Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 28 April 2022 [1]

Case C-585/20

BFF Finance Iberia SAU
v
Gerencia Regional de Salud de la Junta de Castilla y León

(Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 2 de Valladolid (Administrative Court No 2, Valladolid, Spain))

(Reference for a preliminary ruling – Directive 2011/7/EU – Combating late payment in commercial transactions – Recovery, from a public authority, of book debts purchased from several undertakings by a debt collection agency – Article 6 – Fixed sum of EUR 40 in respect of recovery costs – Article 4 – Payment period where a procedure for certification of conformity of goods or services is provided for by statute or in the contract – Article 2(8) – Definition of 'amount due' – Inclusion of value added tax (VAT) in the basis for calculating late-payment interest)

Introduction

1. This request for a preliminary ruling concerns the interpretation of certain provisions of Directive 2011/7/EU on combating late payment in commercial transactions. [2] That directive applies to payments made as remuneration for commercial transactions and seeks to ensure the proper functioning of the internal market, by fostering the competitiveness of undertakings and, in particular, of small and medium-sized enterprises (SMEs). [3]

2. The request has been made in the course of proceedings between BFF Finance Iberia SAU ('BFF') and the Gerencia regional de Salud de la Junta de Castilla y León (Regional Health Management Board of the Autonomous Government of Castile and Leon, Spain) ('the regional administrative authority') concerning the recovery by BFF, from that administrative authority, of the debts corresponding to the amounts due for the supplies of goods and services provided by 21 companies to medical establishments under the control of that administrative authority.

1 Original language: French.

2 Directive of the European Parliament and of the Council of 16 February 2011 (OJ 2011 L 48, p. 1). That directive repealed, with effect from 16 March 2013, and replaced Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35).

3 See Article 1(1) and (2) of Directive 2011/7.

3. The questions referred for a preliminary ruling by the national court invite the Court of Justice to consider the following provisions:

– Article 6 of Directive 2011/7 and, in particular, the cumulative nature of the fixed sum of EUR 40 in respect of compensation for recovery costs where the debts, recovery of which is sought from a single public authority, stem from several invoices not paid on time by that administrative authority to various undertakings which, in the meantime, have assigned those debts to the entity which is claiming them; [4]

– Article 4 of that directive and, in particular, the conditions for applying the payment period for the payment of statutory interest for late payment in transactions between undertakings and public authorities; [5] and

– Article 2(8) of that directive, concerning the definition of 'amount due', and in particular the inclusion, or not, of the value added tax (VAT) specified in the invoices not paid on time in the basis for calculating the statutory interest for late payment. [6]

The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

4. BFF, a company incorporated under Spanish law which operates in the sector of debt recovery, purchased from 21 companies debts relating to unpaid invoices for goods supplied and services provided by those companies, between the years 2014 and 2017, to medical establishments under the control of the regional administrative authority.

5. On 31 May 2019, BFF claimed payment from that administrative authority of sums corresponding to a principal amount, plus late-payment interest and compensation of EUR 40 in respect of the recovery costs incurred for each of the unpaid invoices, in accordance with Article 8 of Ley 3/2004, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales (Law No 3/2004 on combating late payment in commercial transactions) of 29 December 2004. [7]

6. As the administrative authority did not respond to that claim, BFF commenced judicial proceedings before the Juzgado de lo Contencioso-Administrativo No 2 de Valladolid (Administrative Court No 2, Valladolid, Spain), the referring court, seeking an order that the regional administrative authority pay it the sums corresponding to a principal sum of

[4] The Court was called upon to interpret Article 6 of Directive 2011/7 in judgments of 16 February 2017, *IOS Finance EFC* (C-555/14, 'the judgment in *IOS Finance*', EU:C:2017:121); of 1 June 2017, *Zarski* (C-330/16, 'the judgment in *Zarski*', EU:C:2017:418); of 13 September 2018, *Česká pojišťovna* (C-287/17, 'the judgment in *Česká pojišťovna*', EU:C:2018:707); and of 9 July 2020, *RL (Directive on late payment)* (C-199/19, 'the judgment in *RL*', EU:C:2020:548), and in the order of 11 April 2019, *Gambietz* (C-131/18, EU:C:2019:306). Article 3(1)(c) of Directive 2000/35, which was, in essence, replaced by Article 6(3) of Directive 2011/7, was also interpreted by the Court, in judgments of 3 April 2008, *01051 Telecom* (C-306/06, EU:C:2008:187), and of 15 December 2016, *Nemec* (C-256/15, 'the judgment in *Nemec*', EU:C:2016:954). Article 6 of Directive 2011/7 is the subject matter of a request for a preliminary ruling in Case C-370/21, *DOMUS-SOFTWARE-AG* v *Marc Braschoß Immobilien GmbH*, which is pending.

