

**Noutati legislative privind combaterea intarzierii platilor in tranzactiile comerciale**

Pentru a contribui la dezvoltarea unei culturi a platilor la termen, a fost transpusa in dreptul intern Directiva 2011/7/UE a Parlamentului European si a Consiliului din 16 februarie 2011 privind combaterea intarzierii in efectuarea platilor in tranzactiile comerciale prin Legea nr. 72 din 28 februarie 2013 privind masurile pentru combaterea intarzierii in executarea obligatiilor de plata a unor sume de bani rezultand din contracte incheiate intre profesionisti si intre acestia si autoritati contractante, intrata in vigoare la data de 05.04.2013 (in continuare denumita „Legea 72”).

**1. Domeniul de aplicare**

Prezenta Lege 72 se aplica creantelor certe, lichide si exigibile ce constau in obligatii de plata a unor sume de bani care rezulta din contracte incheiate intre profesionisti sau intre acestia si o autoritate contractanta.

Nu sunt incluse in sfera de aplicare a Legii 72:

- creantele inscrise la masa credala in cadrul unei proceduri de insolventa;
- creantele ce fac obiectul unui (i) mandat ad-hoc, (ii) concordat preventiv ori al unei (iii) intelegeri incheiate ca urmare a unei negocieri extrajudiciare de restructurare a datoriilor unei societati;
- contractele incheiate intre profesionisti si consumatori.

**New regulations for combating late payments in commercial transactions**

In order to contribute to developing a culture of prompt payment, Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payments in commercial transactions was transposed into national legislation through Law no 72 as of 28 February 2013 on measures to repel late payments in transactions between professionals and between professionals and contracting authorities, entered into force on 05.04.2013 (hereinafter referred to as "Law 72").

**1. Scope**

Law 72 shall be applied to due and unpaid receivables resulting from an agreement concluded between professionals or between them and contracting authorities.

The following are not regulated by Law 72:

- receivables registered to creditor's group in case of insolvency procedure;
- receivables that are subject to (i) an ad-hoc mandate, (ii) a preventive arrangement with creditors or (iii) an agreement concluded as a result of negotiations of extrajudicial restructuring of company debts;
- agreements between professionals and consumers.

De asemenea, cu privire la obligatiile de plata a unor sume de bani ce rezulta din contracte incheiate inainte de 5 aprilie 2013, dispozitiile Legii 72 nu sunt aplicabile.

## **2. Clauze contractuale si practici abuzive**

Clauzele abuzive sunt lovite de nulitate absoluta, iar raspunderea patrimoniala delictuala si/sau contractuala pentru prejudiciile cauzate de clauzele si practicile abuzive va fi atrasa potrivit dispozitiilor generale din Codul Civil.

Este considerata abuziva practica sau clauza contractuala prin care, in raport cu creditorul, in mod vadit inechitabil se stabileste:

- termenul de plata;
- nivelul dobanzii pentru plata intarziata;
- nivelul daunelor-interese suplimentare.

### **2.1. Criterii pentru calificarea clauzelor contractuale si practicilor abuzive**

Instantele judecatoresti vor fi cele care vor stabili caracterul abuziv al unei clauze contractuale sau practici. Pentru acest proces de evaluare, Legea 72 stabileste in mod exemplificativ o serie de criterii ce vor trebui avute in vedere, cum ar fi:

- abaterile grave de la (i) practicile statornicite intre parti sau de la (ii) uzantele conforme ordinii publice sau bunelor moravuri;
- nerespectarea principiului bunei-credinte;
- nerespectarea principiilor de diligena in executarea obligatiilor;
- natura bunurilor sau serviciilor;
- neprevaderea motivelor obiective de derogare de la (i) termenele de plata sau de la (ii) rata dobanzii;
- pozitia dominanta a cocontractantului in raport cu o intreprindere mica sau mijlocie.

Likewise, Law 72 shall not apply to payment obligations resulting from contracts concluded before April 5<sup>th</sup> 2013.

## **2. Unfair contractual terms and practices**

Unfair contractual terms are considered void and null, whereas in case of tort and/or contractual patrimonial liability caused by unfair contractual terms and practices, the general provisions of the Civil Code shall be applicable.

The following practice or contractual clause is to be considered abusive, if in relation to the creditor unfairly establishes:

- the payment term;
- the interest for late payment;
- the additional compensatory damages.

### **2.1. Criteria qualification of unfair contractual terms and practices**

The courts of law shall qualify the specific clauses and practices as being or not abusive; while performing such assessment, besides the particularities of each contract, the following criteria as exemplified by Law 72 shall also be taken into account:

- serious deviation from (i) practices established between the parties or from (ii) public order or morality practices;
- breach of the good faith principle;
- breach of the principles of diligence in performance of obligations;
- nature of the goods or services;
- lack of stipulating objective reasons for derogating from (i) payment terms or (ii) interest rate;
- dominant position in relation to a small or medium size companies.

