

DELAYED REPAYMENT OF CORPORATE LOANS IN THE EUROPEAN UNION: CAN THE LATE PAYMENT DIRECTIVE BE APPLIED TO LOAN CONTRACTS?

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Summary: This paper examines the Late Payment Directive of the European Union and seeks to answer the question of whether the provisions of the Directive apply to loan contracts in corporate transactions. The paper first describes and analyses the Late Payment Directive and provides a comprehensive analysis of relevant arguments and legal sources. It then evaluates the different factors required by the Late Payment Directive and finally argues that the Late Payment Directive has to be applied to loan contracts and facility agreements, even if this is not explicitly foreseen in the Directive.

Keywords: Late Payment Directive; late payment; interest; loan contracts; linked-credit agreements; remuneration; credit agreements; corporate loans

1. Introduction

Lending and borrowing have become common transactions in everyday life, now constituting an entire branch of business. In this context, payment delays happen almost daily as well, and while the European Union has already been trying to remedy late payment in the European Single Market for most transactions, it still remains unclear whether these European remedies apply to lending operations.

This paper addresses the described issue and seeks to find a solution based on European law. The paper will start by offering a general overview of the Late Payment Directive¹ and its development. This initial section is necessary for fully understanding the background and aims of the Directive, as well as the possible results that are triggered by an application of the Directive to lending transactions. The second and main section of the paper focuses on the question of

1 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions, O.J. L 48/1.

whether the Directive can be applied to loan contracts and, furthermore, which provisions in the Directive argue for or against such an interpretation.

2. Commercial Relevance

The Late Payment Directive, adopted on 16 February 2011, is a European Union legislative act that aims at tackling the issue of late payments. In the commercial environment of the Member States, many payments are executed later than initially accorded in the contract, even if one party has already fulfilled its obligations (i.e., the goods have already been delivered or the services have already been performed).² This leads to a situation wherein the seller of a good or provider of a service is forced to credit the outstanding amount to the buyer.

Late payment influences business transactions in a negative manner.³ When the buyer withholds payment, the liquidity of the seller is impaired, as well as it hinders the seller's effective financial management. He is forced to wait for capital that he could have invested in the meantime. This, in turn, will affect his competitiveness and profitability.⁴ If the seller is forced to obtain external financing to fulfil his own obligations, he will be burdened with interest rates that are higher than the rates he usually charges to his trade partners for late payment (hence, he will make a loss).

Small and medium-sized enterprises (SMEs) are especially vulnerable to late payment, as they typically hold less liquid assets than larger enterprises. They tend to rely on larger suppliers or other business actors that possess more market power.⁵ Their bargaining power is comparatively weak when contracting with dominant enterprises.⁶ Additionally, when it comes to late payment, the administrative costs of pursuing debts are disproportionately high for SMEs. This is the result of a lack of time and manpower to chase outstanding debts, as it is harder for SMEs to afford specialised staff engaged specifically to manage the recovery of debt.⁷ Larger entities can usually cope with late payment more easily and can employ additional staff due to economies of scale.⁸

2 Cf. EUROPEAN COMMISSION. Explanatory Memorandum. 8 April 2009, COM(2009) 126 final, 2009/0054 (COD), p. 3.

3 See in detail McCORMACK, Gerard. Retention of Title and the EC Late Payment Directive. *Journal of Corporate Law Studies*, 2001, vol. 1, no. 2, p. 502, with further references.

4 Recital 3 of the Late Payment Directive.

5 McCORMACK, Gerard. Retention of Title and the EC Late Payment Directive. *Journal of Corporate Law Studies*, 2001, vol. 1, no. 2, p. 502.

6 BILOTTA, Cara. Ending the Commercial Siesta: The Shortcomings of European Union Directive 2011/7 on Combating Late Payments in Commercial Transactions. *Brooklyn Journal of International Law*, 2013, vol. 38, no. 2, pp. 699, 702.

