Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 May 2016[1]

Case C-555/14

IOS Finance EFC SA
v
Servicio Murciano de Salud

(Request for a preliminary ruling from the Juzgado Contencioso-Administrativo No 6, Murcia (Court for Contentious Administrative Proceedings No 6, Murcia, Spain))

(Directives 2000/35/EC and 2011/7/EU — Late payment in commercial transactions — Transactions between undertakings and public authorities — Unfair contractual terms and practices)

1. The Late Payments Directive[2] requires Member States to provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor. For that purpose, grossly unfair contractual terms or practices include those which exclude interest for late payment or compensation for recovery costs. Member States must also ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled to statutory interest for late payment, without the necessity of a reminder.

2. In Spain, Real Decreto-ley 8/2013, de 28 de junio, de medidas urgentes contra la morosidad de las administraciones públicas y de apoyo a entidades locales con problemas financieros (Royal Decree-Law 8/2013 of 28 June 2013 on urgent measures to combat late payment by the public administrative authorities and to support local authorities with financial problems, 'Law 8/2013') provided an extraordinary financing mechanism whereby undertakings having claims against public authorities whose ability to pay was compromised could agree to waive interest, legal costs and recovery costs in exchange for immediate payment of the principal amount. The effect was to cancel the obligation to discharge the whole debt and to terminate any court proceedings which had been brought.

3. A factoring company acquired a number of outstanding claims held by suppliers against a regional health authority in Spain, and pursued those claims, together with interest and recovery costs, in the Spanish courts. It then joined the extraordinary financing mechanism and recovered (almost) the whole amount of the principal claim. However, it has brought further proceedings challenging the exclusion of interest and recovery costs, which it considers to be contrary to the Late Payments Directive.

1 — Original language: English.

2 — Currently embodied in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48 p. 1), which is a recast and amended version of 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).

4. In order to determine whether that argument is valid, the Juzgado Contencioso-Administrativo (Court for Contentious Administrative Proceedings) No 6, Murcia, seeks a preliminary ruling on the interpretation of that directive. A further issue, raised by the Commission, is whether the current version of the Late Payments Directive (Directive 2011/7) or its predecessor (Directive 2000/35) is applicable *ratione temporis* to the claims in the main proceedings.

Legal background

Directive 2000/35

5. Directive 2000/35 applied to 'all payments made as remuneration for commercial transactions' (Article 1), namely, 'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration' (Article 2(1)).

6. Article 3 provided, in particular:

'1. Member States shall ensure that:

(a) interest in accordance with point (d) shall become payable from the day following the date or the end of the period for payment fixed in the contract;

(b) if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder:

(i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or

…;

(c) the creditor shall be entitled to interest for late payment to the extent that:

(i) he has fulfilled his contractual and legal obligations; and

(ii) he has not received the amount due on time, unless the debtor is not responsible for the delay;

(d) the level of interest for late payment ("the statutory rate"), which the debtor is obliged to pay, shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus at least seven percentage points ("the margin"), unless otherwise specified in the contract. …;

(e) unless the debtor is not responsible for the delay, the creditor shall be entitled to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter's late payment. Such recovery costs shall respect the principles of transparency and proportionality as regards the debt in question. Member States may, while respecting the principles referred to above, fix maximum amounts as regards the recovery costs for different levels of debt.

...

3. Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, inter alia, into account whether the debtor has any objective reason to deviate from the provisions of paragraphs 1(b) to (d) and 2. If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair.

4. Member States shall ensure that, in the interests of creditors and of competitors, adequate and effective means exist to prevent the continued use of terms which are grossly unfair within the meaning of paragraph 3.

...'

7. Article 6 required Member States to transpose the directive before 8 August 2002, but allowed them to maintain or bring into force provisions more favourable to the creditor than the provisions necessary to comply with it and to exclude, in particular, contracts concluded before 8 August 2002.

Directive 2011/7

8. Article 1 provides:

'1. The aim of this Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of SMEs.

2. This Directive shall apply to all payments made as remuneration for commercial transactions.

3. Member States may exclude debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring.'

9. Article 2(1) defines 'commercial transactions' in identical terms to those set out in Article 2(1) of Directive 2000/35.

10. Article 4 covers transactions between undertakings and public authorities. Paragraph 1 provides:

'Member States shall ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled upon expiry of the period defined in paragraphs 3, 4 or 6 to statutory interest for late payment, without the necessity of a reminder, where the following conditions are satisfied:

(a) the creditor has fulfilled its contractual and legal obligations; and

(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.'

