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European Commission presents a new series of measures to boost the competitiveness and resilience of SMBs

On September 12, 2023, the European Commission presented a series of initiatives to provide short-term relief to small and medium-sized businesses (SMBs), boost their long-term competitiveness, and strengthen fairness in the business environment across the Single Market.

The contemplated measures include new proposals for a Regulation on late payments in commercial transactions and for a Directive establishing a head office tax system for SMBs, as well as additional tools to support SMBs throughout their entire business life cycle.

The 24 million European SMBs represent 99% of all businesses in the European Union ("EU") and provide two thirds of private sector jobs. They are also deeply embedded in local communities, particularly in rural areas.

European SMBs account for more than half of value added in the EU's non-financial business sector, and are Europe's breeding ground for innovation, diversity, and equality.

European SMBs have been disproportionately affected by the sequence of crises over the past years (COVID-19, Russia's war against Ukraine, energy crisis, rise in inflation, etc.). They still face volatility and unpredictability, as well as supply constraints, labor shortages and, often, unfair competition and an unequal level playing field when doing business in Europe.

It is in this context that the European Commission announced on September 12, 2023 a series of measures[1] to address the latest challenges that European SMBs face, with a view to provide relief and to strengthen their competitiveness and resilience.

The main contemplated measures are outlined below.

Proposal for a Regulation on combatting late payments in commercial transactions

Late payments have a major impact on SMBs.

One of the root causes of late payments is asymmetries in bargaining power between a large or more powerful client and a smaller supplier. This often results in suppliers having to accept unfair payment terms and conditions, and constitutes an unfair practice that compromises the cash flow of SMBs and hampers the competitiveness and resilience of supply chains.

To remedy this situation, the proposal for a Regulation[2] lays down a stronger framework that streamlines the rules across the EU, eliminates ambiguity, empowers SMBs to claim their rights when paid late, and creates enforcement and redress mechanisms to ensure that the rules are respected.

Directive 2011/7/EU of February 16, 2011 on combating late payment in commercial transactions[3] currently in force lays down a payment term of 30 days in B2B transactions. However, this can be extended to 60 days or more "*if not grossly unfair to the creditor*".

In practice, the absence of an effective maximum payment term and the ambiguity in the definition of "*grossly unfair*" in the Directive has led to a situation where payment terms of 120 days or more are often imposed on smaller creditors.

The proposal for a Regulation streamlines the current provisions and introduces a single maximum payment term of 30 days for all commercial transactions, including B2B and transactions between public authorities and businesses. This term will be the same across the EU. The freedom of contract is yet preserved since parties can negotiate any payment term insofar as it does not exceed 30 days. The proposal does not affect shorter payment terms laid down in national legislation, to ensure legal certainty.

It eliminates the ambiguous concept of "*grossly unfair*" contractual provisions and replaces it with a list of well-identified unfair payment terms and practices.

The proposal also aims to better protect creditors from their debtors. It makes the payment of interests automatic and compulsory until payment of the debt and provides that the creditor will not be able to waive its right to claim interests for late payment. The rate of late payment interest should be +8% above the European Central Bank's reference rate. For those Member States whose currency is not the euro, the reference rate should be set by the national Central Bank. In addition, the flat fee compensation of 40 euros (or equivalent) should be raised to 50 euros (or equivalent) per commercial transaction paid late.

Lastly, the new proposal provides for enforcement and redress measures to protect creditors against “late payers”. Member States will have the obligation to set up enforcement authorities to monitor and ensure the application of the rules. These authorities will have the power to receive complaints, initiate investigations, and issue effective, proportionate, and dissuasive sanctions against late payers. Member States will also have to promote the voluntary use of alternative dispute resolution mechanisms to preserve the contractual relation between the relevant debtor and creditor, and provide a quick resolution to the payment dispute between the parties.

The new rules will become applicable one year after the entry into force of the future Regulation in order to allow the relevant actors (public authorities, businesses) to take the necessary steps to comply.

Commercial transactions carried out after the date of application of the future Regulation shall be subject to the provisions of such Regulation even if the underlying contract was concluded before that date.