7 EUROPEAN COMMISSION. *Proposal for a European Parliament and Council Directive combating late payment in commercial transactions*. O.J. C 168/13, 1998, p. 4.

8 A larger enterprise typically concludes more contracts than a SME, or, at least, handles a larger transaction volume. This entails that the outstanding amounts are generally higher. The break-even point, which economically justifies the employment of another staff mem-

The very existence of SMEs can be jeopardised due to late payment: when the outstanding amounts lead to lack of cash, the undertaking can be forced into insolvency.⁹ Late payment is the major reason for illiquidity¹⁰ and the reason for twenty-five percent of all bankruptcies in the European Union.¹¹ Larger enterprises hold sway over SMEs in a way that they have the power to 'starve out' unwanted business partners or disliked competitors.¹² By intentionally withholding payments – a behavior that in the past was seldom followed by any negative consequences – a company can essentially force its contracting partner into insolvency proceedings.

3. The Late Payment Directive and Loan Contracts

3.1 General Remarks

The Late Payment Directive provides a number of measures¹³ that should deter late payment; however, the central provisions of the Directive revolve around the interest rule.¹⁴ The Directive gives companies an entitlement to interest payments in the event of late payment, without foreseeing any reminder requirements.¹⁵ The interest rate is comparatively high, which should deter buyers from executing payments later than their due date.¹⁶ Parties individually may agree on a lower interest rate, which, however, is subject to an unfairness test.¹⁷

ber, is reached when the amount recoverable by receivables management equals the costs of this additional staff member.

- 9 McCORMACK, Gerard. Retention of Title and the EC Late Payment Directive. *Journal of Corporate Law Studies*, 2001, vol. 1, no.2, p. 502.
- 10 EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. Opinion on the Proposal for a Directive of the European Parliament and of the Council on Combating Late Payment in Commercial Transactions (Recast) – Implementing the Small Business Act. O.J. C 255/42, 2010.
- 11 Cf. EUROPEAN COMMISSION. *Proposal for a European Parliament and Council Directive combating late payment in commercial transactions*. O.J. C 168/13, 1998, p.2.
- 12 Cf. McCORMACK, Gerard. Retention of Title and the EC Late Payment Directive. *Journal of Corporate Law Studies*, 2001, vol. 1, no. 2, p. 502.
- 13 For instance, Article 6 (1) provides for a lump sum lump sum to compensate the creditor for the administrative and internal costs linked to the recovery of the debt claim; cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). *Commercial Law. Article-by-Article Commentary*. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 6 (1) et seq.
- 14 Articles 3 and 4 of the Late Payment Directive.
- 15 The directive follows the principle *dies interpellat pro homine*, according to which the creditor is entitled to interest without sending any prior notice of non-performance (e.g. a reminder or a late notice). Cf. Recital 16 of the Directive.
- 16 Article 2 (6) stipulates that the statutory interest for late payment has to be at least eight percentage points above the reference rate of the European Central Bank.
- 17 Cf. Article 7 of the Directive. The unfairness test only applies to transactions between undertakings, as public authorities may not negotiate the interest rate. Cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in

When it comes to loan contracts, the Directive itself does not use the term or any similar expression such as credit agreement or facility agreement.¹⁸ A loan contract is usually an agreement concerning the upfront provision of money for a certain period of time in exchange for interest-bearing recurrent repayments.

To establish whether loan agreements are subject to the Late Payment Directive, it is first necessary to determine whether the normative requirements are met. The Late Payment Directive only applies to commercial transactions,¹⁹ which are defined in Article 2 (1) as *'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration.'*²⁰

3.2 Undertakings, Public Authorities and Consumers

To begin with, the Late Payment Directive uses the term 'undertaking' for what generally would be understood as a company. The concept of an undertaking includes *'any organisation, other than a public authority, acting independently in its economic or professional activity, even where that activity is carried out by a single person.'*²¹ The definition therefore covers all kinds of enterprises: corporations, unincorporated partnerships,²² sole traders as well as the liberal professions.²³ For a transaction to be concluded on behalf of an undertaking, a person

Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 4 (7) et seq.