[5] The Court interpreted Article 4 of Directive 2011/7 in the judgment in *IOS Finance* and the judgment of 28 January 2020, *Commission* v *Italy (Directive on late payment)* (C-122/18, 'the judgment in *Commission* v *Italy*', EU:C:2020:41).

[6] The Court was called upon to interpret certain other points in Article 2 of Directive 2011/7 in the judgments in *Zarski*, *Commission* v *Italy* and *RL*, and in judgments of 18 November 2020, *Techbau* (C-299/19, EU:C:2020:937), and of 13 January 2022, *New Media Development & Hotel Services* (C-327/20, EU:C:2022:23).

[7] BOE 314 of 30 December 2004, p. 42334 ('Law No 3/2004').

EUR 51 610.67, plus late-payment interest; an amount of EUR 40 in respect of recovery costs, for each of the unpaid invoices; an amount of EUR 43 626.76 in respect of statutory interest; an amount in respect of statutory interest accrued on the late-payment interest, plus legal costs.

7. The referring court has doubts regarding the interpretation of the provisions of Directive 2011/7 which concern the calculation of some of those amounts and regarding the compatibility with those provisions of the Spanish legislation which transposed them.

8. First of all, it raises the question of the interpretation of Article 6 of Directive 2011/7 concerning the fixed sum of EUR 40 due in respect of compensation for the recovery costs where a joint claim covering several invoices not paid on time is lodged. It states that the national legislation is inconsistent as regards the question whether that fixed amount is to be calculated per invoice or per claim.

9. Next, that court raises the question of the compliance with Directive 2011/7 of a role of national law which provides for a payment period of 60 days in all situations and for all types of contract, consisting of an initial period of 30 days for acceptance and a further 30 days for payment, without that 60-day period being expressly stipulated in the contract or justified by the particular nature or specific features of the contract.

10. Lastly, that court considers that it needs to know, in view of the various interpretations adopted by the national courts, whether Article 2 of Directive 2011/7 permits the basis for calculating late-payment interest to include the amount of VAT due on the service provided, stated in the invoice, or whether it requires a distinction to be made in that regard depending on the date on which the administrative authority's contractor pays that amount to the State Treasury.

11. In those circumstances, the Juzgado de lo Contencioso-Administrativo No 2 de Valladolid (Administrative Court No 2, Valladolid) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'In the light of [Article] 4(1), [Article] 6 and [Article] 7(2) and (3) of [Directive 2011/7]:

(1) Is Article 6 of the directive to be interpreted as meaning that the sum of EUR 40 applies per invoice in all circumstances, provided that the creditor has individually identified the invoices in his [or her] claims before the administrative authorities and the administrative courts, or does the sum of EUR 40 apply per invoice in all circumstances, even if joint and general claims have been lodged?

(2) How must Article 198(4) of Law 9/2017 [8] [which lays down] a payment period of 60 days in all circumstances and for all contracts, providing for an initial period of 30 days for approval and another, additional period of 30 days for payment, be interpreted, [in the light of] recital 23 of Directive 2011/7 …?

8 Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017, of 8 November 2017, on Public Sector Contracts, which transposes into the Spanish legal system Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 (BOE No 272 of 9 November 2017, p. 107714)).

(3) How is Article 2 of Directive 2011/7 to be interpreted? Does the interpretation of that directive support the conclusion that the basis for calculating late-payment interest recognised in the directive includes the VAT due on the service provided, the amount of which is included in the invoice? Or is it necessary to identify and determine the time when the contractor paid the tax to the tax administrative authority?'

12. Written observations have been submitted by the regional administrative authority, the Spanish Government and the European Commission, which have also replied to written questions posed by the Court.

Analysis

Preliminary observations

13. The dispute giving rise to the request for a preliminary ruling concerns the judicial recovery of the debts which BFF, a debt collection agency, purchased from 21 companies, arising out of the non-payment by the due date, by the administrative authority at issue, of remuneration relating to goods delivered and services provided by those companies to medical establishments under the control of that administrative authority.

