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# How to Recover Interest when Invoices aren’t Paid

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# HOW TO RECOVER INTEREST WHEN INVOICES AREN'T PAID - USE THE EUROPEAN COMMUNITIES (LATE PAYMENT IN COMMERCIAL TRANSACTIONS) REGULATIONS

The credit crunch has made it more difficult for suppliers to recover outstanding invoices but many are unfamiliar with a very useful provision which has just celebrated its eighth birthday and reinforces why, now more than ever, suppliers should review their terms and conditions. An implied term is inserted into every commercial transaction whereby penalty interest will become payable if payments for the commercial transaction are not made within 30 days, unless otherwise specified in a contract. The Regulations implement European Directive 2000/35/EC combating late payment in commercial transactions.

**Application**

The European Communities (Late Payment in Commercial Transactions) Regulations 2002 (the "Regulations") apply to commercial transactions in both the public and private sectors. They apply to all firms, large and small, and to all individuals acting in a professional capacity and all organisations engaged in commercial transactions. The Regulations do not, however, apply to the following:

- contracts made before 7 August 2002
- claims for late payment interest of less than €5.00,
- transactions with consumers, or
- debts that are subject to other laws e.g. insolvency proceedings.

Of the above exclusions, perhaps the most important is the exclusion of transactions with consumers. Consumer is defined in the Regulations as any natural person (not a body corporate) acting outside his or her trade, business or profession.

**Effect**

The Regulations provide that it is an implied term of every commercial transaction that interest is payable in respect of a late payment. Unless an alternative payment period is specified in an agreed contract a payment is regarded as late when 30 days have elapsed from;

1. The date of receipt by the purchaser of an invoice for payment; or

2. The date of receipt of the goods or services where:

   - the date of receipt of the invoice is uncertain; or

   - the purchaser receives the invoice before the delivery of the goods

3. In cases where the parties have agreed a procedure for acceptance or verification of the goods, the payment date will be 30 days after this process has been completed (if this occurs after the date of receipt of an invoice).

This late payment interest is payable for the period beginning on the day after this prescribed payment date and ending on the date on which payment of the amount due is actually made without the necessity for a written reminder.

The supplier is entitled to this late payment interest only to the extent that the supplier has fulfilled its contractual and legal obligations and has not received payment due before the prescribed payment date, unless the purchaser is not responsible for this late payment.

**Rate of Interest**

The rate of late payment interest is high, being the sum of the European Central Bank Main Refinancing Operating Rate plus 7 percentage points. The current rate therefore would be 8.00% p.a. calculated on a daily basis. Unless the parties have contracted for a different interest rate, it is the interest rate that is in force on the payment date that will apply in relation to the late payment.

**Recovery Costs**

The Regulations also provide that it is an implied term of every commercial transaction, that when late payment interest becomes payable, suppliers are entitled, in addition to the late payment interest, to compensation towards the recovery costs incurred as a consequence of the late payment itself. Maximum amounts have been set in this regard being €40 for debts of up to €1,000, €70 for debts over €1,000 up to €10,000 and €100 for debts over €10,000. The supplier is not required to adduce evidence of having incurred these recovery costs.

**Grossly Unfair Terms**

Where a contract purports to vary or waive these payment terms and the supplier considers this variation or waiver to be grossly unfair, the supplier may apply to the Circuit Court or to an arbitrator for an order that the terms concerned are grossly unfair to the supplier and that the terms are unenforceable. The Circuit Court or Arbitrator may vary the terms by substituting for those terms a relevant payment date in accordance with the Regulations or such other terms as it appears to the Court to be appropriate. Criteria for testing whether terms are grossly unfair are specified in the regulations and include:

- good commercial practice;
- the nature of the goods or services concerned;
- the bargaining positions of the parties;
- if the supplier received any inducement to agree to the term in dispute;
- if the purchaser has any objective reason to deviate from normal payment terms or interest rate;

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).

It is important to note that this right of referral to or Circuit Court or to an arbitrator is a right of the supplier only. A purchaser does not have the same right of reference.

**Comments**

A number of very important issues arise from these Regulations:

Suppliers have a legal right to charge interest and/or compensation for recovery costs to their late payers but it is not compulsory to do so. A supplier is free to decide whether or not to charge interest and/or compensation to some or all of its late payers. This applies equally to the public and private sector. Purchasers should therefore be aware that while a supplier need not (and in most cases probably will not) charge interest under the Regulations there is potential for suppliers to rely on the Regulations and insist on late payment interest and compensation towards recovery costs.

The Regulations apply only where there is no contract in place or the contract is silent on payment terms or where payment terms contained in a contract are not met.

The Regulations could cause problems for companies in relation to multiple invoicing within a month. Under the Regulations each invoice would become payable within 30 days. This could lead to the situation whereby a purchaser could have a large number of payment deadlines with the same supplier and could find itself having to issue a number of cheques to satisfy each invoice. To simplify matters, companies should try to agree terms (in writing) whereby the 30 day payment date should apply from the end of the month of delivery of goods or date of invoice. This would result in just one payment date in each month.

Every business should be aware of the effect of the Regulations on it both in its capacity as a supplier and as a purchaser. It may be advisable to:

- review current payment practices. You should make sure contracts are put in place wherever possible and that payment terms are agreed in advance with which both parties will be happy.
- in order to avoid court proceedings, to agree in advance how to deal with any disputes (e.g. agree to use an Arbitrator).
- agree a fair penalty interest rate for late payments and indicate the compensation which would be charged if you were to collect late payment interest. Both should be specified in writing in a contract.
- ensure that a system is put in place that will highlight unpaid debts before they become late and therefore start to accrue penalty interest.
- work out what the likely effect of this legislation will be on cash flow and to budget accordingly.

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