18 Note however that Recital 13 of the Directive uses the term 'trade credit'. Cf. footnote 47 for further treatise.

19 Article 1 (2) of the Directive.

20 Article 2 (1) of the Directive. Typically, two parties in their private autonomy agree upon a certain transaction. In the ruling of ECJ 26 February 2015, C-104/14, *Federconsorzi*, the question was posed whether statute-based relationships meet the definition of 'commercial transactions'. The ECJ did not rule on this question; yet, it can be assumed that such 'contracts' do not fulfil the requirements of a commercial transactions. For further details cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 2 (4).

21 Article 2 (3) of the Directive.

22 Cf. SCHULTE-BRAUCKS, Reinhard, ONGENA, Steven. The Late Payment Directive – a step towards an emerging European Private Law?. *European Review of Private Law*, 2003, vol. 11, no. 4, p. 528.

23 OELSNER, Tobias. Die Neufassung der Zahlungsverzugsrichtlinie. *Europäische Zeitschrift für Wirtschaftsrecht*, 2011, vol. 22, no. 24, p. 941. Liberal professions can be regarded as undertakings only for the purpose of the Late Payment Directive. Member States should not derive any assimilation to undertakings or merchants for purposes outside the scope of the Late Payment Directive as this is not the intention of the Directive. Cf. Recital 10 of the Directive; cf. SCHULTE-BRAUCKS, Reinhard. Zahlungsverzug in der Europäischen Union. *Neue Juristische Wochenschrift*, 2001, vol. 54, no. 2, p. 105; SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 2 (14).

has to act within the framework of an independent economic or professional activity.²⁴ This framework can be defined as an ‘*activity in a structured and stable manner, so that the activity cannot be limited to an isolated one-off supply, and that the transaction in question must form part of that activity.*’²⁵

Public authorities, in comparison, do not operate in ordinary market conditions, nor do they aim to make a profit or bear losses resulting from their activities. Still, they are covered by the Late Payment Directive. Such authorities typically are ‘*state, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.*’²⁶ To define a body governed by public law, several criteria are relevant. First, it has to be established for the specific purpose of meeting needs in the general interest (therefore, it must not pursue an industrial or commercial purpose).²⁷ Secondly, it must have a legal personality. For the third criterion, one out of three alternatives has to be fulfilled: (1) the body is financed (at least for the most part) by a State, regional or local authority or another body governed by public law; (2) the body is subject to management supervision by those bodies; or (3) the body has an administrative, managerial or supervisory board, more than half of whose members are appointed by named authorities. Each of the three alternatives under the third criterion essentially indicates a proximity to the public sector.²⁸

24 ECJ 15 December 2016, C-256/15, *Nemec* (33).

25 *Ibid.* (34).

26 Article 2 (1) (a) of Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, O.J. L 134/1. Cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 2 (8) et seq.

27 Even if such bodies were set up with the goal of meeting needs in the general interest, the activity might still be of an industrial or commercial character. Cf. Recital 12 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, O.J. L 94/243 (*Utilities Directive*), Recital 10 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, O.J. L 94/65 (*Public Procurement Directive*). Those two Directives apply due to the reference made in Article 2 (2) of the Late Payment Directive to the earlier version of each Directive; cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 2 (8) et seq. for further details.

28 Article 1 (9) of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134/144 (former *Public Procurement Directive*), which defined the same criteria as Article 2 (1) (a) of Directive 2004/17/EC (former *Utilities Directive*). The institutions of the European Union can be qualified as public authorities as well, cf. Recital 27 of the Late Payment Directive.