14. As a preliminary point, the question arises as to whether that dispute involves 'commercial transactions' within the meaning of Article 2(1) of Directive 2011/7, defined as 'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration' and, consequently, whether that situation falls within the scope *ratione materiae* of that directive. Under Article 1(2), the directive applies to 'all payments made as remuneration for commercial transactions'.

15. Doubts may be raised in that regard on the ground that the debts at issue arise from contractual relationships, not between the regional administrative authority and BFF, but between that administrative authority and the companies from which BFF purchased those debts.

16. In that regard, I would point out that the debts at issue relate to remuneration that was not paid on time by a public authority for the supply of goods and the provision of services by those companies (namely the 21 assignor companies). Those debts therefore arose from 'commercial transactions', within the meaning of Article 2(1) of Directive 2011/7, and BFF purchased them with all the rights deriving therefrom. Therefore, the situation in the main proceedings is part of the extension of the initial commercial transactions. Accordingly, the assignment of debts by the original creditors to the debt collection agency has no effect on the applicability *ratione materiae* of that directive to the situation at issue.

17. That interpretation is confirmed by the judgments in *IOS Finance* [9] and *RL*, [10] which define the material scope of Directive 2011/7 broadly, permitting it to apply to all payments made as remuneration for commercial transactions.

[9] The case which gave rise to the judgment in *IOS Finance* was also a claim for recovery of a number of debts together by a debt collection agency, to which those debts were assigned by several companies. Although it is true that, in its judgment, the Court did not analyse the applicability *rationae materiae* of Directive 2011/7, the fact that it replied to the questions referred for a preliminary ruling on the interpretation of the provisions of that directive presupposes that it considered that that situation fell within the scope *ratione materiae* of the directive.

[10] The judgment in *RL* (paragraphs 22 and 23 and the case-law cited).

18. Therefore, I consider that the relationship between the administrative authority in question and BFF falls within the material scope of Directive 2011/7.

The first question

19. By its first question, the referring court asks, in essence, whether Article 6 of Directive 2011/7 must be interpreted as meaning that the fixed sum of EUR 40 designed to compensate the creditor for recovery costs is due for each unpaid invoice duly identified in the claim or for each administrative or judicial claim, irrespective of the number of invoices for which payment is claimed. [11]

20. The regional administrative authority claims that Article 6 of that directive is to be interpreted as meaning that the fixed sum of EUR 40 is due per claim, irrespective of the number of invoices for which payment is claimed. Similarly, the Spanish Government maintains that that fixed sum is linked not to the invoices but to the costs associated with recovery of the sums owed. For its part, the Commission considers that the fixed sum is due for each invoice (or commercial transaction) which is not paid within the period prescribed.

21. As a preliminary point, I note that Article 6 of Directive 2011/7 seeks to ensure a minimum compensation for the recovery costs incurred by the creditor where interest for late payment becomes payable under that directive, in accordance either with Article 3 (commercial transactions between undertakings) or Article 4 (commercial transactions between undertakings and public authorities) of that directive. Moreover, it is clear from the order for reference that Article 6 was transposed into Spanish law by Article 8 of Law No 3/2004, which adopted the sum of EUR 40 provided for in Article 6(1) of that directive. [12]

22. As regards the interpretation of those provisions, it must be recalled that, in accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part. [13]

23. In the first place, as regards the wording of Article 6 of Directive 2011/7, it must be observed that paragraph 1 thereof refers to the creditor's right to obtain from the debtor, as a minimum, the payment of a fixed amount of EUR 40. Paragraph 2 requires Member States to ensure, first, that that fixed amount is payable automatically, without the necessity of a reminder, [14] and, second, that such an amount is intended to compensate the creditor for the recovery costs incurred. Paragraph 3 provides, inter alia, that the creditor is entitled to claim from the debtor, in addition to the fixed sum of EUR 40, reasonable compensation for any recovery costs exceeding that fixed sum incurred as a result of late payment by the debtor, such as the costs incurred in instructing a lawyer or employing a debt collection agency. [15]

[11] If the first interpretation is accepted, the referring court wishes to know whether the payment of EUR 40 per invoice is subject to the creditor having individually identified those invoices in each of its claims, whether before the administrative authorities or the administrative courts, or if a joint and general claim is sufficient for subsequently requiring those EUR 40 per invoice.

[12] As a minimum of harmonisation is involved, Member States are free to provide for fixed sums for compensation of recovery costs which are higher than the sum of EUR 40 and therefore more favourable to the creditor (see recital 21 of Directive 2011/7).

