

L.N. 272 of 2012

**EUROPEAN UNION ACT
(CAP. 460)**

Commercial Code (Amendment) Order, 2012

IN exercise of the powers conferred upon him by article 4(2) of the European Union Act, the Prime Minister has made the following Order:-

1. The title of this Order is the Commercial Code (Amendment) Order, 2012, and this Order shall be read and construed as one with the Commercial Code, hereinafter referred to as "the Code".

Citation.

Cap. 13

2. For Sub-Title IA of Title II of the Code, there shall be substituted the following new Sub-Title:

Substitutes Sub-Title IA of Title II of the Code.

"Sub-Title IA

OF LATE PAYMENTS IN COMMERCIAL TRANSACTIONS

Definitions for the purpose of this Sub-Title.

26A. For the purposes of this Sub-Title:

"amount due" means the principal sum which should have been paid within the contractual period of payment, including, where applicable, taxes, duties, levies or charges specified in the invoice;

"commercial transactions" means transactions between undertakings or between undertakings and public authorities, which lead to the delivery of goods or the provision of services for remuneration;

"Commission Directive 2006/111/EC" means the Commission Directive of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings;

"enforceable title" means any decree, judgment or order for payment issued by a Court or other competent authority, whether for immediate payment or payment by instalments, which permits the creditor to have his claim against the debtor collected by means of forced execution. It includes any such decree, judgment or order for payment that is provisionally enforceable;

"interest for late payment" means statutory interest for late payment or interest at a rate agreed between the undertakings, subject to the provisions of article 26G;

"invoice" means a bill sent by a provider of a product or service to the purchaser. The invoice establishes an obligation on the part of the purchaser to pay. For the purpose of this definition, "invoice" includes an equivalent request for payment;

"late payment" means payment not made on the date agreed upon in the contract or according to law, and on the fulfilment of the conditions laid down under article 26C(1) and article 26D(1);

"legal interest for late payment" means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percent (8%);

"public authority" means the Government of Malta, the Local Councils or bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

For the purpose of this definition, "a body governed by public law" means a body which:

- (a) is established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature;
- (b) has legal personality; and

(c) is financed for the most part by the State, or Local Councils or other public bodies, or is subject to management supervision by those bodies, or has an administrative, managerial or supervisory board more than half of whose members are appointed by the State, Local Councils, or other public bodies;

"reference rate" means the interest rate applied by the European Central Bank to its most recent main refinancing operations, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank;

"undertaking" means any organization, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person.

Scope of this
Sub-title.

26B The provisions of this Sub-Title shall, notwithstanding the provisions of any other law, apply to payments made as remuneration for commercial transactions carried out between private and public undertakings, between undertakings and public authorities, and between main contractors and their suppliers and subcontractors, as from 1st March, 2012:

Provided that this Sub-Title shall not regulate transactions between consumers, interest in connection with other payments such as payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payment from insurance companies.

Interest in the
case of late
payment in
transactions
between
undertakings.

26C. (1) In the case of transactions between undertakings, the creditor shall be entitled to interest for late payment to the extent that it:

(a) has fulfilled its contractual and legal obligations; and

(b) has not received the amount due on time, unless the debtor is not responsible for the delay.

(2) The creditor may proceed with the claim of late payment against the debtor without reminding the debtor that the amount is due.

(3) On fulfilment of the conditions under sub-article (1), the creditor shall be entitled to interest for late payment from the day following the date or the end of term for payment fixed in the contract:

Provided that when the date or term for payment is not fixed in the contract, the creditor shall be entitled to late payment upon the expiry of any of the following time limits:

(a) thirty calendar days following the date of receipt by the debtor of the invoice;

(b) thirty calendar days after the date of receipt of the goods or services, when the date of the receipt of the invoice is uncertain;

(c) thirty calendar days after the date of the receipt of the goods or services, when the debtor receives the invoice earlier than the goods or services;

(d) thirty calendar days after the date when according to law as agreed or in the contract the product has to be ascertained or verified, and the debtor receives the invoice earlier or on the date on which such acceptance or verification takes place:

Provided further that the parties to a contract may expressly agree in the contract or in any tender document to extend the thirty calendar day period under paragraph (d) to a longer period, so long as the extension of time is not grossly unfair to the creditor.