Other entities, such as associations, political parties, trade unions or religious communities, are not governed by the Late Payment Directive due to their non-commercial nature (as long as they do not fulfil the definition of a body governed by public law).²⁹ Consumers are explicitly excluded from the scope of the Directive.³⁰

As an initial result of the above constraints, it can be summarized that the Late Payment Directive only applies to loan contracts between two undertakings or an undertaking and a public authority. It can therefore be held preliminarily that the Late Payment Directive is restricted to corporate transactions. As a next step, it has to be clarified if corporate loans fall under the heading of corporate transactions.

3.3 *Delivery of Goods or Provision of Services*

A commercial transaction must involve the delivery of goods or the provision of services, both for remuneration.³¹ These are the typical components of a synallagmatic relationship (i.e., the delivery of goods or the provision of services for remuneration). In the case of corporate loans, it has to be clarified whether the provision of money constitutes a service at all.

To start with, Article 2 (1) explains that a commercial transaction can include a service provided by an undertaking in exchange for remuneration. Whether a financial service (like the provision of money) is covered by the term ‘service’, has to be specified in greater detail.

Commonly in European law, financial services are classified as services.³² The Distance Marketing of Financial Services Directive provides just one example, holding that a financial service ‘means any service of a banking, credit, insurance, personal pension, investment or payment nature.’³³ Yet, secondary law often exempts financial services from provisions that govern general services.³⁴ Still it

29 Cf. OELSNER, Tobias. Zwingendes Recht im Geschäftsverkehr durch die Reform der Zahlungsverzugsrichtlinie. *Zeitschrift für das Privatrecht der Europäischen Union*, 2013, vol. 10, no. 4, p. 183.

30 Cf. Recital 8 of the Directive. B2C transactions are covered by other specific provisions of European Union law. Cf. for the definition of consumers for the purpose of European Directives: ULLREICH, Stefan, Mathias. *Der Verbrauchervertrag. Unternehmer – und Verbraucherbegriff im Konsumentenschutzrecht*. Vienna: Verlag Österreich GmbH, 2016, p. 128.

31 *Ibid.*

32 JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. *Neue Juristische Online-Zeitschrift* 2015, vol. 15, no. 8, p. 242; FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. *Zeitschrift für Wirtschaftsrecht*, 2015, vol. 36, no. 38, p. 1809.

33 Article 2 (b) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, O.J. L 271/16 (Distance Marketing of Financial Services Directive).

34 Examples for such exemptions can be found for instance in Article 2 (2) (b) of Directive

appears that the European legislature regards financial services as services and merely excludes them from certain fields of regulation which are not adequate to the financial sector.³⁵ In other words, an exemption would not be necessary if financial services were not first considered services in general. Excluding financial services from certain legislative acts makes sense given the particular nature of financial services. On the other side of that coin, this means that the financial services sector in many aspects requires different regulation than the traditional services sector.³⁶

Alongside, the European Court of Justice (ECJ) qualifies financial services as services. This was made clear in a judgement in 1998 wherein the Court held that the '*grant of a credit facility is indeed the provision of a service [...]*'.³⁷ This is maintained in other holdings of the ECJ³⁸ and it is already well-settled case law that an institution that provides credit is to be understood as a service provider.³⁹

Even the Late Payment Directive itself indicates that financial services are covered by the Directive. This follows from Recital 8 Sentence 2 of the Directive, which exempts some financial transactions, such as payments made as compen-

2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. L 376/36 (Services Directive). It says that the Directive shall not apply to '*financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, [...]*'. Another example can be found in Article 3 (3) (d) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, O.J. L 304/64 (*Consumer Rights Directive*), which stipulates that the Directive shall not apply to contracts regarding financial services.

35 Cf. FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. *Zeitschrift für Wirtschaftsrecht*, 2015, vol. 36, no. 38, p. 1809.

