



STATUTORY INSTRUMENTS.

S.I. No. 580 of 2012



EUROPEAN COMMUNITIES (LATE PAYMENT IN COMMERCIAL
TRANSACTIONS) REGULATIONS 2012

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I, RICHARD BRUTON, Minister for Jobs, Enterprise, and Innovation, 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. 2011/7/EC of the European Parliament and of the Council of 23 February 2011¹, 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 2012.

(2) These Regulations come into operation on 16 March 2013.

Interpretation

2. (1) In these Regulations—

“amount due” means the principal sum which should, on foot of a commercial transaction, have been paid within the contractual or statutory period of payment, including the applicable taxes, duties, levies or charges specified in the invoice or the equivalent request for payment, or provided for in the contract, relating to the said transaction;

“commercial transaction” means a transaction between undertakings, or between an undertaking and a public authority, which involves the delivery of goods, or the provision of services, for remuneration;

“contractual or statutory period of payment” means the period within which the purchaser is required, in accordance with the terms of the contract or by reason of statutory obligation, to make full payment to the supplier in respect of a commercial transaction;

“Directive” means Directive No. 2011/7/EC of the European Parliament and of the Council of 23 February 2011 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 payment not made within the contractual or statutory period of payment where—

¹OJ No. L48, 23.2.2011, p1.

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 15th January, 2013.

- (a) the supplier has fulfilled its contractual and legal obligations, and
- (b) the supplier has not received the amount due on time, unless the purchaser is not responsible for the delay.

“local authority” means a county council, a city council or a town council within the meaning of the Local Government Act 2001 (No. 37 of 2001);

“Minister” means the Minister for Jobs, Enterprise and Innovation;

“public authority” means—

- (a) government or other public administration, including public advisory bodies, at national, regional or local level,
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services, and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, under the control of a body or person falling within paragraph (a) or (b),

and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
- (vii) a company under the Companies Acts, 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,
 - (III) by a board or other body within the meaning of paragraph (vi), or
 - (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities,

but does not include any body when acting in a judicial or legislative capacity.

“purchaser” means—

- (a) an undertaking which contracts with a supplier for the delivery of goods or the provision of services to or on the direction of the undertaking, or
- (b) an undertaking (“the main contractor”) which—
 - (i) obtains from another undertaking goods to be delivered to or services to be provided to, or
 - (ii) contracts with another undertaking for that undertaking, on behalf of the main contractor, to deliver goods or provide services to,

an undertaking;

“reference rate” has the meaning assigned to it by Regulation 5;

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

- (a) subject to paragraph (d), 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, the date falling 30 calendar days after—
 - (i) subject to clause (II) of subparagraph (ii) and paragraph (c), the date of receipt by the purchaser of the invoice, or
 - (ii) the date of the delivery of the goods or the provision of the services where—
 - (I) the date of receipt of the invoice is uncertain, or
 - (II) the purchaser receives the invoice before the delivery of the goods or the provision of the 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 than or on the date on which such acceptance or verification takes place, the date falling 30 calendar days after the date on which such acceptance or verification takes place;
- (d) where the contract does specify the date for payment, such date, provided that where that date exceeds 60 calendar days from the date of

the delivery of the goods or the provision of the service, such date shall—

- (i) be expressly agreed in the contract, and
- (ii) not be grossly unfair, within the meaning of Regulation 6, to the supplier.

“statutory late payment interest” has the meaning assigned to it by Regulation 4(1);

“supplier” means an undertaking which provides goods or supplies 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) 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 16 March 2013,
- (b) transactions with consumers,
- (c) debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring,
- (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 (2)(d) does not prevent statutory 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,

whether 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.

Commercial transactions — implied term as to statutory 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, (in these Regulations referred to as “statutory late payment interest”) without the necessity of a reminder, on the amount outstanding under the contract concerned at the rate specified in Regulation 5.

(2) The supplier shall be entitled to statutory late payment interest on the said amount outstanding 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) A supplier shall be entitled to statutory 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 statutory late payment interest

5. (1) Unless otherwise specified in the contract concerned, the statutory 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 (in this Regulation referred to as “the reference rate”) and published in the Official Journal of the European Communities plus 8 percentage points.

(2) (a) The reference rate in force on 1 January 2013 shall apply for the period from the coming into operation of these Regulations and ending on 30 June 2013.

- (b) Subject to subparagraph (a), the reference rate in force on—

- (i) 1 January in a particular year shall apply for the period commencing on that date and ending on 30 June in that year, and
- (ii) 1 July in a particular year shall apply for the period commencing on that date and ending on 31 December in that year.