Creation of a head office tax system for SMBs

The objective of the proposal for a new Directive on head office tax system for SMBs[4] designed by the European Commission is to make sure SMBs operating in different Member States will be able to fully maximize the freedom of establishment and the free movement of capital without being hindered by unnecessary tax related obstacles.

When SMBs operate cross-border, they become taxable in more than one Member State as soon as their activity abroad creates a permanent establishment.

The current systems of business taxation in the EU can be complex as cross-border businesses can face high tax compliance costs, as well as risks of double or over-taxation and time-consuming legal disputes. This situation can also prevent SMBs, in particular new businesses, from developing their business in more than one Member State.

The European Commission’s proposal for a new Directive aims to give SMBs operating cross-border through permanent establishments the option to interact with only one tax administration – i.e., that of the Head Office – instead of having to comply with multiple tax systems.

Under this new framework, SMBs would calculate their taxes based only on the tax rules of the Member State of their head office. SMBs would file one single tax return with the tax administration of their head office, which would then share this return with the other Member States where the SMB operates. The Member State of the head office would also subsequently transfer any resulting tax revenues to the countries where the permanent establishments of the SMB are located.

The scope of these new rules would be limited to standalone SMBs with permanent establishments. It would not be extended to SMB groups with subsidiaries.

Once an SMB chooses to apply these new rules, it will have to remain under this system for five financial years, except in case of (i) transfer of the head office in another country, or (ii) exponential growth of its foreign business activity in comparison to the business activity in the Member State of origin, in which cases these rules will cease applying.

The foreseen provisions on SMBs' eligibility to this new framework and its termination are designed to discourage any potential tax planning practices, e.g., the deliberate transfer of the head office to a low-tax country.

As such, this proposal for a Directive on head office tax system streamlines rules for SMBs during their early stages of expansion.

If SMBs successfully expanded to the point of no longer being eligible to this framework, they would then be able to opt into the so-called "*Business in Europe Framework for Income Taxation*" ("BEFIT") initiative which aims to reduce tax compliance costs for large businesses, primarily those operating in more than one Member State, and to make it easier for national authorities to determine which taxes are due[5].

Other measures to support SMBs

Improvement of the regulatory environment for SMBs

Administrative burden or regulatory obstacles are among the biggest problems for 55% of SMBs according to Flash Eurobarometer 486 on SMBs, start-ups, scale-ups and entrepreneurship published in September 2020[6].

Several tools have been created to better take SMBs into consideration in the EU policy making process:

- The "SMB test" that analyses the impact of European Commission's proposals on SMBs;
- The newly introduced competitiveness check, which aims to report in an integrated manner all impacts on the competitiveness on business, including on SMB competitiveness;
- The "SMB filter" which aims to identify SMB-relevant policy initiatives in the early stages of policy making.

The European Commission is committed to making greater use of these tools, particularly in impact assessment reports, and encourages the European Parliament and the Council to carry out an "on the spot" assessment of the impact on SMBs and their competitiveness of proposed substantial amendments to the European Commission's proposals during the co-legislative process.

European Commission will shortly appoint an EU SMB Envoy to guide and advise it on SMB-related issues and to advocate SMBs' interests to the outside world.

Lastly, the European Commission will systematically consider in the future specific SMB-friendly provisions in new legislative proposals (for example longer transition periods for SMBs, SMB-targeted guidance, consideration of the impact of delegated and implementing acts on SMBs, and review and sunset clauses in secondary legislation).

The aim of all these measures is to take better account of the needs of SMBs when drafting any new legislative or regulatory proposals.

Reduction of the administrative burden

The announced extension of the "*one in, one out*" approach is intended to help reduce the regulatory burden on SMBs by making sure that the consequences and costs of applying EU legislation will be better taken into account upstream. The "*one in, one out*" principle means that newly introduced burdens must be offset by removing equivalent burdens in the same policy area.

