstances, or under the same circumstances but with different contracting parties be deemed perfectly fair.

Consequently, not many trading practice can be said to be unfair by default, and the assessment between fair and unfair must therefore be done on a case-by-case basis. Introducing legislation would only hinder certain trading practices used by businesses at large, to the detriment of the contractual freedom and economic viability of the internal market.

[Re. clarity concerning flat fee compensation \(article 6\)](#)

As reflected in the Call for Evidence, this European Court of Justice has clarified this issue, in its recent ruling (C-585/20). The Danish Chamber of Commerce greatly support the incorporation of recent case law developments in an upcoming revision of the late payment directive.

[Re. clarity concerning verification procedures](#)

As reflected in the Call for Evidence, this European Court of Justice has clarified this issue, in its recent ruling (C-585/20). The Danish Chamber of Commerce greatly support the incorporation of recent case law developments in an upcoming revision of the late payment directive.

[Re. lack of “tools” for monitoring and enforcing compliance](#)

The Danish Chamber of Commerce acknowledge that there are situations where companies do not act in an optimal way, but the answer to “unfair behaviour” in individual cases is not more legislation in all cases. Contract regulation and introduction of complex schemes will only lead to increased administrative and financial burdens for European companies.

The Danish Chamber of Commerce supports the Commissions point of enforcing the existing rules of the late payment directive. According to the European Payment Report 2020, 66% never or only sometimes make use of the enforcement options in late payment directive, while 10% do not even know the rules exist.

If there are illegalities in relation to the dominant position or other competitive problems, specific measures must be taken to ensure optimal conditions for competition. However, the Danish Chamber of Commerce firmly believe, that any imbalances in a commercial practice between two companies must be treated based on existing rules, including general competition law and contract law, and even the existing rules of the late payment directive. As such, the possibilities provided of existing legislation should be fully utilized before considering introducing new regulation.

[Re. lack of suitable means of redress](#)

Firstly, the Danish Chamber of Commerce considers it unlikely, that it will be possible to introduce legislation which will ensure that any legal action against a business partner – be it a creditor or debtor, supplier, or byer, small or large – will not simultaneously entail a risk of damaging an existing business relationship.

Secondly, the Danish Chamber of Commerce firmly believe, that the possibilities provided by existing legislation, including general competition law, contract law, and even the existing rules of the late payment directive, may adequately be used to addresses many of the issues raised in the Call of Evidence.

As mentioned above and according to the European Payment Report 2020, 66% never or only sometimes make use of the enforcement options in late payment directive, while 10% do not even know the rules exist. As such, the Danish Chamber of Commerce believe that a first step should be to ensure that companies know the enforcement mechanisms of the late payment directive and second, to ensure that companies use the enforcement mechanisms of the late payment directive. These two steps should be carried out before any considerations is made towards the introduction of new legislation, especially legislation limiting the contractual freedom of European companies.

The Danish Chamber of Commerce do not support new legislation which allows for the use of anonymous complaints, as this is contrary to basic legal principles. While the possibility to submit anonymous complaints may have a positive effect on the will of the weaker party to complain, the Commission should be careful not to introduce measures that will significantly reduce the due process of the parties to a contract.

The Danish Chamber of Commerce can support the establishment of a code of conduct with the purpose of discussing concrete actions to improve conditions for small and medium-sized companies, as well as address concerns that may exist in specific markets, and the use of mediation to deal with payments disputes faster, while protecting business relationships.

[Re. asymmetry of bargaining power between large and smaller operators](#)

The Danish Chamber of Commerce believe that the entire starting point for B2B-transactions, is a "Trust Factor", which is completely neglected by the Call of Evidence.

Trust is a very basic element of all supply chains as it has far-reaching consequences if the trust is broken. If a company cheats another company in the supply chain, that will require a trust building that the Danish Chamber of Commerce do not believe can be remedied by any legislative initiative that the EU may think to include in the late payment directive.

Companies that do not deal with each other in good faith and ensures a profit for both usually have short interactions.