11. Article 4(3), (4) and (6) specify a period for payment of 30 or, in certain circumstances, up to 60 days.

12. Article 6 reads as follows:

‘1. Member States shall ensure that, where interest for late payment becomes payable in commercial transactions in accordance with Article 3 or 4, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40.

2. Member States shall ensure that the fixed sum referred to in paragraph 1 is payable without the necessity of a reminder and as compensation for the creditor’s own recovery costs.

3. The creditor shall, in addition to the fixed sum referred to in paragraph 1, be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor’s late payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency.’

13. Article 7 provides, in particular:

‘1. Member States shall provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor.In determining whether a contractual term or a practice is grossly unfair to the creditor, within the meaning of the first subparagraph, all circumstances of the case shall be considered, including:

(a) any gross deviation from good commercial practice, contrary to good faith and fair dealing;

(b) the nature of the product or the service; and

(c) whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment, [or] from the payment period …

2. For the purpose of paragraph 1, a contractual term or a practice which excludes interest for late payment shall be considered as grossly unfair.

3. For the purpose of paragraph 1, a contractual term or a practice which excludes compensation for recovery costs as referred to in Article 6 shall be presumed to be grossly unfair.

…’

14. Article 12 provides, in particular:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 8 and 10 by 16 March 2013. …

…

3. Member States may maintain or bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with this Directive.

4. In transposing the Directive, Member States shall decide whether to exclude contracts concluded before 16 March 2013.’

15. Article 13 provides, in particular:

'Directive 2000/35/EC is repealed with effect from 16 March 2013, without prejudice to the obligations of the Member States relating to the time limit for its transposition into national law and its application. However, it shall remain applicable to contracts concluded before that date to which this Directive does not apply pursuant to Article 12(4).

…'

Spanish law

16. Directive 2000/35 was transposed into Spanish law by Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales (Law 3/2004 of 29 December 2004 on combating late payment in commercial transactions; 'Law 3/2004'). That law applied to contracts concluded after 8 August 2002.

17. Directive 2011/7 was transposed by Real Decreto-ley 4/2013, de 22 de febrero, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo (Royal Decree-Law 4/2013 of 22 February 2013 on measures to support entrepreneurship and stimulate growth and create employment; 'Law 4/2013'),[3] Article 33 of which amended Law 3/2004. Article 9(1) of Law 3/2004 now reads, in particular:

'Terms agreed between the parties in respect of the date for payment or the consequences of late payment which depart from the period for payment … or the statutory interest rate … respectively are void, as are terms which are contrary to the conditions for demanding interest for late payment in Article 6 if they are grossly unfair to the creditor, taking into account all the circumstances of the case, including the nature of the product or service, the furnishing by the debtor of additional guarantees and good commercial practice. A term which excludes compensation for recovery costs … is presumed to be unfair.

…

In determining whether a term or a practice is unfair to the creditor, it will be taken into account, inter alia, whether the debtor has any objective reason to deviate from the period for payment and the statutory rate of interest for late payment …; account will be taken of the nature of the product or the service and of whether it constitutes a gross deviation from good commercial practice, contrary to good faith and fair dealing.

In addition, in determining whether a term or a practice is unfair, it will be taken into account, considering all the circumstances of the case, whether [the term or practice] mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, or whether the main contractor imposes on his suppliers and subcontractors terms of payment which are not justified on the grounds of the terms granted to himself or on other objective grounds.'[4]

3 — This at least is what the order for reference records. In its written observations, the Spanish Government suggests that transposition was effected by Ley 11/2013, de 26 de julio, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo (Law 11/2013 of 26 June 2013 on measures to support businesses and to stimulate growth and the creation of jobs). I express no view as to which is correct.

4 — The order for reference states that that paragraph has been amended in turn by Ley 17/2014, de 30 de septiembre, por la que se adoptan medidas urgentes en materia de refinanciación y reestructuración de deuda empresarial (Law 17/2014 of 30 September 2014 adopting urgent measures in relation to refinancing and restructuring of corporate debt). However, it does not explain in what way it has been amended.

18. With regard to contracts concluded before the entry into force of Law 4/2013, the third transitional provision of that law states:

'The performance of all contracts with effect from one year from the entry into force of the present Royal legislative decree, even if they were concluded earlier, shall remain subject to the provisions of [Law 3/2004], as amended herein.'

