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***Directive proposal of the European Commission
published on 8 April 2009
on combating late payment in commercial
transactions***

[COM(2009) 126 final]

***Joint opinion
of the German social insurance
umbrella organisations***

presented on 10 December 2009

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The European representation of the German social security system

The German social security system has had a joint European representation in Brussels since 1993, acting on behalf of the branches of the statutory pension, health and accident insurance system. The body is responsible for informing the national leading organisations of all relevant developments in the process of European integration and maintaining and extending contact with the European institutions. It also ensures that the expert knowledge of the German social security organisations and the principles of solidarity and independence of the state that they uphold are effectively included in the formation of common policy.

Website: www.deutsche-sozialversicherung.de

1. General Remarks

The Directive proposal of the European Commission published on 8 April 2009 on combating late payment in commercial transactions (COM(2009) 126 final) aims to improve the efficiency of mechanisms for late payment. Affected by the scope of the Directive are so-called “public authorities”, respectively “contracting authority” as defined by the Directive 2004/18/EC, which includes the statutory health-, pensions-, occupational disease and accident insurance organisations.

A central aspect of the Directive proposal is the obligation under Article 5 for public authorities to settle invoices within 30 days of receipt. In the case that the public authority fails to pay within this time period, it is obliged to pay the lost interest (Article 3), compensation for recovery costs (Article 4) and a lump sum compensation equal to 5% of the amount due (Article 5). Article 5 does not apply to private undertakings.

In general, the German Social Security Umbrella Organisations welcome the European Commission’s initiative to improve the functioning of the internal market by taking action to strengthen payment procedures, as long as the rules apply to all. We do not share the Commission’s opinion that public authorities face lighter financial constraints than private undertakings and therefore are more easily able to fulfill the terms of payments (cf. Recital 17 of the Directive proposal). We note that the social insurers have the obligation to manage responsibly and economically the contributions they receive from their members. This requires that invoices received e.g., from care providers, are thoroughly examined in order to avoid overcharging and abuse of the contributions paid by the statutory insured.

2. Detailed remarks

Flat rate compensation for recovery costs, Art. 4, Para. 1

Article 4 states that creditors have the legal right to claim compensation for costs in addition to lost interest. This compensation should be paid in the form of a lump sum equal to: 40 euros for a debt of less as 1,000 euros and 70 euros for a debt of 1,000-10,000 euros; for a debt of more than 10,000 euros, 1% of the sum, on which lost interest is also charged, has to be paid – with no defined ceiling.

The German Social Security Umbrella Organisations view the flat rate compensation foreseen in Article 4 as acceptable, as long as it is seen as an instrument for the alleviation of the burden of proof and as long as this compensation reflects the true damage. It is however not justified that flat rate compensations are graduated, since recovery costs are independent of the amount claimed. Further, the level of the proposed Flat rate compensation is not justified if one considers that the European Commission itself acts on the assumption that recovery costs are around 20 euro (see page 38 of the accompanying

impact assessment report of the European Commission from 8 April 2009: Sec(2009) 315).

To avoid that the flat rate compensation for recovery costs is seen as a punitive tool, the German Social Security Umbrella Organisations call for the rate referred to in Article 4, Para. 1a to be fixed at 20 euros, unless the creditor is able to prove that the costs were higher. It should also be possible for the debtor to provide evidence that the actual cost to the creditor is less than this sum and reduce the compensation.

Lump sum compensation equal to 5% of the amount due, Article 5

According to Article 5 of the commission proposal, public authorities will in general be obliged to pay invoices for commercial transactions leading to the delivery of goods or the provision of services within 30 days. Following expiry of this period, the creditor can claim compensation to the amount of 5% of the sum due in addition to any interest accrued and compensation for recovery costs. While compensation under Article 5 is compulsory for public authorities it can be waived by private enterprises.

