SOME CONSIDERATIONS ON THE PAYMENT ORDER REGULATION

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Abstract

The delay of payments, or sometimes even their absence, has particularly negative effects on the activity of a company. Debt recovery is an activity that requires a lot of time, involves costs and causes lack of liquidity. In particular, small and medium-sized companies are deeply affected. They are obliged to resort to bank loans which increases operational costs or to delay payments which can bring them into insolvency.

Debt recovery is thus an important goal for the current legislator who should create an encouraging legal framework for the development of businesses.

The difference between the rules at national level had negative effects on the commercial relations within the European Union.

Therefore, the regulation of this framework was carried out in the last decades at the level of the European Union. The different approaches in the practice of the national courts led to the reform of this legislation.

This article aims to analyze the way in which the European regulation was transposed into the Romanian legislation and the possible problems or aspects worthy of being emphasized that appeared during this period.

Keywords: *commercial debts, delay of payments, EU law, civil procedure code, debt collection.*

1. Introduction

As the vast majority of contracts are known – civil or commercial – involve the obligation of one party to pay a sum of money to the other in return for the performance of an obligation which usually characterises the essence of that contract.

At the same time, most contracts are consensual acts in the sense that the law does not condition the appearance of legal effects on the realization of any special form or the execution of any material act.

Often, buyers or other contractors delay the payment of the sums of money corresponding to the purchased goods or services rendered. Non-payment has a severe impact on the trading partner.

In practice, two major hypotheses emerge that mark the cleavage between purely civil contracts or those concluded with consumers and those concluded between entrepreneurs.

In most of the states, the legislator intervened by adopting a special procedure for the debt collection[1]. As a rule, the procedure is found in the Code of Civil Procedure (art. 1405 *et seq.* from the French *Code de procédure civile* or art. 688 from German *Zivilprozessordnung*).

The difference between the rules at national level had negative effects on the commercial relations within the European Union.

2. The EU Regulation on late payments

Therefore, one of the most well-known regulations in the field of combating contractual non-performance was the Directive 2000/35/EC of the European Parliament and of the Council of June 29, 2000, on combating late payment in commercial transactions[2].

The issuance of the directive was motivated by the following arguments:

- Late payment is in reality a breach of contract which has been made financially attractive to debtors in most EU states by low interest rates on late payments and/or slow procedures for redress. A decisive change is essential to reverse this trend and to ensure that the costs of late payments are such as to discourage or, at least, to limit the late payment.
- Substantial administrative and financial burdens are placed on businesses as an outcome of excessive

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[1] See, on this topic, G. Boroi, M. Stancu, *Drept procesual civil*, Hamangiu Publishing House, Bucharest, 2020, p. 1034 *et seq*.

[2] See OJ L 200, 08.08.2000, 35-38.

payment periods and late payment. These difficulties constitute a major source of insolvencies threatening the survival of businesses especially the small and medium-sized enterprises.

- In this field, the regulation is very diverse in the European Union.
- As a major consequence the differences between payment rules and practices in the EU states can be considered as an impediment to the good functioning of the internal market (we must analyse by observing the art. 26 TFEU).

Therefore, the main goal of the Directive 2000/35/EC is to limit the abuse of freedom of contract to the „disadvantage of the creditor".

Two main hypotheses were taken into account:

- an agreement mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor,
- the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself.

Despite the good intentions of the authors of that directive some problems emerged.

One of this was related to the legal aspects regarding the recovery of the amount of money.

According to art. 5 para. (1) „member States shall ensure that an enforceable title can be obtained, irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, *provided that the debt or aspects of the procedure are not disputed*".

The same article permitted to the EU states that duty shall be carried out in conformity with their respective national legislation, regulations and administrative provisions.

Practically, the debtor could raise objections concerning the legal grounds of the claims and that attitude blocked the entire procedure.

The Directive 2000/35/EC was, therefore, a failure. The regulation had to be improved.

Finally, a new regulation was enacted and that is the Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating late payment in commercial transactions[3].

At this moment, the preamble was considerably extended in order to explain better the goals of the new directive.

The economic context was largely described.

According to the second point of the preamble „most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis whereby the supplier gives its client time to pay the invoice, as agreed between parties, as set out in the supplier's invoice or as laid down by law".

Given that situation we became aware that „many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult".

On the other hand, in its Communication of June 25, 2008 entitled „Think Small First" - A „Small Business Act" for Europe', the Commission highlighted that small and medium-sized enterprises' (SMEs) access to finance should be simplified and that a legal and business environment supportive of timely payments in commercial transactions should be settled.

It should be retained that public authorities have a special duty in this field. The criteria for the definition of SMEs are set out in Commission Recommendation 2003/361/EC of May 6, 2003 concerning the definition of micro, small and medium-sized enterprises.

