



Interview with lawyer Pere Brachfield ▶ Presentation of the book 'Manual contra la morosidad'

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Delinquency between companies is an issue that generates significant treasury problems for those who suffer from it, as well as being considerable in the macroeconomic and structural field, which sometimes has economic but also cultural and emotional causes. To find out more about this issue in Andorra and Europe, EL PERIÒDIC interviewed Pere Brachfield, lawyer, managing partner of Brachfield & Asociados and director of studies of the Multisectoral Platform against Delinquency (PMcM), and with Joaquín Marqués-Pacual, expert in communication, political science and law, have written *Manual contra la morosidad, todas las claves legislativas* (Editorial Aranzadi, 2022), a key work to understand business delinquency and know first hand the legislation that has been enacted at European level and Spanish to fight it.

–What is business delinquency, why does it occur, and in what type of payments is it given more?

–Default is a delay in the fulfillment of a payment obligation by the buyer, and constitutes an infringement of the credit right of the supplier. However, the delinquency must be differentiated from the actual default (bad credit), since in the event of late payment, although late, it can still occur.

The main causes can be grouped into five categories: 1) lack of liquidity and financial problems of the client; the debtor company suffers from a cash lag between collections and payments, and a negative short-term cash flow occurs; 2) Economic causes: These are usually companies that generate losses year after year or whose profits are insufficient for the business to be viable. The most common cause is a drop in sales, which leads to a decrease in operating income; 3) Circumstantial causes: the debtor is going through short-term difficulties such as an illness, a business accident (factory fire), the loss of a major customer, the entry of a foreign competitor, or that has affected him a bankruptcy of a debtor; 4) Cultural causes: The debtor, despite having money, does not pay because he lacks a business culture that dictates that his payment behavior must be ethical. This position of «for the time being, I do not pay» is often encouraged by the social environment, and 5) emotional causes: some debtors who do not have solvency problems, do not pay for emotional reasons, who are angry with the provider for some dispute trade or that there is an unresolved conflict that has damaged relations.

With regard to the types of payments where more is given, inter-company delinquency tends to increase or decrease in certain sectors due to conjunctural causes. For example, the hospitality industry has now grown significantly, while companies in the trade sector have significantly reduced their rates.



Pere Brachfield

Managing Partner of Brachfield & Associates Attorneys

«Delinquency causes thousands of business closures and the loss of tens of thousands of jobs»

–What are the effects it has on the companies that suffer from it?

–Late payments in commercial transactions cause serious pro-

blems for SMEs, micro-enterprises and self-employed people and can even lead to insolvency in many businesses. Delinquency generates

significant economic losses that seriously harm the profitability, competitiveness and survival of SMEs causing thousands of business clo-

tures, and the loss of tens of thousands of jobs.

–Is it as important for SMEs as it is for large corporations?

–In the event of delinquency, micro, small and medium-sized enterprises incur significant financial costs to straighten out their treasury, while large companies have more liquidity and better financial resources to deal with it.

–The European institutions have been fighting delinquency in commercial operations since the early 1990s; struggle symbolized by the first directive of the year 2000 which



«The solution is France: a system of offenses and sanctions that will reduce delinquency in a few years»

«A code of good conduct for companies is needed, as enacting laws will not be enough»

has since been reformed without much effectiveness. What mistakes have been made and how can they be fixed?

–The key precepts of the European Directive of the year 2000, and of the Spanish Law of fight against the delinquency of the 2004 establish that the suppliers can claim interests of delay and indemnifications by the expenses of recovery in case of delinquency of his customers. But in some countries of the European Union (EU), such as Spain, suppliers do not exercise the rights granted to them by law for fear of losing customers if they claim them. In order to neutralize the abuses and bad payment practices of the buyers, the current anti-delinquency legislation is not enough, due to the climate of fear suffered by the suppliers. Consequently, the solution was implemented by France, which approved a system of offenses and sanctions that in a few years significantly reduced delinquency. In Spain, the Grupo Parlamentario Plural presented in 2020 a bill to amend the Law against delinquency to implement a system of offenses and sanctions similar to that which exists in France. Consequently, in order to reduce delinquency, it is essential that this bill comes to fruition and that the sanctioning regime be approved.

-How do you rate these two positions (Spanish and French)?

-The main problem presented by the current law against delinquency is that the substantive measures against delinquency that this law regulates, - on the one hand, the require of default interest that are automatically reported with interest rates of delay that today is elevating, and on the other hand, the power granted to the creditor to claim from the debtor a reasonable compensation for the costs of collection - in fact they do not apply in transactions between companies. In support of this claim we have the report on delinquency published in 2020 by the Multisectoral Platform against Delinquency (PMcM) which showed that, in case of non-payment of invoices, 86% of suppliers never or almost never demand from its delinquent debtors the default interest established by law, which is currently at 8% per annum; and that 94% of suppliers in the event of non-payment of trade credits did not demand from their debtors legal compensation for recovery costs, to which they are entitled. The explanation given by the PMcM for this widespread waiver is the fear that suppliers have of losing customers if they request it.