[13] See, to that effect, the judgment in *Commission* v *Italy* (paragraph 39 and the case-law cited).

[14] Under recital 16 of Directive 2011/7, '[this directive] should not oblige a creditor to claim interest for late payment. In the event of late payment, this Directive should allow a creditor to resort to charging interest for late payment without giving any prior notice of non-performance or other similar notice reminding the debtor of his obligation to pay'.

[15] See the judgment in *Česká pojišťovna* (paragraphs 18, 20 and 21).

24. In that regard, it is apparent from a combined reading of recitals 19 and 20 of Directive 2011/7, which aim, in essence, to state reasons for the content of Article 6 thereof, that the fixed sum referred to in Article 6(1) of that directive represents only part of the 'fair compensation of creditors for the recovery costs incurred due to late payment[, designed] to discourage late payment'. As pointed out in the second sentence of recital 19 of that directive, the fixed sum set by the EU legislature corresponds to 'the recovery of administrative costs and compensation for internal costs incurred due to late payment'.

25. In that regard, the Court has explained that the fact that recital 19 states that Directive 2011/7 should determine a fixed minimum sum for the recovery of administrative costs and the compensation of the internal costs incurred due to late payment does not preclude reasonable compensation of those costs from being awarded to the creditor in so far as that fixed minimum sum is insufficient. In accordance with recital 20 of that directive, in addition to that entitlement to payment of the fixed sum, creditors should also be entitled to reimbursement of the 'other recovery costs' they incur as a result of late payment. It is precisely those additional 'other recovery costs' to which Article 6(3) of the directive refers. The Court has established that, by employing the expression 'exceeding that fixed sum', the EU legislature sought to emphasise that recovery costs which exceed the sum of EU 40, whatever they may be, may be the subject of reasonable compensation, [16] since those costs are no different from those referred to in Article 6(1). [17]

26. In the light of the foregoing, and since the fixed sum of EU 40 becomes payable 'without the necessity of a reminder [to the debtor]' and seeks to recover the 'administrative costs and compensation for the internal costs incurred due to late payment', it seems clear to me that whether that amount is due depends on there being an administrative or judicial claim.

27. However, the fact that the fixed sum presupposes such a claim cannot be interpreted, as the Spanish Government interprets it, in essence, as meaning that it is payable per debtor rather than per invoice, so that the fixed sum of EUR 40 may be accumulated when recovery is claimed in a joint claim from a single public authority.

28. According to a literal interpretation, a claim (administrative or judicial) seeking to compensate the creditor for the recovery costs he or she has incurred presupposes, under the terms of Article 6(1) and (3) of Directive 2011/7, a 'late payment'. It is the 'late payment' that constitutes the accounting indicator for the costs for which the creditor must be compensated. However, that delay concerns commercial transactions taken individually. Such transactions must be evidenced by the issue of an invoice (or an equivalent request for payment). [18] As pointed out in recital 18 of that directive, 'invoices trigger requests for payment' and it is specifically the receipt of the invoice which makes it possible to determine payment deadlines. [19]

29. It follows that Article 6 of Directive 2011/7 is worded in a way which means that each compensation for recovery costs is necessarily linked to each commercial transaction, and, therefore, to each invoice.

30. In the second place, that interpretation is supported by the context of Article 6 of that directive. As has been pointed out in point 21 of this Opinion, the right to obtain payment of a fixed sum depends on the late-payment interest being payable under Articles 3 and 4 of that

16 See the judgment in *Česká pojišťovna* (paragraph 22).

17 See the judgment in *Česká pojišťovna* (paragraphs 22 and 23).

18 See, to that effect, Article 2(4) and (8) of Directive 2011/7.

19 See, in that regard, point 40 of this Opinion.

directive. In other words, the creditor may claim late-payment interest owing to non-payment related to a given transaction, so that each transaction (as evidenced by the existence of an invoice) gives the right to a fixed compensation of EUR 40.

31. In the third place, I consider that the literal and contextual interpretations of Article 6 of Directive 2011/7 are corroborated by the objectives pursued by the directive and by the provision at issue.

32. On the one hand, so far as concerns the general objective of Directive 2011/7, its aim, as is apparent from the Court's case-law, is to combat late payment in commercial transactions, that delay constituting, according to recital 12 of that directive, a breach of contract which has been made financially attractive to debtors because, inter alia, low or no interest is charged on late payments. [20] It follows that the objective of that directive is to provide effective protection for creditors against late payment. [21] Such protection means offering those creditors the fullest possible compensation for the recovery costs incurred, in such a way as to discourage such late payment. [22] As regards the facts of the case in the main proceedings, an interpretation of Article 6 of the directive to the effect that the fixed sum of EUR 40 is linked to the claim and therefore applies only once might be considered contrary to that objective.