19. Law 8/2013[5] provided for a third and final phase of an extraordinary financing mechanism, initiated and continued by two earlier laws, for the payment of suppliers of, inter alia, the Autonomous Community of the Region of Murcia (Comunidad Autónoma de la Región de Murcia). Under that mechanism, the suppliers agreed to waive part of the debt arising from the late payment by the administrative authority in exchange for immediate payment of the principal debt.[6]

20. The referring court states that the purpose of that law was to provide for short-term, extraordinary and urgent measures to assist the reduction and eradication of late payment by public administrative authorities as a first step towards the application of structural measures in order to comply with the objectives of budgetary stability and financial sustainability.

21. Article 6 of that law was headed 'Effects of payment of outstanding debts' and provided:

'Payment to the supplier leads to extinguishment of the debt owed to the supplier by the Autonomous Community or local authority, as the case may be, in respect of the principal sum, interest, legal costs and any other additional expenses.'

Facts, procedure and questions referred

22. Between 2008 and 2013, a number of suppliers in the health sector made deliveries and provided services to medical establishments forming part of the Servicio Murciano de Salud (Murcia Health Service; 'the Health Service'), which failed to pay the relevant invoices on the due date.

23. IOS Finance EFC SA purchased from those suppliers certain book debts arising from the unpaid invoices.[7] In September 2013, it claimed payment from the Health Service of: EUR 2780463.37 corresponding to the amount of the unpaid invoices in respect of which the right of recovery had been assigned to it; EUR 165164.24 in respect of interest for late payment accrued on the unpaid invoices as at 2 September 2013, without prejudice to the interest continuing to accrue; and EUR 14256.35 in respect of compensation for recovery costs. The Health Service failed to pay.

24. In December 2013, IOS Finance gave notice that it would bring an administrative action against the implied rejection of its request for payment. Subsequently, however, it joined the extraordinary financing mechanism for payment of suppliers of the Autonomous Community of the Region of Murcia, in period 2, phase 3 of that mechanism as laid down in Law 8/2013, with the effects provided for therein. Of the principal sum claimed, IOS Finance thus recovered EUR 2765621.79 through that mechanism. However, it received no payment in respect of interest for late payment nor did it receive compensation for recovery costs.

5 — Cited in point 2 above.

6 — It was indicated at the hearing that access to the mechanism has now closed, the final date for subscription being 31 December 2013.

7 — Although the order for reference does not indicate the date or dates of the relevant assignments, counsel for IOS Finance indicated in reply to a question at the hearing that the company had acquired the debts before the refinancing plan under Law 8/2013 had been introduced.

25. In May 2014, IOS Finance brought proceedings before the Juzgado Contencioso-Administrativo No 6, Murcia (Court for Contentious Administrative Proceedings No 6, Murcia) claiming EUR 272771.03 in respect of interest for late payment and EUR 14256.35 in respect of compensation for recovery costs.

26. It argues that: (a) the right to receive interest for late payment and compensation for recovery costs cannot be waived and arises by operation of law as a result of the expiry of the deadline for payment without the administrative authority having paid the principal sum due; (b) Law 8/2013 is contrary to EU law, in so far as it provides that payment of the principal sum leads to extinguishment of the interest, legal costs and any other additional expenses; and (c) the Late Payments Directive is directly applicable in so far as it states that contractual terms and practices which exclude interest for late payment and compensation for recovery costs are grossly unfair.

27. The Health Service contends that joining the extraordinary mechanism of the scheme for payment of suppliers was voluntary and that waiver of the right to receive interest for late payment and compensation for recovery costs did not take place prior to incurral of the debt but rather once that debt had been incurred and had not been paid.

28. The referring court is uncertain about the interpretation of the applicable EU law and the compatibility with that law of the Spanish law applied. It therefore makes the following request for a preliminary ruling:

'Regard being had to Articles 4(1), 6 and 7(2) and (3) of [Directive 2011/7]:

Must Article 7(2) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to interest for late payment?

Must Article 7(3) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to compensation for recovery costs?

Should the answer to those two questions be in the affirmative, where the debtor is a contracting authority, can it rely on the freedom of contract of the parties in order to avoid its obligation to pay interest for late payment and compensation for recovery costs?'

29. Written observations have been submitted by IOS Finance, the Spanish and German Governments, and the European Commission. At the hearing on 2 March 2016, oral argument was presented by IOS Finance, the Spanish Government and the Commission.

Assessment

Preliminary point

30. Although the referring court's questions appear to be based on the premiss that the legislation applicable *ratione temporis* to the facts in the main proceedings is Directive 2011/7, the Commission notes in its written observations that the position may not be so straightforward.