36 This is the reason for the special regulation of financial services in many regards. Cf. FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. *Zeitschrift für Wirtschaftsrecht*, 2015, vol. 36, no. 38, p. 1809.

37 ECJ 17 March 1998, C-45/96, *Bayerische Hypotheken und Wechselbank AG v Edgar Dietzinger* (18) on the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, O.J. L 372/31.

38 ECJ 15 March 2012, C-453/10, *Jana Pereničová and Vladislav Perenič v SOS financ spot sro* on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. L 95/29; ECJ 14 November 1995, C-484/93, *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme* (11); ECJ 9 July 1997, C-222/95, *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie* (17). Cf JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. *Neue Juristische Online-Zeitschrift* 2015, vol. 15, no. 8, p. 242.

39 ECJ 3 October 2006, C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* (39) et seq. When the ECJ had to determine into which category of the fundamental freedoms the activity of granting credit on a commercial basis falls, the Court concluded that this activity indeed constitutes a provision of services.

sation for damages (including payments from insurance companies), from the scope of the Directive.⁴⁰ These exemptions, however, imply that insurance contracts in general can (and should) be subsumed under the Late Payment Directive. As insurance contracts undoubtedly belong to the financial services sector, the narrow exemption suggests that the Late Payment Directive covers other contracts within this sector.⁴¹

In light of all the above factors, the provision of money seems rightly classified as a service. Therefore, as an interim result, it can be held that if the provision of capital is a 'service' in the context of the Late Payment Directive, said Directive has to be applicable to loan contracts.

3.4 The Concept of Remuneration

The final criterion of Article 1 (2) of the Directive that has to be fulfilled is the presence of remuneration, as the '[...] Directive shall apply to all payments made as remuneration for commercial transactions.'⁴² In Recital 8, it is again specified that the scope of the Directive is limited to remuneration payments.⁴³ Consequently, not all commercial payments are governed by the Directive, but only such payments that are made as remuneration for a commercial transaction.⁴⁴

40 The Directive excludes some commercial transactions from its jurisdiction, as the European legislature did not intend to regulate certain areas. Payments under the laws on cheques and bills of exchange, for instance, are not regarded as commercial transactions in the context of the Directive. The reason for this exclusion is the potential conflict of laws between the Directive and the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) as well as the Convention Providing a Uniform Law for Cheques (Geneva, 1931). Said conventions have been ratified by 14 Member States of the European Union and the Late Payment Directive should not intervene in this regard. Cf. SCHROETER, Ulrich, Gerd. *UN-Kaufrecht und Europäisches Gemeinschaftsrecht*. München, Sellier. European Law Publishers, 2005, Article 6 (343). Moreover, the Directive does not govern compensation payments. This includes payments from insurance companies, as the application of the Directive 'should be limited to payments made as remuneration for commercial transactions.' The focus lies on the term *remuneration*, as compensatory payments are not regarded as remuneration for a good or service.

41 FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. *Zeitschrift für Wirtschaftsrecht*, 2015, vol. 36, no. 38, p. 1809. When the Late Payment Directive uses the term 'trade credit' in Recital 13, however, this is no indication that the Directive should cover loan agreements. The wording is misleading as trade credits do not qualify as credits as such. Trade credits are granted by the seller of a product to the buyer in the context of the sale of a certain good and bear the character of a payment deferral rather than a classic credit agreement. JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. *Neue Juristische Online-Zeitschrift* 2015, vol. 15, no. 8, p. 242.