33. On the other hand, it is clear from recital 19 of Directive 2011/7 that the objective of Article 6 thereof is to provide for 'fair compensation of creditors for the recovery costs incurred due to late payment … *to discourage late payment*'. [23] As the Commission points out, and as evidenced by the amounts claimed in the dispute in the main proceedings, the costs incurred for recovering unpaid debts may represent a significant part of the economic operator's liquid assets, particularly in the case of an SME. Therefore, linking that compensation to each invoice claimed and not to a debt as a whole unquestionably increases the amount of debt which the creditor may recover, thus discouraging late payment, and pursuing the general objective of that directive referred to in point 32 of this Opinion.

34. Lastly, I would add that that interpretation is also consistent with the genesis of Article 6 of Directive 2011/7. The explanatory memorandum of the Commission's proposal for a directive indicated that that provision had a twofold objective, namely that the creditor would be able to recover his or her internal administrative costs related to late payment and that that measure would have a deterrent effect on debtors. [24]

[20] See the judgments in *Česká pojišťovna* (paragraph 25) and *IOS Finance* (paragraph 24).

[21] See the judgments in *Česká pojišťovna* (paragraph 26) and *Nemec* (paragraph 50).

[22] See the judgment in *Česká pojišťovna* (paragraph 26).

[23] Emphasis added.

[24] See Article 4 of the Commission's proposal for a recast of Directive 2000/35 (COM(2009) 126 final). The principle of providing for a fixed sum to compensate for the costs of recovering unpaid amounts was laid down in Article 4 (entitled 'Compensation for recovery costs') of the Commission's initial proposal, but with a more onerous obligation. In particular, under that initial provision, the fixed sum of EUR 40 concerned only debts of less than EUR 1 000. However, Article 4 of the Commission's proposal provided for a fixed sum of EUR 70 for debts of between EUR 1 000 and EUR 10 000 and, lastly, an amount corresponding to 1% of the sum for which late-payment interest is due for debts of EUR 10 000 or more. The European Parliament expressed the wish to reduce the severity of that initial provision, proposing an amendment which, in essence, consisted of setting the fixed sum for recouping recovery costs per debtor rather than per invoice, but, subsequently, withdrew that amendment (see amendment No 29 of the report on the Commission's proposal, of 4 May 2010), agreeing, in essence, with the Council of the European Union that those costs should be paid for each invoice.

35. In the light of the foregoing, I propose that the answer to the first question referred for a preliminary ruling should be that Article 6 of Directive 2011/7 must be interpreted as meaning that the right to the (minimum) compensation of EUR 40 (or equivalent) in respect of recovery costs applies to each invoice (or commercial transaction) giving rise to the levy of late-payment interest.

The second question

36. By its second question, the referring court asks, in essence, whether Article 4 of Directive 2011/7, read in the light of recital 23 thereof, precludes national legislation which lays down, in the case of transactions between undertakings and public authorities, a maximum payment period of 60 days in all circumstances and for all contracts, subdivided into an initial period of 30 days for the procedure of acceptance or verification of compliance of the goods delivered or the services provided with the contract and a further period of 30 days for actual payment of the agreed price.

37. The regional administrative authority and the Spanish Government maintain, in essence, that Article 4 of Directive 2011/7 does not preclude such legislation. The Commission agrees with that position, provided that the application of the additional period is dependent on the existence of a specific procedure for acceptance or verification of the conformity of the goods delivered or services provided with the contract ('the procedure for acceptance') and that it does not have the effect of circumventing the general obligation to pay within 30 days.

38. As a preliminary point, it must be observed, first of all, that, in accordance with Article 4(1) of Directive 2011/7, the Member States must ensure that, in commercial transactions where the debtor is a public authority, the creditor who has met his or her obligations and who has not received the amount owed on time has the right to obtain interest for late payment without the need to remind the debtor, unless the debtor is not responsible for the delay.[25] Next, under Article 4(3)(a) of that directive, Member States are to ensure, in the same commercial transactions, that the period for payment does not exceed 30 calendar days ('the general period for payment') from the factual circumstances which it enumerates in particular in points (i) to (iv). Lastly, Article 4(4) of that directive grants Member States the power to extend that time limit up to a maximum of 60 calendar days for the public authorities and entities mentioned.[26]

39. On the one hand, concerning the wording of Article 4(3) of Directive 2011/7, I note that the Court has held that that provision imposes on the Member States a specific obligation pertaining to the effective compliance by the public authorities with the periods for payment of statutory interest it prescribes.[27]

[25] See the judgment in *IOS Finance* (paragraph 27).

