LAW NO. 72/2013 ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS

As of 5 April 2013 Law no. 72/2013 on combating late payment in commercial transactions between undertakings or between undertakings and public authorities (“Law no. 72/2013”) has entered into force. Law no. 72/2013 has been enacted for the implementation of Directive 2011/7/UE and brings new special rules and interdictions with respect to the payments made as remuneration for commercial transactions.

The aim of Law no. 72/2003 is to combat late payment in commercial transactions between undertakings, as well as transactions between undertakings and public authorities, having as object the delivery of goods or the provision of services, including the design and execution of public works and building and civil engineering works.

The new legal provisions apply to monetary claims for debts which are due, certain and liquid. Law no. 72/2003 shall not apply in case of (i) transactions between professionals and consumers and (ii) of debts registered with the list of liabilities under the insolvency procedure, debts subject of an ad hoc mandate, preventive concordat or of an understanding of the parties following an extrajudicial negotiation with respect to the company’s debt restructuring procedure.

Please find below a brief outline of some of the most relevant provisions:

1. **Payment periods**

   If no payment period has been agreed by the parties under the contract, the creditor is entitled to interest for the late payment upon the expiry of any of the following deadlines:

   i. 30 calendar days as of the date of receipt by the debtor of the invoice or of an equivalent request for payment;

   ii. if the date of the receipt of the invoice or of the equivalent request for payment is uncertain, or if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days as of the date of receipt of the goods or services;

   iii. if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by law or under the

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1 This information note does not purport to be and should not be construed as legal advice. Professional advice should therefore be sought before any action is undertaken in relation to the matters set out in this information note.
contract, and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days as of such date.

In any case, the maximum duration of a procedure of acceptance or verification cannot exceed, as a general rule, 30 calendar days. Nevertheless, it may be possible for a verification procedure to exceed 30 calendar days, when expressly agreed in the contract and in any tender documents, in cases objectively justified and if it is not grossly unfair to the creditor.

In case of transactions between professionals, according to Law no. 72/2013 contractual payment periods should be limited to maximum 60 days. As an exception, the parties may expressly agree on payment periods longer than 60 days, provided however that such extension is not manifestly unfair / abusive for the creditor.

In case of transactions between professionals and public authorities, the contractual term for payment by the authority cannot be longer than 30 days (calculated as referred to under paragraphs i, ii and iii above). As an exception, the 30 calendar days term might be extended to a maximum 60 calendar days term in one of the following situations: (a) in case of public entities in the health field and of public entities providing health care or (b) in other type of agreements, only if it has been expressly agreed under the contract and in the tender documents, provided that the extension is objectively justified considering the nature and the features of the transaction and only if such clause is not abusive. Unlike the transactions between professionals, in case of transactions between professionals and public authorities the 60 days term in which the authority shall perform a payment obligation is a maximum term which cannot be further extended.

The above rules are without prejudice to the possibility of the parties to agree on payment schedules providing for installments.

2. **The parties cannot contractually agree upon the date of issuance/ receipt of the invoice;**

Any such contractual clause shall be null and void. Unlike the Law 72/2013, the EU Directive 2011/7/UE only refers to the date of receipt of the invoice. Moreover, in the EU Directive 2011/7/UE this restriction applies only to contracts between authorities and professionals, however in the Romanian Law no. 72/2013 this applies also to contracts concluded between professionals.

The broad and unclear wording of the Law no. 72/2013 may generate confusion in practice with regards to the invoicing procedure which the parties are allowed to agree under their contracts.

3. **Legal interest level. Additional costs for recovery of the receivable**

The legal interest level was increased to the interest reference rate plus 8 percentage points. Separately from the interest for late payment, the creditor shall also be entitled to compensation for recovery costs (e.g. legal costs, debt collection agency costs, etc); in any case the creditor is entitled to a minimum amount of EUR 40 as compensation for the creditor’s own (internal) recovery costs.

4. **Abusive clauses sanctioned with absolute nullity**

The following types of contractual clauses have been qualified as being abusive and are sanctioned with absolute nullity:

i. exclusion of payment of interest for late payment or establishing a delay interest rate lower than the legal interest;
ii. providing for a delay notification before the creditor is entitled to interest for the late payment;

iii. establishing a period longer than 30 days as of the agreed payment date starting from which the interest for late payments starts to run;

iv. exclusion of the possibility of the creditor to request for additional indemnification (other than the contractual interest) in case of late payment

v. establishing the date of issuance/ receipt of the invoice (please refer to our comments under section 2 above);

vi. establishing a payment term longer than 60 days – such clause is null and void in case of the contracts concluded with the public authorities.

Depending on the circumstances of a case, the court may consider that other clauses than the ones listed above are abusive as well.

It is not clear at this point how these legal provisions will affect the possibility of the parties to contractually agree on a cap of the interest for the late payment or on a maximum limit for the indemnification for damages deriving from recovery formalities.

5. **Entry into force and applicability**

Law no. 72/2013 has entered into force on 5 April 2013 and it is applicable only for the agreements concluded after such date while the agreements concluded prior to the entry into force of Law no. 72/2013 will continue to be governed by the existing legal provisions.

As an exception, article 15 regulating the legal sanction for abusive clauses (i.e. absolute nullity) shall apply to all contracts, irrespective of the date on which they have been concluded.