Grossly unfair terms — application by supplier to Circuit Court or arbitrator

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

- (a) in a case where the contract does not specify the date or period for payment, the relevant payment date, 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 for an order or, in accordance with Regulation 7, to an arbitrator for an award, under this Regulation.

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

- (a) that the term concerned is grossly unfair to the supplier,
- (b) that the term concerned is unenforceable,
- (c) varying the term by substituting for that term—
 - (i) the relevant payment date,
 - (ii) the provisions of Regulation 4, or
 - (iii) such other term as appears to the Court or the arbitrator 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 the arbitrator to be appropriate having regard to any loss, costs and expenses incurred by the supplier by reason of the term concerned,

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

(3) In making an order or an award under paragraph (2), a Court or an arbitrator, as the case may be, 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 to arbitrator for award under Regulation 6

7. (1) Where a supplier wishes to make an application under Regulation 6 to an arbitrator, he or she shall request in writing the agreement of the purchaser to the appointment of a named person to act as an arbitrator for the purposes of Regulation 6.

(2) 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, either such party may apply in writing to the President of the Law Society of Ireland to appoint a person to be arbitrator for the purposes of Regulation 6.

(3) The Arbitration Act 2010 (No. 1 of 2010) applies to an arbitration carried out under Regulation 6.

(4) The determination of an arbitrator in such an arbitration is binding on both parties save that, on a point of law, either party may appeal to the High Court.

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. 2003/361/EC of 06 May 2003 concerning the definition of small and medium-sized enterprises².

(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

²OJ No. L124, 20.5.2003, p. 36.

(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 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 representative body 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 statutory late payment interest becomes payable under Regulation 4, the supplier shall be entitled, without the necessity of a reminder, in addition to the statutory late payment interest, to the amount specified in the Schedule as compensation towards the relevant recovery costs incurred by the supplier as a consequence of late payment.

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

(3) The supplier shall, in addition to the fixed sum referred to in paragraph (1), be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the purchaser's late payment. This may include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency.

Revocation

10. Subject to Regulation 11, the European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S. I. No. 388 of 2002) are revoked with effect from 16 March 2013.

Transitional provisions

11. Notwithstanding the revocation of the European Communities (Late Payment in Commercial Transactions) Regulations 2002 by Regulation 10, those Regulations shall continue to apply to a contract for the provision of goods or services to which those Regulations apply which was made before, and is still in force after, the coming into operation of these Regulations.

Schedule

Amount of compensation payable under Regulation 9

Regulation 9

Not exceeding €1,000	€40
Exceeding €1000 but not exceeding €10,000	€70
Exceeding €10,000	€100



GIVEN under my Official Seal,
22 December 2012.

RICHARD BRUTON,
Minister for Jobs, Enterprise and Innovation.

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 2011/7/EC of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. That Directive repeals, with effect from 16 March 2013, an earlier Directive from 2000 (Directive 2000/35/EC) on combating late payment in commercial transactions.

The Regulations repeal, with effect from 16 March 2013, the European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. No. 388 of 2002) which transposed Directive 2000/35/EC).

The Key provisions in the Regulations are as follows:

The Regulations will apply to commercial transactions in both the public and private sectors.

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 8 percentage points unless otherwise agreed.

For business to business payments, the general deadline is 30 days unless otherwise stated in the contract. It is possible, if both parties agree to extend payment terms up to 60 days. The period may be extended beyond 60 days only if “expressly agreed” by the parties in the contract and provided that it is not grossly unfair to the supplier.

The standard deadline for public authorities to business payments is 30 days. Payment can be extended up to 60 days only if it is “expressly agreed” and justified in light of the nature or feature of the contract.

The supplier is also entitled to compensation costs from defaulting purchasers. Suppliers are entitled to charge a minimum of €40 in relation to expenses incurred as a result of the late payment and may also be able to claim any reasonable recovery costs incurred.

Where a contract provides for a verification or acceptance period, the Regulations provide that interest does not run until verification or acceptance has taken place.

Where payment is made by instalments, the Regulations provide that the late payment of an instalment will attract interest and compensation but only in respect of that instalment and not the whole contract price.

Any clause in a contract which seeks to exclude interest for late payment or compensation is held to be grossly unfair and the Regulations provide that such a clause is either unenforceable or gives a rise to a claim to damages.

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 16 March 2013.

The Regulations repeal the European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. No. 388 of 2002) from 16 March 2013.

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