

NEW BILL ON PAYMENT PERIODS ETC.

1. Introduction

On 3 October 2012, the Danish Minister of Justice published a bill laying down rules regarding maximum payment periods in agreements between business operators and public authorities, amended interest provisions in the event of late payment in such agreements, as well as provisions regarding recovery costs.

The bill aims at implementing the European Parliament's and the European Council's Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions.

A purpose of the bill is to limit unilaterally fixed long payment periods. The main features of the bill are described below.

2. Overview

2.1 Payment periods

- The payment period is limited to 60 days for business operators and, in principle, to 30 days for public authorities.
- As regards business operators, an extended payment period may be agreed, provided that it is not unfair to the creditor.
- The option to agree on payment schemes providing for instalments.

2.2 Interest and recovery costs

- The surcharge on the statutory default interest rate is raised from 7% to 8% (including transactions with consumers).
- The right to compensation in the form of a fixed sum in the event of late payment (does not apply to transactions with consumers).
- The right to claim compensation for recovery costs and the right to a default interest rate cannot be excluded by an agreement etc.

2.3 Entry into force

- The bill is expected to enter into force on 1 March 2013.
- In principle, the act will not apply to agreements made prior to 1 March 2013.
- Such agreements will, however, be covered by the new rules on default interest rate and

compensation for recovery costs if any claims of payment arise as a consequence of any delay after the bill's entry into force.

3. Payment Periods

3.1 Agreements covered

The bill's provisions on payment periods include claims of remuneration pursuant to the agreement of the delivery of goods or services entered into among business operators as part of their business or between a business operator as part of its business and a public authority.

3.2 Agreements among business operators

If the agreement is entered into among business operators as described in item 3.1, the agreed payment period is limited to 60 days from the time when the creditor invoices the debtor or makes an equivalent request for payment.

This payment period is, however, extendable if the creditor expressly has approved an extended payment period, and this extension is not unfair to the creditor.

The bill refers to the Directive, according to which all matters of the case must be taken into consideration, including any clear divergence from sound business practices against "good faith and fair dealing", the nature of the product or service, as well as whether the debtor has an objective reason to diverge from the payment period. Further, reference is made to the Danish Contracts Act, Section 36, according to which an agreement may be altered or disregarded, partly or fully, if its enforcement would be unfair or in contravention with fair dealing.

Beyond this, nowhere in the draft bill or the preliminary work is it mentioned what is regarded as unfair in this connection. We must assume, however, that the longer the payment period is extended beyond the 60 days, the higher is the risk that it may be regarded as unfair. Similarly, in the event that no external circumstances prompt an extension of the payment period, it would arguably be more difficult to view such an extension as fair. The same applies to major companies that have no need for the liquidity which an extended payment period provides.

It is for the debtor to prove that a payment period extended beyond 60 days has been accepted.

Pursuant to the preliminary work on the bill, a payment period of more than 60 days must be expressly approved by the creditor. Therefore, if the condition is included in a standard agreement, it would be required that the creditor's attention be specifically drawn to the condition in question.

In contrast, an extension contained in unilaterally fixed standard terms, or terms in standard agreements, is in principle not regarded as having been accepted by the creditor, unless reference has been made thereto in some other manner, regardless of the fact that other provisions

in standard terms/standard agreements may be regarded as having been accepted.

In this connection, it is worth noting that the preliminary work on the act does not go as far as including a requirement for the creditor's written consent, but accepts that the consent may be given in some other manner, provided that the creditor has been made clearly aware of the condition. We must assume that the requirement may be met, for instance, if the debtor, when placing an order, specifically indicates that special payment terms apply and possibly makes reference to the specific item in the debtor's standard terms regarding the extension of payment period.

3.3 Agreements between business operators and public authorities

If an agreement is made between a business operator and a public authority, see item 3.1, the agreed payment period may not exceed 30 days from the time when the creditor invoices the debtor or makes an equivalent request for payment. The Danish Minister of Justice does, however, have the power to stipulate a payment period of 60 days for public authorities carrying on financial activities of an industrial and commercial nature in certain situations.

It is not possible to agree on an extended payment period when the debtor is a public authority. Instead, it may be agreed that payment be made in instalments if the need is present.

3.4 Agreement to pay in instalments

Whether the debtor is a business operator or a public authority, an agreement may be made that payment be made in instalments, provided that maturity of the individual instalments has been determined in a payment scheme that has been expressly approved by the creditor.

In this case, each instalment will be subject to the above-mentioned payment periods of 60 days and 30 days, respectively, with the option of agreeing to an extended payment period, if the agreement in question is among business operators, see item 3.2.

3.5 Approval or control procedure

In the event that an approval or control procedure has been determined pursuant to an agreement covered by the above-mentioned provisions, according to which it must be determined if the goods or the service are in accordance with the agreed, this procedure cannot exceed 30 days. A longer period of time may be agreed according to the same principles as govern agreements to extend a payment period, provided that such extension is not unreasonable to the creditor, see the description in item 3.2.

4. Interest and Recovery Costs

4.1 Default interest rate

The current default interest rate is determined at an annual interest rate corresponding to the

interest rate determined by the Bank of Denmark, with the surcharge of 7%. It is proposed to raise said surcharge to 8%. This increased interest rate will also apply to transactions with consumers.

It is further proposed that it should not be possible to exclude this requirement by agreeing to or by trade usage, or by any other custom, just as it should not be possible to reduce the interest rate if the debtor is a public authority.

4.2 Right to compensation in the form of a fixed sum in the event of late payment

It is proposed that the creditor should be entitled to demand that the debtor pay compensation in the form of a fixed sum in the event of late payment, and that it should not be possible to exclude this claim by agreeing to or by trade usage, or by any other custom.

The level of compensation is determined by the Danish Minister of Justice.

5. **Assessment of the new Rules**

With the possibility of making agreements on payment periods extended beyond 60 days, business operators, who currently have the possibility of obtaining extended payment periods, e.g. on account of their negotiation position, will continue to maintain that possibility to a wide extent.

It is expected that to a wide extent, such business operators will update their terms of business towards the bill's entry into force, expressly stressing any conditions regarding payment periods extended beyond 60 days, or obtaining the creditor's written confirmation thereof.

As regards the increased requirements regarding interests and recovery costs, their wording does not provide the creditor with an increased level of security, but in any case, when it comes to major customers, the creditors will likely display a certain degree of caution with regard to the enforcement of these rules.

6. **Example**

A provision in an agreement to extend payment periods may be rather short. The key factor is that the payment period is agreed separately or that it has clearly been pointed out to the creditor, see item. 3.2.

A provision in an agreement might for instance be worded thus:

The Parties have expressly agreed that the payment terms are 90 days from the date of the invoice, which both Parties agree is reasonable.

A reference to particular terms might for instance be worded thus:

Please note that particular payment terms apply, including as regards payment periods, see item [] in the attached standard terms.

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