According to the European Payment Report 2022, 67% (against 65% in 2021 and 73% in 2020) of the respondents agreed with the statement, that payment paid on time is critical to building and maintaining trust with suppliers and partners. Data further show, that both SMEs and large corporations' benefit from the flexibility provided by contractual freedom.

Business power and the fact that companies have different negotiating positions is a natural consequence of the competition in a market. A condition that exists in all supply chains. Likewise, it is natural that there will be some degree of conflicting interests, both between different links in the supply chain, but also between different actors in the same link in the chain.

The Danish Chamber of Commerce do not believe that it is possible to legislatively change the asymmetry and power balance between small and large companies without simultaneously risking the creation of a larger problem. A very large company will often have several advantages over a small company. This is due, for example, to economies of scale, greater bargaining power, products that other companies depend on, international sales companies, better sourcing opportunities, etc. In an open and competitive market, such asymmetry is a naturally occurring phenomenon.

The Danish Chamber of Commerce believe that existing rules in e.g., contract law and competition law, can be used to address any unjustified misuse of the asymmetry and power balance between contracting parties. The Danish Chamber of Commerce however do not believe that any such issues can successfully be solved by generally restricting the companies' contractual freedom or by distorting competition.

The fact is, that it is not possible to neutralize one distortion of competition by creating another.

[Re. pervasive culture of bad payment because prompt payment is not incentivised or rewarded](#)

The Danish Chamber of Commerce believe that most contracting parties, prefer to build good, long-term relationships with their business partners, be it suppliers or customers. This is particularly the case with suppliers, as it ensures stable supplies, which is an essential parameter to any business customer. The Danish Chamber of Commerce is therefore puzzled that the Call for Evidence leaves the impression that the starting point for B2B-relationships is the opposite.

The Danish Chamber of Commerce suggests that the Commission investigate the existence of financing opportunities which may benefit small- and medium sized sellers, e.g., the possibility of Supply Chain Finance (SCF). It is our understanding, that the Directorate-General for Financial Stability, Financial Services and Capital Markets Union has carried our work on this issue, for the purpose of expanding the use of, inter alia, SCF to small- and medium sized companies across the EU.

[Re. the practical need for EU regulation](#)

The Danish Chamber of Commerce do not believe that there is a general need for new EU regulation on this issue.

No data has shown or documented bad faith or will to be the reasons for late payments, and the Danish Chamber of Commerce fear, that introducing new legislation on this issue, will not only hamper the contractual freedom of European companies, but also risk resulting in significant damage to the competitiveness of European companies.

The Danish Chamber of Commerce encourage the European Commission to thoroughly assess and analyse the consequences of such existing legislation in member states that have introduced rules in this field, as well as thoroughly assess and analyse whether existing legislation in the EU can be used to address the issues mentioned in the Call for Evidence (e.g., the rules of abuse of dominant position and ordinary contract).

The Danish Chamber of Commerce supports initiatives that will improve cross border trade and the general focus of the European Commission on providing an appropriate framework for efficient B2B-transactions. As such, the Danish Chamber of Commerce can support the establishment of a code of conduct with the purpose of discussing concrete actions to improve conditions for small and medium-sized companies, as well as address concerns that may exist in specific markets, and the use of mediation to deal with payments disputes faster, while protecting business relationships.

Re. objectives and policy options

The Danish Chamber of Commerce do not believe that there is a documented or generally sufficient argumentation for the appropriateness of legislative initiatives, and that these initiatives risk doing more harm than good. Not only to the contractual freedom or competitiveness of the European companies, but also to the reputation of the EU as a base for good and sound business.

The Danish Chamber of Commerce believe that strengthening the knowledge and abilities of small- and medium sized European companies, will improve their competitiveness.

The Danish Chamber of Commerce supports the possibility of making mediation schemes more widespread, but do not believe, that administrative penalties should be introduced.

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The Danish Chamber of Commerce is of course available if there are any questions about the answers given in the consultation.

Best regards,

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The Danish Chamber of Commerce