The German Social Security Umbrella Organisations do not dispute the fact that public authorities above all should behave in an exemplary fashion and therefore should aim to settle outstanding accounts on time. However, we reject the creation of a specific law aimed exclusively at public authorities since this is discriminatory. In addition, we view as arbitrary the differentiation based on whether it is more or less easy for certain groups of debtors to fulfill their contractual obligations. The same rules have to apply to both private and public enterprises.¹ We point out further that the need for such a law is not empirically proven. The low numbers presented in the impact assessment document of the European Commission are not significant, in addition to which comparing tables 3 and 4 on page 46 of the report (Sec(2009) 315, Annex 1 8.1 lit. b) there are more public authorities tabled as "never" causing problems by late payment than other authorities. We note also that the circumstances of late payments, recorded during the consultation procedure, are not accessible.²

Further, the German Social Security Umbrella Organisations doubt whether the Directive proposal will increase the efficiency of business: if the reason for late payment is the debtor's lack of funds, then increased sanctions will not lead to more punctual payment. In addition, the European Commission refers in the impact assessment (see Sec(2009) 315, page 9) to the fact that some creditors (in particular SMEs) fear that customers would be lost if they claim against them.

¹ See also the decision of the Federal Council of Germany from 10. July 2009 – BR Drucksache 385/09), available in German under:

[http://www.bundesrat.de/cln_099/SharedDocs/Drucksachen/2009/0301-400/385-09_28B_29,templateId=raw,property=publicationFile.pdf/385-09\(B\).pdf](http://www.bundesrat.de/cln_099/SharedDocs/Drucksachen/2009/0301-400/385-09_28B_29,templateId=raw,property=publicationFile.pdf/385-09(B).pdf)

² Consultation by the European Commission from 29 May 2008 to 31 August 2008 on Your Voice on Europa. 510 Responses were received and should build the basis for the impact assessment. Consultation results under: http://ec.europa.eu/enterprise/regulation/late_payments/index.htm

The German Social Security Umbrella Organisations want to stress that the social security institutions in particular are legally obliged to handle the contributions of their members responsibly and economically. This implies an exact examination of the invoices received from service providers, in order to avoid overcharging and the abuse of insurance funds. The social security insurers are further legally obliged to obtain the optimum return on the contributions received from their members. However, the liquidity of the social insurers also depends at times on external circumstances. Since the establishment of the health fund in the German statutory health insurance the solvency of the individual health insurance companies is dependent temporarily also on exogenous factors, e.g. the level of the basic assessment (Grundlagenbescheid). Therefore, cutbacks in payments out of the health funds or unexpected payments into the health funds can cause sporadic obstacles to payments by individual health insurance companies. Despite these restrictions payments within 30 days or less are the norm in business relations with most contract partners and health service providers (hospitals, nursing facilities, physicians or pharmacists). This is the case for the vast majority of statutory health insurance companies and for legal accident insurance. In addition, rehabilitation benefits paid by old age pension insurances are in principle completed within 30 days.

Finally, the German Social Security Umbrella Organisations reject the proposal for a compulsory lump sum compensation equal to 5% of the due amount to be paid by public authorities under Article 5 of the draft Directive. The sanctioning of payment delays by public authorities only cannot be justified from an objective point of view. Since this lump sum compensation is additional to recuperation of lost interest and recovery costs it has to be considered as a deterrent and not as a damage adjustment. Sanctions aimed at punishing or deterring are not consistent with the objective of this proposal which is damage reconciliation. Further, it is about avoiding the “*Americanisation* of European legislation“: punitive compensation claims should not be supported in the European Union. In this context, the German Social Security Umbrella Organisations refers to the fact that the European Commission has elsewhere rejected the principle of punitive compensation.³ Contracts entered into by social insurers are already subject to civil law; under this law debtors are already entitled to claims for damages and lost interest due to delayed payment. In addition, it should be remembered that high interest payments represent further expenditures, which would only add to the pressure already felt by solidarity based systems of social protection.

The German Social Security Umbrella Organisations call strongly for the deletion of Article 5 of the Commission’s proposal, or at least for the exclusion of the social insurers from its scope.

³ Green paper of the European Commission On Consumer Collective Redress [COM(2008)794]; Page 7: “At the same time, the necessary safeguards have to be taken not to burden business with unmeritorious claims, punitive damages, or excessive costs.”

This opinion has the support of all members of the Deutsche Sozialversicherung Arbeitsgemeinschaft Europa e.V.:

- AOK-Bundesverband, Berlin**
- BKK Bundesverband, Essen**
- Deutsche Gesetzliche Unfallversicherung, Berlin**
- Deutsche Rentenversicherung Bund, Berlin**
- Gemeinsame Vertretung der Innungskrankenkassen e.V., Berlin**
- Knappschaft, Bochum**
- Spitzenverband der landwirtschaftlichen Sozialversicherung, Kassel**
- Verband der Ersatzkassen, Berlin**