Law on Combating Late Payment in Commercial Transactions - Interference with the Freedom of Contract

On July 29, 2014 the law on combating late payment in commercial transactions came into force. It serves to implement the Directive 2011/7/EU of the European Parliament and the Council of February 16, 2011. The aim of the Directive is to develop a legal and economic environment encouraging prompt payment in order to improve the liquidity, competitiveness and profitability, in particular of small and medium-sized enterprises.

The new provisions impose new time limits for contractually agreed payment terms, the contractually agreed occurrence of default and the duration of contractually agreed procedures of acceptance and verification. In addition, they raise the statutory interest on late payment and introduce a claim for payment of a fixed compensation in case of late payment.

Due to these new provisions it is necessary to review general terms and conditions, in particular general terms and conditions of purchase. Otherwise, there may be financial disadvantages.

The following overview outlines the legal situation for agreements in a business-to-business relationship. Agreements with consumers or public authorities may be subject to different provisions.

1. Which agreements and provisions are affected?

The new provisions apply to any agreements concluded after July 28, 2014 and to any continuing obligation having arisen prior to this date if the goods or services are provided after June 30, 2016 (Art. 229, Sec. 34 Introductory Law to the German Civil Code (EGBGB)).

The new regulations affect any payment terms longer than 60 days in individual agreements and longer than 30 days in general terms and conditions as well as any procedures of acceptance and verification longer than 30 days in individual agreements and 15 days in general terms and conditions. In addition, any agreements excluding or restricting the statutory default interest or the fixed compensation in case of late payment must be aligned with the new provisions.

2. What are the changes?

- Maximum periods for contractually agreed payment terms and for acceptance and verification: Generally, payment according to Sec. 271
(1) German Civil Code (BGB) becomes due immediately. The parties may agree on different provisions. The new Sec. 271a (1) sentence 1 BGB now interferes with the freedom of contract and stipulates that a payment term longer than 60 days as of the receipt of goods or the provision of services or, if an invoice is received after the receipt of goods or the provision of services, after receipt of such invoice, is only valid if the longer payment term was expressly agreed by the parties and is not grossly unfair to the creditor of the payment. According to the criteria of the Directive (Art. 7 (1) to (3)), gross deviations from the commercial practice in breach of the principle of good faith are, for example, grossly unfair and therefore invalid. A payment term longer than 60 days will therefore only be valid in exceptional cases.

Stricter criteria apply to the agreement of payment terms in general terms and conditions: Unreasonably long payment terms are invalid. If the user is an private business, a payment term longer than 30 days as of the receipt of goods or the provision of services or, if an invoice is received after the receipt of goods or the provision of services, after receipt of such invoice, is unreasonably long (new Sec. 308 no. 1a) BGB).

If a claim for payment is only to be fulfilled after goods or services have been verified or accepted, a period longer than 30 days as of the receipt of goods or the provision of services for the verification or acceptance of the goods or services is only valid if it was expressly agreed by the parties and is not grossly unfair taking into account the creditor's interests (new Sec. 271a (3) BGB). In general terms and conditions periods longer than 15 days as of the receipt of goods or the provision of services are invalid (new Sec. 308 no. 1b) BGB). The examination procedure stipulated in Sec. 377 German Commercial Code (HGB) shall not be affected. The mere purpose of the examination according to Sec. 377 HGB is to ensure that the purchaser's rights due to defects continue to exist. It has no impact on his payment obligation.

- **Agreement on the occurrence of default**: The time constraints in the new Sec. 271a BGB with regard to the due date may not be by-passed through an agreement on the occurrence of default (new Sec. 286 (5) BGB). If the parties do not agree on a due date, the time limits and requirements specified in the new Sec. 271a BGB shall also apply to any agreements on the occurrence of default to the extent they deviate from the statutory provisions of default in Sec. 286 (1) to (3) BGB. Any express agreement according to which default occurs no earlier than 60 days after receipt of the goods or the provision of services or the receipt of the invoice is therefore valid, unless it is grossly unfair. If the parties agree on a due date in accordance with the new Sec. 271a BGB, the maximum time limits of Sec. 271a BGB shall continue to apply and shall bind the parties in accordance with the new Sec. 286 (5) BGB, even if the parties concluded an agreement on the occurrence of default.

- **Increase of statutory interest on late payment**: For legal transactions in a business-to-business relationship, the default interest rate on claims for payment was raised from 8 to 9 percentage points above the basic rate of
interest (new Sec. 288 (2) BGB). The claim for payment of default interest cannot be fully excluded in advance (new Sec. 288 (6) sentence 1 BGB). A lower default interest is invalid if it is grossly unfair to the creditor of the payment (new Sec. 288 (6) sentence 2 BGB).

- **Fixed compensation in the event of late payment:** Already under the former statutory provisions, the creditor was entitled to claim reimbursement of the recovery costs in the event of the debtor's late payment. The claim for payment of a fixed compensation in the amount of EUR 40 (new Sec. 288 (5) sentence 1 BGB) which exists irrespective of whether the creditor incurred any damage at all and regardless of the amount of the damage incurred by the creditor, is new. Thus, German law now stipulates a sort of punitive damage. The creditor is already entitled to the full amount of this claim as soon as default occurs. Any exclusion or limitation of the claim of this fixed compensation is invalid if it is grossly unfair with regard to the creditor's interests (new Sec. 286 (6) sentence 2 BGB). This is presumed according to the new Sec. 286 (6) sentence 3 BGB so that the burden of substantiation and proof is imposed on the debtor of this compensation. The creditor can continue to assert any higher damage due to the default.