31. It observes that Article 12(4) of Directive 2011/7 allows Member States, in transposing that directive, to exclude contracts concluded before 16 March 2013 from its scope. It goes on to note the transitional provision laid down by Law 4/2013 which states that the 'performance' of all contracts 'with effect from one year from the entry into force of the decree-law, even if they were concluded

earlier', was to remain subject to the provisions of Law 3/2004. From that, it infers that the Spanish legislature had chosen to exclude contracts executed prior to the date of coming into force of Law 4/2013, namely 24 February 2014, from the scope of application of Directive 2011/7. Those contracts will accordingly remain subject to Directive 2000/35.

32. I express no view on the meaning of the transitional provision in question or on its application to the contracts at issue in the main proceedings. That is a matter falling entirely within the jurisdiction of the national court. It is however this Court's settled case-law that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude this Court from providing the national court with all the elements of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds in the order for reference, the points of EU law that require interpretation, regard being had to the subject matter of the dispute. [8]

33. That being so, I shall consider the referring court's questions from the point of view of both Directive 2000/35 and Directive 2011/7 in turn.

The first and second questions

34. By its first and second questions, which I shall consider together, the referring court essentially asks whether the EU legislation governing the late payment of commercial debts should be construed as precluding legislation under national law which (a) gives a creditor the right to subscribe to a scheme providing for 'accelerated' payment of the principal sum due under a contract to be made where the creditor has performed his obligations under the contract, subject to the condition that he waives entitlement to payment of interest for late payment and to compensation for recovery costs, whilst (b) allowing the creditor to refuse to subscribe to such a scheme with the result that his entitlement to both interest and compensation will remain, albeit that it is likely that he will have to wait considerably longer to receive payment. The referring court asks its questions with particular regard to the provisions of what is now Article 7(2) and (3) of Directive 2011/7 governing grossly unfair contractual terms or practices.

Directive 2000/35

35. Directive 2000/35 was adopted in order to combat what it termed the 'heavy administrative and financial burdens … placed on businesses … as a result of excessive payment periods and late payment'. [9] Recital 12 recorded that 'the objective of combating late payments in the internal market cannot be sufficiently achieved by the Member States acting individually and can, therefore, be better achieved by the Community. This Directive does not go beyond what is necessary to achieve that objective. This Directive complies therefore, in its entirety, with the requirements of the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty'. According to recital 16, 'late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low interest rates on late payments and/or slow procedures for redress'. Recital 19 went on to state 'this Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor'.

8 — See, inter alia, judgment of 17 November 2015 in *Regio Post*, C-115/14, EU:C:2015:760, paragraph 46.

9 — Recital 7.

36. It is important to state at the outset that the scope of Directive 2000/35 was a limited one. In its judgment in *Caffaro,* the Court held that it is necessary to construe the directive in the light of the aims it pursued and the system it established.[10] It went on to state that the directive 'simply aims to harmonise as far as possible certain payment rules and practices in the Member States in order to combat late payment in commercial transactions' and that it 'governs only certain specific rules intended to combat such delays, namely, rules on interest for late payments …, retention of title … and procedures for recovery of unchallenged claims …'.[11] In her Opinion in that case, Advocate General Trstenjak observed that the directive constituted only 'minimum harmonisation'.[12] The directive should not, in other words, be construed as seeking to harmonise every aspect of the laws of the Member States relating to late payment of debts in commercial transactions.[13]

37. I shall go on to explore in greater detail the harmonisation which the directive sought to achieve in the context of the first two questions referred.

38. Article 3(1) of Directive 2000/35 gave creditors a series of rights designed to give them protection against late payment. In particular, it specified the date from which interest was to be payable[14] and the level of interest which the debtor was obliged to pay for late payment.[15] Interest was to arise only to the extent that the creditor had fulfilled his contractual and legal obligations and had not received the amount due on time, unless the debtor was not responsible for the delay.[16] The directive also gave the creditor an entitlement to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter's late payment (unless he was not responsible for the delay).[17] Those costs were to respect the principle of transparency and proportionality as regards the debt in question and Member States were allowed to fix maximum recovery costs for different levels of debt provided always that they respected those principles. Article 3(2) governed the date from which and the rate at which interest was to be payable in certain cases.[18]

39. The rights given by Article 3(1) in respect of the date for payment and the rate of interest payable applied only to the extent that the contract did not provide otherwise. Article 3(3) filled what might have otherwise been a manifest gap in protection by laying down provisions concerning grossly unfair contractual terms. Member States were to provide that an agreement on the date for payment or on the consequences of late payment which was not in line with the provisions of Article 3(1)(b) to (d) and (2) was either to be unenforceable or to give rise to a claim for damages if, when all the circumstances of the case were considered, it was grossly unfair to the creditor. In determining whether an agreement fell within that category, account was to be taken of whether the debtor had any objective reason to deviate from those provisions. If an agreement was determined to be grossly unfair, the provisions of Article 3(1)(b) to (d) and (2) (defined as 'the statutory terms') were to apply unless the national courts determined different conditions which were fair. The scope of Article 3(3) did not extend to the recovery costs measures laid down in Article 3(1)(e). However, the protection afforded by that provision was not qualified by the terms of the contract.