[26] See the judgment in *Commission* v *Italy* (paragraph 38).

[27] The judgment in *Commission* v *Italy* (paragraphs 40, 43 and 53). In that judgment, the Court held, in essence, that an average payment time by public authorities of 50 days for the whole of 2016 constituted a continuous and systematic exceedance of the payment periods prescribed in Article 4 of Directive 2011/7 and an infringement of that directive (see paragraphs 16, 22, 57, 59, 62 and 66 of that judgment).

40. More specifically, points (i) to (iv) of that provision fix a payment period not exceeding 30 calendar days, calculated on the basis of three different dates, depending on the factual circumstances at issue, namely:

– the date of receipt by the debtor of the invoice (or an equivalent request for payment; together, 'the invoice') (point (i));

– the date of receipt of the goods or services, where the date of receipt of the invoice is uncertain (point (ii)) or where the debtor receives the invoice earlier than the goods or the services (point (iii)); or

– the date on which acceptance or verification takes place, where a procedure of acceptance is provided for by statute or in the contract, and if the debtor receives the invoice earlier or on the date on which such acceptance or verification takes place (point (iv)).

41. On the other hand, under Article 4(4) of Directive 2011/7, the EU legislature has allowed Member States to extend the aforementioned time limits, referred to in paragraph 3(a) of that article, up to a maximum of 60 days, in two situations, namely for public authorities carrying out economic activities of an industrial or commercial nature as a public undertaking (subparagraph (a))[28] or for public entities providing healthcare (subparagraph (b)),[29] by means of a procedure which involves sending a report on such extension to the Commission.

42. In the present case, the referring court seems to express doubts only as to the compatibility of the national law with the provisions of Directive 2011/7 relating to the procedure of acceptance, within the meaning of Article 4(3)(a)(iv) of that directive. Therefore, the fact that the dispute in the main proceedings concerns services provided to medical establishments is irrelevant for the purposes of this analysis, in so far as that court does not state that that fact is likely, in itself, to lead to the application of the maximum period laid down in Article 4(4)(b) of that directive. It is therefore necessary to analyse only the provisions relating to the procedure of acceptance, within the meaning of Article 4(3)(a)(iv) of the directive.

43. In that regard, first, it should be pointed out that, under that provision, the period for payment starts to run from the date of acceptance only where such a procedure of acceptance is provided for by statute or in the contract. Also, Article 4(5) of Directive 2011/7 states, in relation to that first provision, that Member States must ensure that the maximum duration of a procedure of acceptance does not exceed 30 calendar days from the date of receipt of the goods or services, 'unless otherwise expressly agreed in the contract and any tender documents and provided it is not grossly unfair to the creditor within the meaning of Article 7'. Recital 26 of that directive states that the 'maximum duration of a procedure of acceptance … does not exceed, as a general rule, 30 calendar days … [except] in the case of particularly complex contracts, when expressly agreed in the contract and in any tender documents and if it is not grossly unfair to the creditor'.

44. It is therefore apparent from a combined reading of Article 4(3)(a)(iv) and (5) of Directive 2011/7 that the payment period, where there is a procedure of acceptance, may consist of an initial maximum period of 30 days for the procedure of acceptance, followed by an additional maximum period of 30 days for actual payment of the agreed price. Although it is not expressly

[28] See, in that regard, recital 24 of Directive 2011/7.

[29] See, in that regard, recital 25 of Directive 2011/7.

stated in the wording of those provisions that the payment period follows the verification period, economic, contractual and budgetary logic assumes, as a general rule, that payment is not made until the goods or services provided have been accepted.

45. Second, it must be stated that that extension of the general period of 30 days under Article 4(3)(a)(iv) and (5) of Directive 2011/7 is not automatic and cannot be fixed as a general rule. The maximum period may be applied only where the conditions laid down in those provisions are met, specifically where a procedure of acceptance is provided for by statute or in the contract.