- **Amendment of the Law on Actions for Injunction (Unterlassungsklagengesetz, UKlaG):** Anyone using invalid provisions in general terms and conditions may be subject to an action for injunction (Sec. 1 UKlaG). According to the new Sec. 1a UKlaG such claims now also exist if the new provisions (Sec. 271a (1) to (3), 286 (5) or 288 (6) BGB) in individual agreements are breached. As it is the case with general terms and conditions, these claims may, however, not be asserted by consumer associations (new Sec. 3 (2) no. 2 UKlaG).

### 3. Legal consequences of invalid payment agreements

Agreements on payment terms and periods for verification or acceptance procedures, which are invalid due to a breach of the new provisions, may have negative financial consequences for the debtor of a payment.

In case of longer payment terms than those stipulated in the new Sec. 271a (1) sentence 1 BGB or Sec. 308 no. 1a) BGB, the statutory provisions apply, i.e. payment becomes due immediately (Sec. 271 BGB). In a commercial transaction the seller may demand interest in the amount of 5 % (Sec. 353 HGB) as of the date when the payment becomes due. Upon the occurrence of default the seller may demand default interest in the amount of now 9 percentage points above the basic rate of interest (new Sec. 288 (2) BGB). In the absence of any contractual agreement, default occurs at the latest when payment is not made within 30 days after the due date of the claim for payment and receipt of an invoice (Sec. 286 (3) BGB). In addition, a claim for payment of the newly introduced fixed compensation in the amount of EUR 40 arises upon occurrence of default (new Sec. 286 (5) BGB). Furthermore, there is a risk that any breach may be punished by a warning letter or an action for injunction. The user must in any case bear the costs of the warning letter and must regularly oblige himself to pay a considerable contractual
penalty for each breach of the cease-and-desist declaration attached to the warning in order to avoid legal proceedings. Equally, the new provisions ensure that the creditor receives the payments faster or receives higher interest and that he may demand the fixed compensation in case of late payment.

4. Legal situation in other European countries

As the new provisions are based on a European Directive, there are corresponding provisions in the jurisdictions of other European countries. A high-level summary of the potential agreements on payment terms according to the jurisdictions of the most important European countries is included in the following table. Our colleagues in the other European Baker & McKenzie offices can provide further details upon request. None of the jurisdictions set out below provides restrictive provisions for general terms and conditions as in Germany.

Overview of the implementation of the Directive 2011/7/EU in 9 European countries

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<th>Country</th>
<th>Maximum period for payment</th>
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<td>1. Austria</td>
<td>A payment period of up to 60 days is not considered as grossly unfair.</td>
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<td>2. Belgium</td>
<td>Statutory payment term of 30 days. The parties can agree on different payment terms; these can be longer than 60 days, but provided in all cases that this is not “grossly unfair”. In principle, any deviation from the statutory payment term could be challenged on the basis that it would be “grossly unfair”.</td>
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<td>3. France</td>
<td>30 days as from the delivery of the goods or services, if no contractual payment term is agreed. If the parties agree on payment terms, the maximum period for payment is 45 days as of the end of month, or 60 days from the date of issue of the invoice. In case of the issuance of periodic invoices for several deliveries of goods or services, the maximum period allowed is 45 days as of the issue of the invoice. Maximum period of 30 days as of the issuance of the invoice for certain goods/services: Road freight transport, vehicle leasing, transport commission contracts and forwarding agents activities, ship’s agents, air carrier’s agents, freight brokers, customs agents. Shorter maximum periods (30 days or 20 days from delivery) for certain perishable food products.</td>
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<td>4. Italy</td>
<td>30 days unless the parties provide otherwise in the contract. 60 days if agreed by the parties in the contract. The parties may agree on a term exceeding 60 days, provided that such term is expressly agreed upon in writing and is not grossly unfair to the creditor.</td>
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In the food and agricultural sector the maximum payment term is 30 days for perishable products and 60 days for non-perishable products. Payment terms shall run from the last day of the month in which the dated invoice was issued. In the absence of a dated invoice, the payment term shall run from the last day of the month of the delivery of the agricultural products and foodstuffs concerned.

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<td>5. Poland</td>
<td>60 days as of the date of receipt of the invoice or receipt confirming the delivery of goods or provision of services. The parties can agree otherwise provided this is not grossly unfair to the creditor.</td>
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<td>6. Spain</td>
<td>30 days as of the receipt of the products or the provision of the services (even if the invoice was received in advance) if the parties did not agree on any payment term in the contract. The payment term may be extended by mutual agreement but shall in no event exceed 60 days.</td>
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<td>7. Sweden</td>
<td>A payment term of 30 days applies unless agreed otherwise. The parties may agree on a longer payment term provided that the creditor agrees by an explicit approval and the parties have agreed to a payment plan, in which the debt is paid by installments in a fixed plan.</td>
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<tr>
<td>8. The Netherlands</td>
<td>60 days, unless the parties explicitly agree otherwise and provided this is not grossly unfair to the creditor.</td>
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<td>9. UK</td>
<td>30 calendar days as of the receipt of the goods or services or the invoice unless the contract provides otherwise. If the contract contains an express payment term, the payment period can be up to 60 calendar days, unless a longer period is expressly agreed by the parties and such period is not &quot;grossly unfair&quot; to the creditor. The parties may contract out of these provisions by contractually agreeing on an interest rate as long as it provides a substantial remedy for late payment. The 60-day period and the examination whether a period is grossly unfair only apply when statutory interest (8%) is charged. Therefore, if the parties agree on an interest rate, any term may be agreed as long as it provides a substantial remedy for combating late payment. The 60-day payment period will only apply if the contract does not provide for any interest rate.</td>
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