In addition, to enable a more innovation-friendly regulatory framework, the European Commission promotes the use of "regulatory sandboxes" in a number of innovative areas, such as artificial intelligence. Such instruments should allow businesses in the EU, in particular SMBs and start-ups, to experiment in real-life situations new technologies, practices, services, applications in a controlled real-world environment, particularly in cases where legal uncertainty or regulatory gaps and barriers are hampering their development.

In parallel, the European Commission wants to promote the wider use of the Single Digital Gateway designed to improve the European business environment for companies, in particular SMBs, by cutting red tape and reducing administrative burden. This Gateway provides a one-stop-shop for reliable administrative and regulatory information, thereby helping SMBs better reap the opportunities offered by the Single Market.

By the end of 2023, Member States must ensure that administrative procedures in 21 key areas (such as starting, running and closing a business, moving to a different Member State, etc.) are fully accessible online.

They will also have to set up the "*Once-Only Technical system*" (OOTS) which will enable the cross-border exchange of key documents among public authorities, avoiding the need for SMBs to re-submit documents in different Member States. It will reduce the cost of free movement in the Single Market and administrative frictions without imposing additional obligations on businesses while significantly reducing their administrative burden through online procedures in key areas.

Lastly, in order to improve the long-term competitiveness of businesses, in particular SMBs, the European Commission should present in October 2023 a set of proposals to rationalize reporting requirements with the aim to reduce such burden by 25% without undermining the related policy objectives.

Improved access to financing

The European Commission aims to improve access to financing for SMBs. Support for SMBs is expected to reach more than 200 billion euro until 2027 under the various EU funding programs.

It also intends to build on the success of the SBE window of *InvestEU* program – which provides better access to finance for SMBs with more favorable financing conditions – by encouraging Member States to allocate additional resources to I*nvestEU* national compartments.

In addition, SMBs play an important role in helping Europe achieve its climate neutrality goals and other environmental goals according to the OECD[7]. The European Commission wishes, therefore, to make it easier for SMBs to access sustainable finance, in particular by creating a simple and standardized framework to report on ESG (Environmental – Social – Governance) issues and to encourage financial institutions to include green SMB financing in their business models.

SBMs, with the exception of listed SMBs, are formally not subject to the requirements of the EU sustainable finance framework. However, the European Commission is aware that these SMBs face increasing requests for sustainability information by their financial and value chain partners, often in a non-standardized format.

Concretely speaking, the European Commission intends to set simplified reporting standards for listed SMBs and a voluntary standard for non-listed SMBs, thereby providing a legal limit to the information that European Sustainability Reporting Standards can require large companies to obtain from SBEs in their value chain in order to (i) limit the indirect impact on SMBs of value chain reporting requirements imposed on large businesses, and (ii) create better opportunities to obtain green financing and thus facilitate the transition to a sustainable economy.

In addition, the European Commission will encourage financial institutions to include green SMB financing in their business models by working towards a standard or a definition of green loans for SMBs and assessing an SMB-friendly adaptation of the green asset ratio of banks.

Easier access to public procurement

Public procurement represents 14 % of the EU GDP. Yet, SMBs still have difficulties finding access to procurement.

The European Commission has, therefore, presented initiatives that facilitate the access of SMBs to public procurement, including cross-border procurement. The underlying objective is to increase the SMB share of public procurement in line with their overall weight in the economy.

To achieve this, the European Commission wants to make it easier for SMBs to handle tender documents by promoting the use of standardized provisions and clauses, especially for low-risk or low-value contracts, and practices that improve SMB involvement, such as the adoption of more favorable financial qualifications and the adaptation of payment terms.

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[1] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the SMB Relief Package:

https://single-market-economy.ec.europa.eu/publications/sme-relief-package_fr

[2] https://single-market-economy.ec.europa.eu/publications/proposal-regulation-combating-late-payment-commercial-transactions_en

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0007

[4] https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/head-office-tax-system-smes_en

[5] For more info on the BEFIT initiative, please visit https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_4407

[6] https://europa.eu/eurobarometer/surveys/detail/2244

[7] Activity Report 2023 of the OECD Platform on Financing SMBs for Sustainability: https://www.oecd.org/cfe/smes/SME%20activity-report-2023.pdf