The goal of the Directive 2011/7/EU was mainly the same. This does not regulate transactions with consumers, interest in connection with other payments, for instance payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance

[3] See OJ L 48, 23.02.2011, 1-10.

companies. More, the EU states can eliminate the debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.

However, the Directive 2011/7/EU regulate „all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings". The commercial transactions between main contractors and their suppliers and subcontractors are not exclude from the field of its application.

As the Directive 2000/35/EC did the Directive 2011/7/EU considers – we wonder if that would be necessary – that „late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift to a culture of prompt payment, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment. Such a shift should also include the introduction of specific provisions on payment periods and on the compensation of creditors for the costs incurred, and, inter alia, that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair" (Preamble, point 12).

As a consequence, contractual payment periods have to be limited, as a general rule, to 60 calendar days. Of course, there may be situations in which undertakings need more extensive payment periods, especially when undertakings wish to grant trade credit to their clients. Therefore, the parties have to agree in an explicit manner on payment periods longer than 60 calendar days. Such extension must not be totally unfair to the creditor.

On one hand, it must be mentioned that the Directive did not oblige a creditor to claim interest for late payment. In that specific case, the Directive should permit a creditor to resort to charging interest for late payment without giving any prior notice of non-performance or other similar notice reminding the debtor of his obligation to pay.

On the other hand, according to the Preamble, the debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations. In the case of the implementation of the directive into the Romanian legislation, as we will see below, the Romanian legislator did not consider as a condition the creditor's execution of his obligations for the running of the procedure[4].

As we can suppose the invoices trigger requests for payment and constitutes the most important documents in the chain of transactions for the supply of goods and services, *inter alia*, for determining payment deadlines.

The Directive purpose was that fair compensation of creditors for the recovery costs incurred due to late payment is essential to discourage late payment or, in other words the payment that delay at the debtor's will.

Creditors are entitled to reimbursement of the other recovery costs they incur as a result of late payment by a debtor. Such costs may include those incurred by creditors in instructing a lawyer or employing a debt collection agency.

It must be noticed that the EU States are able to provide for fixed sums for compensation of recovery costs which are higher and therefore more favourable to the creditor, or to increase those sums, among other things, in order to keep pace with inflation.

As we can imagine the Directive has no impact on the payments by instalments or staggered payments. The parties can freely settle different methods of payment. Nevertheless, each instalment or payment has to be paid on the agreed terms and should be subject to the rules for late payment.

An interesting situation is, obviously, that of the public authorities. As, it is recognized by the Directive Preamble, these have generally more *secure, predictable* and *continuous* revenue streams than undertakings. All this let the public authorities to get financing at more attractive conditions than undertakings. These also depend less than undertakings on building stable commercial relationships for the achievement of their goals. These are, in fact, supplementary reasons in order not to exclude from the application sphere of the directive the public authorities.

Of course, as we can imagine, late payment by public authorities for goods and services lead to unjustified costs for undertakings. That's why it became essential to impose specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in

[4] See art. 1014-1025 CPC.

particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.

On a whole, the EU states had to implement the Directive in a way that in commercial transactions the maximum duration of a procedure of acceptance or verification will not exceed, as a general rule, 30 calendar days. However, as an exception a verification procedure can surpass 30 calendar days, especially in the situation of complex contracts, when expressly settled in the contract and in any tender documents and if it is not grossly unfair to the creditor.

The commercial agreements are made on the ground of the freedom choice of the parties. However, a limit was identified by the Directive authors. They support the idea that the Directive sense is to limit the abuse of freedom of contract „to the disadvantage of the creditor". As a result, where a term in a contract or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is not justified on the grounds of the terms granted to the debtor, or it mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, it may be regarded as constituting such an abuse.

The Directive has to have no impact on the national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor (it seems probably that the Directive authors were considering the agreements with consumers).

One of the most important provisions of the Directive is art. 10 - *Recovery procedures for unchallenged claims*.

According to first paragraph the EU states shall ensure „that an enforceable title can be obtained, including through an expedited procedure and irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed". The EU states shall carry out this duty in accordance with their respective national laws, regulations and administrative provisions.

Of course, national laws, regulations and administrative provisions shall apply the same conditions for all creditors who are established in the Union.

3. Civil Procedure Code Regulation

The Directive 2011/7/EU was transposed mainly by the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code (CPC)[5].

The Code contains a special section under the title „Payment Order".

According to art. 1014 para. (1) CPC the provisions of this title „shall apply to *certain, liquid and due claims* consisting of obligations to pay sums of money resulting from a civil contract, including those concluded between a professional and a contracting authority, established by a document or determined according to a statute, regulation or other document, appropriated by the parties by signature or in another way permitted by law".