For its part, French law provided for administrative sanctions in the event of a buyer defaulting. Non-compliance can be penalized with an administrative penalty of two million euros, but the fine can reach up to four million euros for legal entities who are repeat offenders in breach of the maximum legal deadlines established by law. In the case of individuals who are entrepreneurs or self-employed, the penalties are 75,000 euros, and can reach up to 150,000 euros in case of recidivism. Likewise, all contractual clauses or business practices

that have the effect of abusively delaying the start date of the calculation of payment terms are prohibited, and in the event that a debtor company practices them, the same administrative sanctions will be applied, which have been established for non-compliance with legal payment deadlines. The results of these measures to combat delinquency have been very positive, as before the enactment of the law, in France, the average payment term for commercial operations was 66 days, and now, thanks to the regime of sanctions, is 42 days.

-As an expert in the field, what do you think is missing?

-In Spain there is a problem of business ethics, as unethical practices in payments are so ingrained in companies that they have become the norm, instead of being an exception. With this mentality it is difficult to eradicate delinquency. Therefore, it is necessary to publish a code of good payment behavior for Spanish companies, as the enactment of laws will not be enough to improve the payment practices of commercial operations. In the EU, some countries have already developed an excellent promotion of ethics in the payment behavior of companies through codes of conduct and institutional campaigns.

In addition to the approval of a sanctioning regime, a proposal is the creation of a new judicial system consisting of the creation of commercial courts such as those that have existed since the late eighteenth century in France (commercial courts), which would be a good measure to unload the courts of first instance of cases and expedite the resolution of claims of many companies. They would be courts specialized in judging exclusively the actions that companies exercise against ot-



«Scandinavian countries have long since put an end to delinquency in intercompany operations»

«In Andorra there is a good payment behavior of companies and a balance of relations between suppliers and customers»

her companies in claiming their credit rights. The provision of judges in these courts could be carried out through a system similar to the fourth round, and may choose jurists with a recognized career and more than 10 years of professional practice, and who pass a specific course in the field, and who were appointed by the Governing Chamber of the respective higher court of justice of the Autonomous Community at the proposal of one of the most representative employers' associations in the Autonomous Community.

-At the Spanish level, the creation of a State Observatory on Private Delinquency is planned. What will be its functions?

-The Observatoire des délais de paie-

ment has been in existence for years in France, presenting an annual report on the evolution of companies payment terms. This report also provides guidance on the actions taken by the authorities to better enforce the provisions of the anti-delinquency law, which has proved to be very useful and has greatly influenced the French government's decisions to combat delinquency through legal rules. In Spain, the bill for the creation and growth of companies provides for the creation of a state observatory of delinquency, which will be responsible for monitoring the deadlines. This observatory will prepare a report on the situation of payment terms and delinquency in commercial transactions that will allow the analysis of the results and effectiveness of this law. This report will be presented and analyzed in the State Council of SMEs. The government will then send it to the Cortes Generales and publish it on the website of the Ministry of Industry, Trade and Tourism. The report will include information on the situation of payment deadlines and delinquency of public administrations that will be provided by the Ministry of Finance and Civil Service.

-Is there a country in Europe that has managed to curb it individually?

-The Scandinavian countries have long since ended delinquency in inter-company operations. As an example, say that the average payment terms in these countries are around 30 days, while in Spain the average payment term is 96 days. Sweden is the paradigm of punctuality and paying suppliers within a short timeframe. In this country, delinquent customers have had to pay their creditors a high default interest rate for more than 30 years, as well as compensation for recovery costs.

-At the Andorran level, what are the peculiarities of delinquency?

-In Andorra, due to the fact that it is a small and prosperous country that enjoys long-term economic stability, there is generally a good trajectory of payment behavior of companies and a balance of relations between suppliers and customers. In addition, agents operating in different business sectors are often known and if a supplier does not know a new customer can ask for references in the market on their payment behavior, so delinquents are isolated and difficult to continue operating.

-What system is used to combat it? Is there a lack of legislation?

-Information on the solvency, ability to pay and seriousness of compliance with the obligations of buyers is much easier and faster to obtain than in other larger countries in which there are countless agents involved in a given market. In addition, bad reputation is an element that, on the one hand, makes it easier to identify potential delinquents and, on the other hand, it is a brake for customers to incur delinquency, as their delinquent behavior will be quickly known in the sector.

-Do you think that in the future it will be possible to reduce it to a residual economic problem?

-I hope so, but that is why it is necessary to implement the measures that have worked in other European states. If something works well in another country to minimize delinquency, it is advisable to adopt it. However, these are political decisions that must be made by legislators, who are not always afraid of the work or are influenced by lobbies or partisan interests. ≡

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