42 Article 1 (2) of the Late Payment Directive.

43 Recital 8 of the Late Payment Directive stipulates that '*The scope of this Directive should be limited to payments made as remuneration for commercial transactions.*'

44 This clarification was added by the Council in the course of drafting the initial Late Payment Directive, Directive 2000/35/EC of the European Parliament and of the Council of

However, the Directive does not include a definition of the term ‘remuneration’. In the German version of the Directive, the expression ‘*Entgelt*’ is found, which usually describes any consideration for a contractual obligation. In general, it can be stipulated that remuneration only comprises monetary obligations.⁴⁵

In order to subsume facility agreements under the Late Payment Directive, it has to be clarified which part of a loan agreement can be regarded as remuneration. In Austria, for instance, remuneration for a loan is the interest that is provided for in the loan contract.⁴⁶ In the German literature, the remuneration aspect of loans is argued in different ways.⁴⁷

The predominant view holds that only the contractual entitlement to interest represents the creditor’s consideration for the provision of capital. The German literature thus (in line with the Austrian view) qualifies the *interest* for a credit as remuneration,⁴⁸ which has to be distinguished from the simple repayment of the credited amount. The credited amount is hereinafter referred to as the ‘proceeds of the loan’. Said proceeds of the loan do not constitute remuneration for the provision of the service, but have to be returned as part of the contractual obligations in the synallagmatic relationship.⁴⁹ This opinion was mainly shaped by *Freitag*, who invokes two Directives to supplement his arguments. Alongside

29 June 2000 on combating late payment in commercial transactions, O.J. L 200/35 (former *Late Payment Directive*); cf. COUNCIL. Common Position (EC) No. 36/1999 adopted on 29 July 1999, O.J. C 284/1.

- 45 SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 1 (10) et seq. FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1806.
- 46 Cf. WELSER, Rudolf, ZÖCHLING-JUD, Brigitta. *Bürgerliches Recht. Fourteenth Edition*. Vienna: Manz Verlag Wien, 2015, paras. 918 et seq; §988 of the Austrian Civil Code (ABGB).
- 47 Cf. JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. Neue Juristische Online-Zeitschrift 2015, vol. 15, no. 8, p. 242 et seq. versus FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1809.
- 48 FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1806; LÖWISCH, Manfred, FELDMANN, Cornelia. In STAUDINGER, Julius von (ed). BGB. 17th edition. Berlin: Sellier-de Gruyter, 2014, § 286 (97).
- 49 LÖWISCH, Manfred, FELDMANN, Cornelia. In STAUDINGER, Julius von (ed). BGB. 17th edition. Berlin: Sellier-de Gruyter, 2014, § 286 (97) in conjunction with § 288 (21); FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1806; ERNST, Wolfgang. In Münchener Kommentar zum Bürgerlichen Gesetzbuch. 7th edition. München: C.H.Beck, 2016, § 288 (19).

the *Consumer Credit Directive*,⁵⁰ he mentions the *Mortgage Credit Directive*.⁵¹ He argues that neither of these Directives considers the proceeds of a loan as remuneration. They in fact differentiate between the terms 'borrowing rate' and other 'charges' versus 'repayment.'

Nevertheless, *Junglas* recently tried to disprove this common perspective and argued for the contrary, in order to classify the proceeds of the loan as remuneration as well. According to his point of view, remuneration is the counter-value of a service and, therefore, the equivalent of the service in question. According to this view, if the provision of money constitutes the service, everything that is provided in return should be regarded as remuneration. *Junglas* qualifies the repayment of the loan as remuneration for the provision of money and the interest on the loan as remuneration for capital utilisation. He points out that the repayment of the proceeds of the loan has a recompensing effect, and that is not the money *in rem* that is given back but a certain *amount* of money (which will not be the exact same bank notes that were provided initially).⁵² This amount of money cannot be regarded as a 'black box' that is given forth and back. The provision of money is a service, which is remunerated by everything that is given in return. Both the proceeds of the loan, as well as the interest, therefore constitute remuneration in *Junglas*' view.

The classification of the remuneration part is relevant, as the actual outcome determines how much interest is due in the case of late repayment of a loan. If the first view is supported, interest can only arise on the contractual interest that is paid back late (i.e., interest on the interest for the loan), but not on the outstanding amount that qualifies as the proceeds. If, however, *Junglas*' approach is followed, interest for late payment can be demanded for the entire outstanding amount, i.e. for the proceeds of the loan and for the outstanding interest.