46. In that respect, Article 4(6) of that directive provides that Member States must ensure that the period for payment fixed in the contract does not exceed the time limits of 30 days provided for in paragraph 3, 'unless otherwise expressly agreed in the contract and *provided it is objectively justified in the light of the particular nature or features of the contract*'.[30] Moreover, even in such a situation, 'it in any event [must] not exceed [the maximum period of] 60 calendar days'. Any such evidence which may objectively justify such an extension of the period owing to an acceptance procedure may constitute circumstances in which performance of a contract appears particularly complex from a technical point of view.

47. It is therefore apparent from a combined reading of Article 4(3), (5) and (6) of Directive 2011/7 that the extension of the general period to the maximum period of 60 days is exceptional. As the Court, sitting as a Grand Chamber, has stated, Article 4 of that directive expressly provides that 'Member States are to ensure that the period for payment does not exceed 30 days or, *in certain cases*, a maximum of 60 days'.[31]

48. Third, that interpretation is supported by the objectives pursued by that directive.[32] In that regard, the Court has already held that it is clear from a combined reading of recitals 3, 9 and 23 of Directive 2011/7 that public authorities, which make a considerable number of payments to undertakings, enjoy more secure, predictable and continuous revenue streams than private undertakings, can obtain financing on more attractive conditions than undertakings, and depend less on stable commercial relationships for the achievement of their aims than undertakings. In the case of those undertakings, however, late payments by the authorities in question lead to unjustified costs for them aggravating their liquidity constraints and complicating their financial management. Those late payments are also detrimental to their competitiveness and profitability, as those undertakings have to obtain external financing because of them.[33]

49. As the referring court rightly points out, recital 23 of Directive 2011/7 confirms that the provision laying down a period of 60 days is not a general provision, but is clearly limited to situations in which there is an objective justification, whether under Article 4(3)(a)(i) or Article 4(4) of that directive. Under recital 23, 'long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, *unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and* in any event *not exceeding* 60 calendar days' (emphasis added).

30 Emphasis added.

31 The judgment in *Commission* v *Italy* (paragraph 44). Emphasis added.

32 See point 1 of this Opinion.

33 The judgment in *Commission* v *Italy* (paragraph 46).

50. Consequently, the use, by Member States, of the power to lay down an additional period of 30 calendar days for payment of the amounts due, apart from the situations referred to in Article 4(4) of Directive 2011/7,[34] must be expressly stipulated by contract and objectively justified by the nature or specific features of the contract.

51. The question arises as to whether national legislation which provides for a payment period of 60 days in all circumstances and for all contracts is compatible with Article 4 of Directive 2011/7.

52. In that regard, it must be stated that it is not for the Court, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation of such provisions is correct. The national courts alone are competent to decide on the interpretation of domestic law.[35] It is therefore for the referring court to assess, in the light of all of the relevant elements of national law, whether national law establishes, with sufficient reasoning, the need to apply the acceptance procedure in order to prevent a general rule of law making it possible to circumvent the general obligation to pay within 30 days.

53. In the present case, I note that the referring court does not refer to any provision of Spanish law referring specifically to an acceptance procedure or to specific grounds that objectively justify the need for an additional payment period of 30 days. Moreover, in my view, a mere mention in national legislation of that procedure cannot be enough to satisfy the condition laid down in Article 4(3)(a)(iv) of Directive 2011/7. Such a provision of national law cannot have the effect of circumventing the general obligation to pay within 30 days established in Directive 2011/7 and of undermining the directive's effectiveness.

54. In the light of the foregoing, I propose that the reply to the second question referred should be that Article 4 of Directive 2011/7 does not preclude national legislation which, in the case of transactions between undertakings and public authorities, provides for a payment period of a maximum duration of 60 days, composed of an initial period of 30 days for the procedure of acceptance or verification of the conformity of the goods delivered or services provided with the contract and an additional period of 30 days for actual payment of the agreed price, on condition that the application of that additional period is subject to the existence of a specific procedure of acceptance or verification that is expressly stipulated by statute or in the contract and as long as the application of that additional period is objectively justified by the nature or specific features of the contract at issue.

The third question

55. By its third question, the referring court asks, in essence, whether Article 2(8) of Directive 2011/7 must be interpreted as meaning that the 'amount due', defined therein, includes late-payment interest calculated on the basis of the total amount of the invoice, that is to say, including the amount of VAT due on the service provided, and if, for that purpose, it is relevant to identify and determine the time when the creditor paid that amount to the State Treasury.

56. The regional administrative authority and the Spanish Government claim, in essence, that the inclusion of the VAT in the basis for calculating late-payment interest is permitted only if the creditor shows that he has paid that amount to the State Treasury. The Commission, for its part,

[34] See points 38 and 42 of this Opinion.