10 — Judgment of 11 September 2008 in *Caffaro*, C-265/07, EU:C:2008:496, paragraph 14.

11 — Judgment of 11 September 2008 in *Caffaro*, C-265/07, EU:C:2008:496, paragraphs 15 and 16.

12 — Opinion in *Caffaro*, C-265/07, EU:C:2008:250, point 28.

13 — See also judgments of 26 October 2006 in *Commission* v *Italy*, C-302/05, EU:C:2006:683, paragraph 23, and 3 April 2008 in *01051 Telecom*, C-306/06, EU:C:2008:187, paragraph 21, where the Court held that the directive did not harmonise all the rules relating to late payment in commercial transactions but governed only specific rules in that field.

14 — Subparagraphs (a) and (b).

15 — Subparagraph (d).

16 — Subparagraph (c).

17 — Subparagraph (e).

18 — See further, as regards Article 3 of Directive 2000/35, judgment of 11 December 2008 in *Commission* v *Spain*, C-380/06, EU:C:2008:702, paragraph 17 et seq.

40. Article 3 of Directive 2000/35 thus gave creditors a series of rights in respect of late payment.[19] If and to the extent that the underlying contract was silent, terms were to be implied as a matter of law as regards the date for payment under the contract and the rate of interest payable. In so far as the contract in question provided for those matters but failed to extend the protection afforded by Article 3(1)(b) to (d) and (2), it risked being unenforceable or giving rise to a claim for damages. The right to recover compensation in respect of late payment was to be built in to national law. The contract as concluded between the creditor and the debtor was altered to that extent but only, as regards interest on and compensation for late payment, to that extent. That was the (limited) degree of harmonisation which the directive sought to achieve. The creditor was, in other words, given a series of benefits which he might choose whether or not to exercise.

41. Can it be said that Directive 2000/35 precluded a creditor who was provided with those rights from electing to waive them in exchange for prompt payment in circumstances where he might also, if he chose, decide instead to refuse to do so and to await payment in full? In my view, it did not.

42. It is indeed true that, in order to give effect to such a waiver, a contract would be required. However, such a contract would by definition be ancillary to the first contract, by which the debt itself was constituted. It would derogate from the rights given to the creditor through the first contract by substituting a fresh right, namely the right to immediate payment. Provided always that the right to await payment in full was real and not illusory, I cannot see that such an arrangement could be classified as 'grossly unfair' to the creditor for the purposes of Article 3(3) of Directive 2000/35. The very existence of the choice given to the creditor would preclude that conclusion.

43. Applying that reasoning to the case in the main proceedings, I would make a number of observations. First, as counsel for IOS Finance observed at the hearing, the Court has held that, although the terms on which a contract is entered into are in general characterised by the principle of freedom of contract, there may nonetheless be limitations on that principle arising from the application of rules under EU law.[20] But for that reasoning to apply, EU law must first have intervened to restrict that freedom. While it may be observed that the effect of the directive was, through the provisions of Article 3(3), to impose a degree of restraint on the parties' freedom to contract as regards any failure on the debtor's part to make payment on the due date, in my view it did not do so as regards the situation described in point 41 above.

44. Second, the financing mechanism introduced by Law 8/2013 gave the creditor a choice. He might subscribe to the mechanism, in which case he would be paid, if not forthwith, at least in early course. Alternatively, he could opt for the situation to continue as before. If he did so, he should expect to wait longer (and possibly considerably longer) for payment but he would retain his entitlement to interest for late payment and compensation for recovery costs. When questioned on that point at the hearing, the agent for the Spanish Government stated that all creditors who had chosen not to subscribe to the mechanism had in fact now been paid in full. Although the Commission sought to argue vigorously in response that the mechanism was in some way not a voluntary one and that creditors in fact did not have a choice, such an argument appears to me to be without merit given the explanation provided by the Spanish Government.[21]

19 — The Court has held that the obligation imposed on the Member States under Article 3 to ensure that interest is payable in case of late payment is unconditional and sufficiently precise to have direct effect. See judgment of 24 May 2012 in *Amia*, C-97/11, EU:C:2012:306, paragraph 37.