## 2.2. Calificarea legala a clauzelor abuzive

Nu este necesara verificarea existentei circumstantelor mai sus enumerate, cu privire la urmatoarele clauze declarate in mod expres de Legea 72 ca fiind abuzive:

- clauze ce stabilesc dobanzi penalizatoare inferioare dobanzii legale penalizatoare sau ce le exclud;
- clauze ce fixeaza o obligatie de punere in intarziere pentru a opera curgerea dobanzilor;
- clauze ce prevad un termen mai mare de la care creanta produce dobanzi decat termenele legale maxime prevazute de lege;
- clauze ce elimina posibilitatea platii de daune-interese suplimentare;
- clauze ce stabilesc un termen pentru emitarea si/sau pentru primirea facturii.

## 3. Reguli aplicabile raporturilor contractuale intre profesionisti

### 3.1. Termenul contractual de plata in raporturile contractuale dintre profesionisti

In raporturile dintre profesionisti, termenul contractual de plata nu poate fi mai mare de 60 de zile calendaristice. Prin exceptie, partile pot stipula in contract un termen de plata mai mare, atata vreme cat, in raport cu creditorul, aceasta clauza nu este considerata abuziva.

### 3.2. Termenul legal de plata in raporturile dintre profesionisti

In lipsa unui termen de plata prevazut expres in contract, dobanda penalizatoare va curge:

- a) dupa 30 de zile calendaristice de la data la care debitorul primeste factura sau alta asemenea cerere echivalenta de plata;

## 2.2. Legal qualification of unfair clauses

The existence of the above mentioned circumstances is not to be examined with regard to the following clauses which are qualified *ope legis* as unfair:

- clauses which establish penalty interest rates lower than the legal penalty interest rate or which excludes them;
- clauses which condition the application of penalties to priory putting in delay the debtor;
- clauses which provide a longer period of time from which the interest rate shall be due than the maximum legal terms provided by the law;
- clauses which exclude additional compensatory damages;
- clauses which establish a term for the issuance and/or receipt of the invoice.

## 3. Rules applicable to contractual relations between professionals

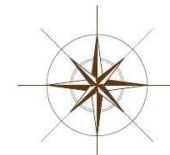
### 3.1. Contractual term of payment in relations between professionals

With respect to the contractual relations between professionals, the contractual payment term cannot exceed 60 calendar days; notwithstanding, parties are allowed to stipulate a longer payment term as long as, in relation to the creditor, the clause is not to be considered unfair.

### 3.2. Legal term of payment applicable between professionals

If the payment term was not specified in the contract, the penalty interest rate will start as of:

- a) 30 calendar days from the date the debtor receives the invoice or other equivalent payment request;



- b) după 30 de zile calendaristice de la data receptiei marfurilor sau prestării serviciilor, dacă data primirii facturii sau a unei cereri echivalente de plată este incertă sau anterioară primirii bunurilor sau prestării serviciilor;
- c) după 30 de zile calendaristice de la recepție sau verificare, dacă prin lege sau prin contract se stabilește o procedură de recepție sau de verificare pentru certificarea conformității marfurilor sau serviciilor, iar autoritatea contractantă/debitorul a primit factura sau cererea echivalentă de plată la data receptiei sau verificării ori anterior acestei date.
- Prin excepție de la litera (c), părțile pot stabili în contract un termen mai mare de 30 de zile calendaristice pentru procedura de recepție sau verificare, sub rezerva ca această clauză contractuală să nu fie considerată abuzivă.

### **3.3. Determinarea dobânzii penalizatoare în raporturile contractuale între profesioniști**

În cadrul raporturilor dintre profesioniști, creanța ce constă în prețul bunurilor livrate sau tariful serviciilor prestate va produce dobânzi penalizatoare dacă creditorul (inclusiv subcontractantii săi) și-a îndeplinit obligațiile contractuale sau dacă creditorul nu a primit suma datorată la scadență.

Dacă termenul de plată a fost prevăzut în contract, dobânda penalizatoare va curge de la scadență până la momentul plății, în cuantumul convenit de părți.

Dacă părțile nu au stabilit nivelul dobânzii pentru plată cu întârziere, se va aplica dobânda legală penalizatoare prevăzută de Ordonanța nr. 13/2011, calculată astfel:

- în raporturile dintre profesioniști și între aceștia și autoritățile contractante, la nivelul ratei dobânzii de referință plus 8 puncte procentuale.

- b) 30 calendar days from the date of receipt of goods or supply of services, if the receipt of the invoice or of other equivalent payment request is uncertain or previous to the receipt of goods or services;
- c) 30 days from reception or verification, whether by law or by contract is established a reception or verification procedure to certify the compliance of goods or services, and the contracting authority/debtor received the invoice or the equivalent payment request at the date of reception or verification or before such date.

Notwithstanding paragraph (c), the parties may contractually stipulate a period longer than 30 calendar days for the procedure of reception or verification, provided that this clause not to be considered unfair.