[35] See, to that effect, the judgment in *IOS Finance* (paragraph 21 and the case-law cited).

considers that the VAT should be included in the amount serving as a basis for calculating late-payment interest, irrespective of whether the VAT has been prepaid, paid in instalments or deferred.

57. In that regard, I would point out that Article 2(8) of Directive 2011/7 defines the concept of 'amount due' as 'the principal sum which should have been paid within the contractual or statutory period of payment, *including the applicable taxes*, duties, levies or charges specified in the invoice or the equivalent request for payment'.[36] Moreover, I note that, in transactions between undertakings and public authorities, the late-payment interest provided for in Article 4 of that directive is due when the conditions laid down in paragraph 1 thereof are satisfied, namely that the creditor has fulfilled its contractual and legal obligations and has not received the amount in due time, unless the debtor is not responsible for the delay.

58. It is clear from the wording of those provisions that, by using the expression 'including the applicable taxes', without any further information in that regard, the 'amount due' within the meaning of Article 2(8) of Directive 2011/7 must necessarily include VAT and, a fortiori, that the EU legislature did not wish to draw a distinction depending on whether or not the creditor has prepaid the VAT to the State Treasury. An examination of the wording of this provision therefore leads to the conclusion that the concept of 'amount due' includes the amount of VAT applicable as shown on the invoice or request for equivalent payment, regardless of whether or not the creditor has previously paid this amount to the State Treasury.

59. That conclusion also results from the contextual interpretation, since no provision of Directive 2011/7 provides for exceptions or special rules relating to the calculation of late-payment interest. Article 2(5) of that directive merely defines 'interest for late payment' as 'statutory interest for late payment or interest at a rate agreed upon between undertakings, subject to Article 7', with no reference to VAT. I conclude from that that late-payment interest is calculated irrespective of the rules governing payment of VAT or the time at which it is paid.

60. However, I think it is necessary to point out that, while late-payment interest is to be calculated on the basis of the total amount of the invoice, including VAT, the late-payment interest itself is not subject to VAT. In other words, it does not form part of the taxable amount of VAT because it does not constitute a consideration for the goods or services provided, but plays a purely compensatory role.

61. In that regard, and for the sake of completeness, I note that Article 63 of Directive 2006/112/EC[37] provides, inter alia, that the tax becomes chargeable when the goods or the services are supplied. However, Article 66 of that directive allows Member States to derogate from the general rule of Article 63 by deferring the time at which VAT becomes chargeable, inter alia, to the time the customer makes the payment. In such a situation, it follows that the creditor does not have to pay the VAT to the State Treasury since the VAT is not 'due', because the debtor has not paid it. In such a situation, late-payment interest must not cover the amount of the VAT because there are no 'taxes' due, within the meaning of Article 2(8) of Directive 2011/7.

62. Having regard to the foregoing, I propose that the answer to the third question should be that Article 2(8) of Directive 2011/7 must be interpreted as meaning that the 'amount due' includes late-payment interest calculated on the basis of the total amount of the invoice, including VAT, irrespective of whether or not the creditor has prepaid that tax to the State Treasury.

[36] Emphasis added.

[37] Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Conclusion

63. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Juzgado de lo Contencioso-Administrativo No 2 Valladolid (Administrative Court No 2, Valladolid, Spain) as follows:

(1) Article 6 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions must be interpreted as meaning that the right to the (minimum) compensation of EUR 40 (or equivalent) in respect of recovery costs applies to each invoice (or commercial transaction) giving rise to the levy of late-payment interest.

(2) Article 4 of Directive 2011/7 must be interpreted as not precluding national legislation which, in the case of transactions between undertakings and public authorities, provides for a payment period of a maximum duration of 60 days, composed of an initial period of 30 days for the procedure of acceptance or verification of the conformity of the goods delivered or services provided with the contract and an additional period of 30 days for actual payment of the agreed price, on condition that the application of that additional period is subject to the existence of a specific procedure of acceptance or verification which is expressly stipulated by statute or in the contract and as long as the application of that additional period is objectively justified by the nature or specific features of the contract at issue.

(3) Article 2(8) of Directive 2011/7 must be interpreted as meaning that the 'amount due' includes late-payment interest calculated on the basis of the total amount of the invoice, including VAT, irrespective of whether or not the creditor has prepaid that tax to the State Treasury.