20 — See, to that effect, judgment of 20 May 2010 in *Harms*, C-434/08, EU:C:2010:285, paragraph 36 and the case-law cited.

21 — I should stress that, were the position to be otherwise and the creditor to be presented with no real choice in the matter, I would consider that such an arrangement contravened the requirements of the directive and was, for the purposes of Article 3(3) 'grossly unfair' to the creditor.

45. Indeed, that element of choice — and the risks associated with it — seems to me to be a normal part of business life. Following the introduction of the financing mechanism, two alternatives were on offer. The first (subscribing to the mechanism) provided a lower degree of risk and a lower degree of reward. The second (opting to continue as before) offered greater risk but also the possibility of greater reward. I do not see that that type of situation was one which the directive was enacted in order to prevent.

46. Third, it makes in my view no difference to the overall outcome that the debtor in the case in the main proceedings was an emanation of the State rather than a private undertaking. It is indeed true that the obligations of a Member State under a directive go beyond the mere enactment of measures in national law which reflect the substantive rules laid down in the directive. It is also under a duty to apply those rules and enforce them in practice.[22] That will *a fortiori* be the case where the debtor under an obligation is the State or an emanation of the State. But the requirement imposed on the Member State in that regard does not, by definition, go beyond the limits of the obligations imposed by the directive. Since, as I have concluded, those obligations did not go so far as to preclude arrangements for the payment of creditors such as those in the main proceedings, the principles I have just outlined cannot intervene to impose a duty on the Member State to comply with a requirement that the directive itself does not lay down.[23]

47. To put the point another way, the question is in my view whether the actions of the Member State in the case in the main proceedings were lawful. Let us suppose that, rather than the debtor in the obligation being the State or an emanation of it, that debtor was a private undertaking. It would not, I think, be a particularly difficult matter to conclude that such an undertaking could, under the directive, validly offer the creditor a compromise arrangement similar to that offered to IOS Finance under the financing mechanism at issue in the present case. Should that answer differ if one were to substitute the Member State or one of its emanations into that equation? In my view it should not.

48. Lastly, and once again at the hearing, there was some discussion of the impact of the fact that the creditor in the main proceedings was not the original supplier of the goods or services to the Health Service but a factoring company. Do what I might term the underlying equities have an impact on the conclusion I have set out in point 41 above?

49. In my view they do not.

50. Factoring companies provide a service to the business community. They do so by buying the book debts of undertakings, commonly those in the manufacturing, retailing or services sectors, at a discount. In calculating that discount the companies concerned will take all relevant elements into account, including the likely time for payment and the risk of non-payment. Such an exercise will inevitably involve a degree of judgment on the company's part. Its ability to set the appropriate level of discount as a result of that judgment will dictate its success or failure in the market place. In exchange for accepting the discount that is offered, the undertaking concerned will receive immediate payment of (part of) its debt. The factoring company, for its part, will take an assignment of the full debt. In accordance with the maxim *assignatus utitur iure auctoris*, the debt, as assigned, will be precisely the debt — no more, but also no less — which, prior to assignment, stood in the books of

22 — See inter alia, to that effect, judgments of 10 April 1984 in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 23, and 2 August 1993 in *Marshall*, C-271/91, EU:C:1993:335, paragraph 24. See also Prechal, S., *Directives in EC Law*, Oxford University Press, Oxford, 2010, p. 51 et seq.

23 — I should add for the sake of completeness that whilst the order for reference states that the payment to IOS Finance was made by the Health Service, the Spanish Government indicated at the hearing that it had in fact been made by the State, with a concomitant obligation as to repayment being imposed on the Health Service at a later date. I do not consider that that matter has any impact on my analysis of the underlying issues.

the undertaking which has been paid. The fact that, in the case in the main proceedings, the factoring company in question appears to have paid the underlying debts prior to the introduction of the mechanism and, as a result, to have made what might appear to be a windfall profit, does not in my view affect the underlying issues.

51. It follows that Directive 2000/35, and in particular Article 3(3) thereof, should be interpreted as meaning that it does not preclude legislation under national law which (a) gives a creditor the right to subscribe to a scheme providing for 'accelerated' payment of the principal sum due under a contract to be made where the creditor has performed his obligations under the contract, subject to the condition that he waives entitlement to payment of interest for late payment and to compensation for recovery costs, whilst (b) allowing the creditor to refuse to subscribe to such a scheme with the result that his entitlement to both interest and compensation will remain, albeit that it is likely that he will have to wait considerably longer to receive payment.