This second view constitutes an undoubtedly more effective measure against late repayment of loans and therefore makes more sense from an economic point of view. To claim interest for just a part of an outstanding instalment seems inadequate. *Junglas* argues that the prevailing view in Germany is too narrow and relies too much on the national, German interpretation of the so-called 'synallagma'.⁵³

50 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, O.J. L 133/66 (*Consumer Credit Directive*).

51 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, O.J. L 60/34.

52 Cf. JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. *Neue Juristische Online-Zeitschrift* 2015, vol. 15, no. 8, p. 243 et seq.

53 *Ibid.*

From a dogmatic point of view, *Junglas'* argumentation is questionable, as it does not fit in with the Austrian or German legal system or the general understanding of the law.⁵⁴ Nevertheless, in terms of content, his rationale is persuasive. An approach that solely relies on a national legal system is too formalistic and does not reflect European Union law. As the goal of the Directive is to ensure liquidity, the predominant German view turns out to be too focused on national legal doctrine. The Late Payment Directive as a European legislative act demands that national understandings of the law have to be applied restrictively for the benefit of European law as a whole. Nothing in the Directive indicates that the proceeds of a loan are not covered by its jurisdiction.

4. Excursus: Compound Interest

A final issue worth mentioning is the treatment of compound interest. As set out above, late repayment of a loan entitles the creditor to demand interest on the outstanding amount. The outstanding amount includes the contractual interest; therefore, he may demand interest on interest. This interest on interest constitutes so-called *compound interest*, and some Member States forbid it.⁵⁵ The intention for such a prohibition lies in the protection of the debtor, who should be able to foresee the amount of debt that may arise.⁵⁶

According to the so-far stipulations, however, national law providing for a prohibition on the accrual of compound interest should be interpreted narrowly. The law of the European Union demands an autonomous interpretation of directives. If an interpretation curbs the effects of a directive, this interpretation cannot be regarded as being in line with European law.⁵⁷ For the purpose of the present analysis, this means that a restriction on a claim to interest would run counter the Late Payment Directive's objectives by keeping the creditor from his remedy for late payment.

5. Conclusions

When finally evaluating all presented arguments, the application of the Late Payment Directive to loan contracts seems convincing. If a loan contract is estab-

54 Cf. FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1807 et seq.

55 See for example § 289 of the German Civil Code (BGB).

56 FREITAG, Robert. Unternehmenskredit und Zahlungsverzug. Zeitschrift für Wirtschaftsrecht, 2015, vol. 36, no. 38, p. 1809.

57 Ibid., 1809 et seq. JUNGLAS, Benjamin. Darlehensrückzahlungsforderungen als Entgeltforderungen iSd § 288 II BGB?. Neue Juristische Online-Zeitschrift 2015, vol. 15, no. 8, p. 244, reaches the same conclusion, even if his argumentative approach is different. Cf. SCHAUER, Martin, GRUBER, Magdalena. Directive 2011/7/EU 2011 on combating Late Payment in Commercial Transactions. In MANKOWSKI, Peter (ed). Commercial Law. Article-by-Article Commentary. Baden-Baden: Nomos Verlagsgesellschaft, 2019, Article 3 (51).

lished between two undertakings or an undertaking and a public authority, the provisions of the Late Payment Directive apply. This results from the classification of a loan as a 'service'. Interest for the outstanding amounts can accordingly arise on the entire amount, not only on the outstanding interest.

The effects of this outcome, however, are extensive. For one thing, many Member States might face infringement proceedings due to inadequate implementation of the Directive. For another thing, this interpretation might put a whole new complexion on corporate loans. Finance providers become vested with a set of rules that strengthens their position. It is apparent that this contributes to the protection of creditors and fosters the functioning of the market, just as it was intended by the European legislature.

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