### **3.3. Calculation of the penalty interest rate in relations between professionals**

Within contractual relations between professionals, the receivable consisting of the price of the delivered goods or the tariff of the provided services shall give right to penalty interest if the creditor (including its subcontractors) fulfilled its contractual obligations or if the creditor did not receive the due amount at maturity date.

If the payment term was stipulated in the contract, the penalty interest shall apply as of due date until payment, at the rate agreed by the parties.

If the interest rate for late payment is not contractually determined, the legal penalty interest rate calculated as per Ordinance no 13/2011, will be applied as follows:

- in contractual relations between professionals and between them and contracting authorities, at the rate of the reference interest rate plus 8 percentage points.

<p><b><u>4. Raporturile contractuale intre profesionisti si autoritati contractante:</u></b></p> <p><b>4.1. Termenul legal de plata aplicabil intre profesionisti si autoritati contractante</b></p> <p>Cu privire la termenul legal de plata, pentru raporturile contractuale dintre profesionisti si autoritati contractante, Legea 72 stipuleaza dispozitii echivalente cu cele aplicabile in raporturile dintre profesionisti, <u>a.i. cele mentionate mai sus la punctul 3.2. se vor aplica si in cazul de fata.</u></p> <p><b>4.2. Termenul contractual de plata in raporturile contractuale intre profesionisti si autoritati contractante</b></p> <p>Spre deosebire de dispozitiile aplicabile raporturilor intre profesionsiti, <u>regula este ca in raporturile dintre profesionisti si autoritatile contractante termenele contractuale de plata vor coincide sau vor fi mai mici decat termenele legale de plata astfel cum sunt stipulate de Legea 72 si astfel cum sunt mentionate mai sus in cuprinsul prezentului la pct. 3.2.</u></p> <p>Cu titlu de exceptie de la regula mentionata mai sus, <u>in contractele incheiate intre autoritati contractante si profesionisti se poate stipula un termen de plata mai mare, maximul fiind de 60 de zile calendaristice doar in urmatoarele conditii:</u></p> <ul style="list-style-type: none"> <li>▪ termenul este stabilit expres atat (i) in contract, cat si (ii) in documentatia achizitiei;</li> <li>▪ termenul este obiectiv justificat, tinand cont de natura sau caracteristicile specifice ale contractului si</li> <li>▪ clauza de prelungire a termenului pana la 60 de zile calendaristice sa nu fie abuziva.</li> </ul>	<p><b><u>4. Contractual relations between professionals and contracting authorities:</u></b></p> <p><b>4.1. The legal payment term applicable between professionals and contracting authorities</b></p> <p>With regard to the legal payment term, when it comes of contractual relations between professionals and contracting authorities, Law 72 stipulates equivalent dispositions with those applying to contractual relations between professionals, <u>for these reasons those mentioned herein above at point 3.2. shall apply for this case too.</u></p> <p><b>4.2. The payment due date in contractual relationships between professionals and contracting authorities</b></p> <p>As opposed to dispositions applicable to contractual relations between professionals, <u>the rule is that, when it comes of contractual relations between professionals and contractual authorities, the contractual payment terms shall not be longer than the legal payment terms as these are stipulated by Law 72, as these are mentioned herein above at point 3.2.</u></p> <p>As an exception to the before mentioned rule, <u>the contracts concluded between professionals and contracting authorities may include longer payment terms, however not longer than 60 calendar days solely if the following conditions shall be met:</u></p> <ul style="list-style-type: none"> <li>▪ the payment term is expressly mentioned (i) in the contract, as well as (ii) in procurement documentation;</li> <li>▪ the payment term is impartially justified, taking into consideration the nature and characteristics of the contract and</li> <li>▪ the clause for the extension of payment term up to 60 calendar days is not considered unfair.</li> </ul>
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**4.3. Dobanda legala penalizatoare aplicabila raporturilor contractuale intre profesionisti si autoritatile contractante**

Si in acest caz nivelul dobanzii legale penalizatoare este egal cu rata dobanzii de referinta plus 8 puncte procentuale, astfel cum se mentioneaza mai sus la punctul 3.3.

**5. Consideratii finale:**

Legea 72 urmareste un merituos dublu scop, acela de a combate intarzierile la plata si de a echilibra relatiile contractuale intre profesionisti si intre profesionisti si autoritatile contractante; atingerea acestui scop va fi influentata insa atat de complexitatea termenilor contractuali si a raporturilor comerciale cat si de jurisprudenta.

**4.3. Legal penalty interest applicable to contractual relations between professionals and contracting authorities**

The same legal penalty rate, meaning the reference interest rate of NBR plus other 8 percentage points, as detailed at point 3.3. above shall apply to this case too.

**5. Final remarks:**

Law 72 settles a worthwhile twofold purpose, to reduce delay payments and to balance the contractual relations among professionals and between professionals and contracting authorities; meeting such purpose shall depend however on one hand on the complexity of contractual terms and business relations but also on the future practice of the courts of law.

*Yours sincerely,  
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