Directive 2011/7

52. Directive 2011/7 recast Directive 2000/35, by building on the protection afforded to creditors as regards late payment in commercial transactions by its predecessor. There was, it appears, a perception that Directive 2000/35 was failing, or at least not sufficiently succeeding, in its aims in that regard. [24] The following are the principal changes introduced by the new legislation.

53. Article 1(3) allows Member States to exclude debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring. Since the Court was informed at the hearing that Spain has not enacted measures to that effect, I shall not consider this matter further.

54. Articles 3 and 4 of Directive 2011/7 each provide for a creditor to be entitled to interest for late payment, thereby reflecting Article 3(1) of Directive 2000/35. However, they introduce a distinction between transactions between two or more undertakings [25] (subject to Article 3) and transactions between undertakings and public authorities (subject to Article 4). [26] Since the latter are generally considered to have stronger revenue streams and to be able to obtain financing on more attractive conditions than undertakings, [27] they are as a rule subject to more stringent conditions. As regards the date or period for payment, Article 3 provides that this may be fixed in the contract, subject to a maximum of 60 days unless it is otherwise expressly agreed in the contract and is not grossly unfair to the creditor within the meaning of Article 7. [28] Under Article 4, that period is in most cases not to

24 — See, for example, the Explanatory Memorandum in the Commission Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) (COM(2009) 126 final), which records that 'there is overwhelming evidence that, despite the entry into force of [Directive 2000/35], late payment in commercial transactions is still a general problem within the EU'.

25 — An 'undertaking' is defined in Article 2(3) as meaning 'any organisation, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person'.

26 — A 'public authority' is defined in Article 2(2) as meaning 'any contracting authority, as defined in point (a) of Article 2(1) of Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and in Article 1(9) of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)], regardless of the subject or value of the contract'.

27 — Recital 23.

28 — See further point 57 et seq. below.

exceed 30 days. The interest rate applying to late payments under Article 3 is to be the rate agreed upon by the parties, subject always to the provisions governing unfair contractual terms and practices laid down in Article 7.[29] The equivalent rate under Article 4 is on any basis a penal one to be calculated by reference to what is termed the 'reference rate'[30] plus at least eight percentage points.

55. Article 6 of the directive provides greater certainty for creditors seeking to recover compensation for recovery costs than its equivalent in Article 3(1)(e) of Directive 2000/35. In particular, it states that Member States are to ensure that, where interest for late payment becomes payable in commercial transactions in accordance with Article 3 or 4, the creditor is to be entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40.

56. Article 7 of Directive 2011/7 replaces Article 3(3) of Directive 2000/35. Under Article 7(1), Member States are to provide that a contractual term or practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs which is grossly unfair to the creditor is either unenforceable or to give rise to a claim for damages. In determining whether a contractual term or practice is grossly unfair, all circumstances of the case are to be considered. To that extent, while not worded in terms that are identical to those of Article 3(3) of Directive 2000/35, the protection afforded to creditors by Article 7(1) of Directive 2011/7 does not differ materially from that given by its predecessor. Paragraphs 2 and 3 of Article 7, however, have introduced significant extra protection for the creditor and it is worth examining them in some detail.

57. First, Article 7(2) provides that, for the purposes of Article 7(1), a contractual term or a practice which excludes interest for late payment is to be considered as grossly unfair. While the expression 'contractual term' requires no explanation, the concept of a 'practice' may do. The term is not defined in the directive. It seems to me that it must be understood as something that has effect at the time the contract is entered into. By this I mean an arrangement which, although not expressly recorded or set out in the contract, nonetheless has binding force as between the parties, most usually as a result of a course of dealing between them or by reason of usage and custom in the particular trade or business concerned. That reflects the overall scheme and purpose of the relevant part of the legislation, which is to lay down rules governing the substantive effect of contracts entered into between parties who will typically be of unequal bargaining power. With a view to providing the necessary protection, Article 7(2) sets out rules as to payment and the consequences of late payment which, by definition, the parties are encouraged to incorporate within their contracts (the carrot) and which, should they not be so incorporated, are either to be treated as leading to unenforceability (or, in some cases, being capable of leading to unenforceability) or as giving rise to a claim for damages (the stick).

58. I am fortified in my conclusion as to the interpretation of the notion of 'practice' by recital 28 of Directive 2011/7, according to which 'this Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. As a result, where a term in a contract or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is not justified on the grounds of the terms granted to the debtor, or it mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, it may be regarded as constituting such an abuse. For that purpose, and in accordance with the academic "Draft Common Frame of Reference", [31] any contractual term or practice which grossly deviates from good commercial practice and is contrary to good faith and fair dealing should be regarded as unfair to the

29 — See further point 57 et seq. below.