(4) Irrespective of any other law, the period for payment fixed in a contract may not exceed sixty calendar days:

Provided that the parties may expressly agree for a longer period, so long as the extension of time is not grossly unfair to the creditor.

(5) The applicable reference rate for:

(a) the first semester of the year concerned shall be the rate in force on 1 January of that year;

(b) the second semester of the year concerned shall be the rate in force on 1 July of that year.

Interest in the case of late payment in transactions between undertakings and public authorities.

26D (1) In the case of transactions between undertakings as creditor and public authorities as debtor, the creditor shall be entitled to legal interest for late payment to the extent that it:

(a) has fulfilled its contractual and legal obligations; and

(b) has not received the amount due on time, unless the debtor is not responsible for the delay.

(2) The creditor may proceed with the claim for late payment against the debtor without reminding the debtor that the amount is due.

(3) On fulfilment of the conditions under sub-article (1), the creditor shall be entitled to interest for late payment upon the expiry of either of the following time limits:

(a) thirty calendar days following the date of receipt by the debtor of the invoice;

(b) thirty calendar days after the date of receipt of the goods or services, when the date of the receipt of the invoice is uncertain;

(c) thirty calendar days after the date of the receipt of the goods or services, when the debtor receives the invoice earlier than the goods or services;

(d) thirty calendar days after the date when according to law or in the contract the product has to be ascertained or verified as being in conformity with the contract, and the debtor receives the invoice earlier or on the date on which such acceptance or verification takes place:

Provided that:

(i) the duration of the procedure relating to acceptance or verification referred to in paragraph (d) shall not exceed thirty calendar days from the date of receipt of the goods or services unless expressly agreed otherwise by the parties in the contract or in a tender document, and provided that it is not grossly unfair to the creditor within the meaning of article 26G;

(ii) unless expressly agreed to between the creditor and debtor in a contract, the period for payment fixed in the contract may not exceed the limits under paragraph (a) to (d), and when such agreement is reached, the period for payment fixed in the contract may not exceed sixty calendar days;

(iii) the time period mentioned under paragraphs (a) to (d) shall be extended to sixty calendar days for:

1. any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject as a public undertaking to the transparency requirements laid down in Commission Directive 2006/111/EC;

2. public entities providing health care which are duly recognized for that purpose.

(4) An agreement between the creditor and debtor extending the date of receipt of the invoice is null and void.

(5) The applicable reference rate for:

(a) the first semester of the year concerned shall be the rate in force on 1 January of that year;

(b) the second semester of the year concerned shall be the rate in force on 1 July of that year.

Compensation
for recovery
costs.

26E. In addition to the claim for late payment under this Sub-Title, a creditor is entitled to recover from the debtor:

(a) a minimum of forty euro (€40) as compensation for the creditor's own recovery costs; and

(b) such other reasonable sum in excess of the forty euro (€40) incurred by him due to the debtor's late payment.

Payment
schedules.

26F. Nothing in this Sub-Title shall prohibit parties from reaching an agreement on payment being effected periodically by means of instalments:

Provided that where an instalment is not paid within the agreed date, the payment of interest and compensation shall be calculated solely on the basis of overdue amounts.

Provision or
practice which
is unfair to the
creditor.

26G. (1) A provision in an agreement or a practice, which relates to the date or period of payment, the rate of interest for late payment or the compensation for recovery costs, may be unenforceable or may give rise to a claim for damages, if such provision or practice is grossly unfair to the creditor.

(2) In determining whether a provision or a practice is grossly unfair to the creditor, the following shall be taken into consideration:

(a) any gross deviation from good commercial practice is contrary to good faith or fair dealing;

(b) the nature of the product or the service; and

(c) whether the debtor has any objective reason to deviate from the legal rate of interest for late payment, from the payment periods referred to in articles 26C(4) and 26D(3), sub-paragraph (ii) of the proviso to article 26D(3), sub-paragraph (iii) of the proviso to article 26D(3), or from the fixed sum as referred to in article 26E(a).

(3) For the purpose of this article, a provision in a contract or a practice which excludes:

(a) interest for late payment, shall be deemed as grossly unfair;

(b) compensation for recovery costs, shall be presumed to be grossly unfair.

Retention of
title.

26H. An agreement to a commercial transaction which provides for the retention of title between the vendor and the purchaser, shall entitle the vendor to retain title over the goods until the price has been paid in full by the purchaser."