However, any claim related to the insolvency proceedings remains out of the sphere of application of these provisions.

According to art. 1014 para. (1) CPC the request for an order for payment shall contain:

- the surname and forenames, as well as the domicile or, where appropriate, the name and registered office of the creditor;
- the name and surname, the personal identification number, if known, and the domicile of the debtor, natural person, and in the case of the debtor who is a legal person, the name and registered office, as well as, where appropriate, if known, the unique registration code or the tax identification code, the registration number in the Trade Register or of entry in the register of legal entities and the bank account;
- the amount representing the object of the claim, the factual and legal basis of the obligation to pay, the period to which they relate, the period to which payment had to be made and any element necessary to determine the debt;
- the amount representing the related interest or other damages due to the creditor, according to the

[5] See Official Gazette of Romania, Part I, no. 365/30.03.2012. See on topic A. Rădoi, *Procedura ordonanței de plată*, în *Noul Cod de procedura civilă comentat și adnotat*, Universul Juridic Publishing House, Bucharest, 2016, vol. II, 1492 *et seq*; G. Boroi, M. Stancu, *op. cit.*, p. 1035.

law;

- the creditor's signature.

The request shall be accompanied by the documents certifying the amount of the sum due and any other documents proving it.

According to art. 1019 CPC, in order to settle the application, the judge shall order the summoning of the parties, in accordance with the provisions on urgent cases, for explanations and clarifications, as well as to insist on the payment of the amount owed by the debtor or in order to reach an agreement of the parties on the methods of payment. The summons will be handed over to the party 10 days before the hearing date.

The summons for the debtor shall be attached, in copy, to the creditor's application and the documents submitted by him in proving the claims.

The summons shall specify that the debtor is obliged to file a statement of defence at least 3 days before the trial term, noting that, in case of non-submission of the defence, the court, in view of the circumstances of the case, may consider it as a recognition of the creditor's claims.

The statement of defence shall not be communicated to the applicant, who shall take cognizance of its content from the case file.

If the creditor asserts that he has received payment of the sum due, the court shall take note of that fact by means of a final decision ordering the closure of the file.

When the creditor and the debtor reach an agreement on the payment, the court shall take note of it, issuing an expedient decision, in accordance with art. 438 CPC.

The expedient decision shall be final and shall constitute an enforceable title.

The rules regarding the possibility to contest the claim are, in our opinion, of great relief. According to art. 1021 para. (1) CPC if the debtor contests the claim, the court shall verify that the objection is well founded, on the basis of the documents in the file and the explanations and clarifications of the parties. If the debtor's defence is well founded, the court will reject the creditor's application by way of order.

If the substantive defences formulated by the debtor involve the taking of evidence other than those referred to in para. (1), and they would be admissible, according to the law, in the ordinary law procedure, the court shall reject the creditor's application for the payment order by way of conclusion.

In the cases referred to in para. (1) and (2), the creditor may bring an application for summons under the ordinary law.

Finally, according to art. 1022 CPC, if the court, following the verification of the application on the basis of the documents submitted, as well as the statements of the parties, finds that the creditor's claims are well founded, it shall issue a payment order, which shall specify the amount and the time limit for payment. If the court, examining the evidence of the case, finds that only a part of the creditor's claims is well founded, it shall issue the payment order only for this party, setting the payment deadline. In this case, the creditor may file a claim in accordance with the ordinary law in order to obtain the debtor's order to pay the rest of the debt.

4. Conclusions

At first appearance, we could conclude that the European and respectful national regulation has achieved the objective pursued, namely that of protecting the creditor against the debtor's delay.

It is likely that the number of unpaid debts and their amount has decreased significantly.

On the other hand, just as likely the debtors were forced to change their attitude towards the payment obligations assumed by the contracts.

However, a few aspects are worth remembering in my opinion.

First of all, through the regulation within the Code of Civil Procedure, a significant prejudice was made to the Civil Code regarding the possibility of executing an obligation without the other party being able to resort to *exceptio non adimpleti contractus*.

This exception is not a derogatory norm with short applicability.

On the other hand, if the debtor manages to convince the court that his allegations constitute substantive legal problems and as such the judge will reject the request because it is not possible to rule on the merits, the creditor will have to resort to the ordinary procedure in order to obtain the recovery of his debt.

This outcome represents significant costs and a period of time lost with significant consequences on the economic activity of the creditor.

The creditor does not have at this time the possibility to request the requalification of his extraordinary action in an ordinary request.

Last but not least, the protection of the creditor cannot be done only by resorting to an extraordinary procedure but together with other measures such as raising the requirements for the creation and functioning of commercial companies (*e.g.*, increase of the legal minimum capital).

As a final conclusion, national legislation must be improved so that bad faith behaviours are limited by effective means and not necessarily by exceptional procedures.

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