30 — Defined in Article 2(7) as meaning either of the following: '(a) for a Member State whose currency is the euro, either: (i) the interest rate applied by the European Central Bank to its most recent main refinancing operations; or (ii) the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank; (b) for a Member State whose currency is not the euro, the equivalent rate set by its national central bank'.

31 — The document is available on the internet at the following address: http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

creditor …'. In that context, I note that the Common Frame of Reference contains the following definition of 'Terms of a contract': 'the terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages'. [32]

59. Second, Article 7(3) introduces a presumption that a contractual term or practice which excludes compensation for recovery costs is grossly unfair. In that regard, it differs from Article 7(2) in so far as the latter states that an exclusion of interest for late payment is to be 'considered as' grossly unfair. There can, in other words, be no discussion on the matter, while the presumption in paragraph 3 is a rebuttable one. A debtor who seeks to overturn it will therefore require to lead evidence sufficient to overturn any arguments to the contrary and to establish his case.

60. That point apart, Article 7(3) requires to be understood in the same way as Article 7(2).

61. Whist Directive 2011/7 has undoubtedly enhanced the protection available to creditors in respect of late payment, its overall structure remains essentially similar to that of Directive 2000/35. Thus, it requires the Member States to ensure that creditors are given rights as regards the date from which interest on late payment becomes payable under a contact, the rate of that interest and compensation for recovery costs. Any attempt by the debtor to impose grossly unfair terms or practices in the contract entered into may, or indeed will, lead to the provision being unenforceable or giving rise to a claim for damages.

62. However, there is in my view nothing in Directive 2011/7 which precludes a creditor from validly entering into a voluntary arrangement with the debtor, following performance of the contract by the creditor, whereby he is to receive immediate payment of the principal sum due under the contract in exchange for renouncing the claims to which he would otherwise be entitled in respect of late payment and to compensation for recovery costs. In particular, it seems to me that the provisions of such an arrangement do not represent a 'contractual term or practice' for the purposes of Article 7(1) to (3) of the directive nor, by extension, are they 'grossly unfair' for the reasons already set out in point 42 above. As regards the application of that directive to the case in the main proceedings, the observations I have set out in points 43 to 50 above regarding Directive 2000/35 are equally relevant to Directive 2011/7.

63. I should add that although the German Government agrees that Article 7(2) and (3) of Directive 2011/7 do not apply in the circumstances of the case in the main proceedings, it submits that Article 7(1) will nonetheless be relevant. That provision is not, in other words, temporally constrained to the same degree as paragraphs 2 and 3.

64. I do not agree.

65. By using the expression 'contractual term or practice' in each of paragraphs 1, 2 and 3 of Article 7, the legislature clearly intended that each of those provisions was to apply in the same circumstances. Paragraphs 2 and 3 therefore merely represent more stringent provisions that cover particularly blatant cases of abuse. They apply 'for the purposes of paragraph 1'. The application of all three paragraphs *ratione temporis* is identical.

66. It follows, in my view, that Directive 2011/7, and in particular Article 7(2) and (3) thereof, should be interpreted as meaning that it does not preclude legislation under national law which (a) gives a creditor the right to subscribe to a scheme providing for 'accelerated' payment of the principal sum due under a contract to be made where the creditor has performed his obligations under the contract,

32 — Section II. — 9:101.

subject to the condition that he waives entitlement to payment of interest for late payment and to compensation for recovery costs, whilst (b) allowing the creditor to refuse to subscribe to such a scheme with the result that his entitlement to both interest and compensation will remain, albeit that it is likely that he will have to wait considerably longer to receive payment.

The third question

67. Since the referring court asks the third question only in the event of an affirmative reply to the first and second questions, it is not necessary to reply to it.

Conclusion

68. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Juzgado Contencioso-Administrativo No 6, Murcia (Court for Contentious Administrative Proceedings No 6, Murcia, Spain) to the following effect:

— Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, and in particular Article 3(3) thereof, and Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, and in particular Article 7(2) and (3) thereof, should be interpreted as meaning that they do not preclude legislation under national law which:

  (a) gives a creditor the right to subscribe to a scheme providing for 'accelerated' payment of the principal sum due under a contract to be made where the creditor has performed his obligations under the contract, subject to the condition that he waives entitlement to payment of interest for late payment and to compensation for recovery costs, whilst

  (b) allowing the creditor to refuse to subscribe to such a scheme with the result that his entitlement to both interest and compensation will remain, albeit that it is likely that he will have to wait considerably longer to receive payment.

— There is no need to answer the third question put by the referring court.