



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

26 February 2015 *

(Reference for a preliminary ruling — Third paragraph of Article 288 TFEU — Combating late payments in commercial transactions — Directive 2000/35/EC — Articles 2, 3 and 6 — Directive 2011/7/EU — Articles 2, 7 and 12 — Legislation of a Member State capable of modifying, to the detriment of a creditor of the State, the interest on a debt predating those directives)

In Case C-104/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 28 November 2013, received at the Court on 5 March 2014, in the proceedings

Ministero delle Politiche agricole, alimentari e forestali

v

Federazione Italiana Consorzi Agrari Soc. coop. arl — Federconsorzi, admitted to a collective insolvency procedure known as ‘concordato preventivo’,

Liquidazione giudiziale dei beni ceduti ai creditori della Federazione Italiana Consorzi Agrari Soc. coop. arl — Federconsorzi,

THE COURT (Eighth Chamber),

composed of A. Ó Caoimh, President of the Chamber, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Liquidazione giudiziale dei beni ceduti ai creditori della Federazione Italiana Consorzi Agrari Soc. coop. arl — Federconsorzi, by D. Santosuosso and G. Niccolini, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,
- the European Commission, by G. Zavvos, acting as Agent, assisted by A. Franchi, avvocatessa,

* Language of the case: Italian.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 2, 3 and 6 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) and Articles 2, 7 and 12 of 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).
- 2 The request has been made in proceedings between the Ministero delle Politiche agricole, alimentari e forestali (Ministry of Agriculture, Food and Forestry) ('the Ministero'), on the one hand, and the Federazione Italiana Consorzi Agrari Soc. coop. arl (Federation of Italian Agricultural Cooperatives), admitted to a collective insolvency procedure known as 'concordato preventivo' ('the Federconsorzi') and the Liquidazione giudiziale dei beni ceduti ai creditori della Federazione Italiana Consorzi Agrari Soc. coop. arl — Federconsorzi (Judicial liquidation of assets transferred to the creditors of the Federconsorzi), on the other, concerning the interest on a debt owed to the Federconsorzi by the Ministero.

Legal context

European Union law

- 3 Directive 2000/35, which was repealed by Directive 2011/7 with effect from 16 March 2013, provided in Article 1 that its provisions applied to all payments made as remuneration for commercial transactions. In accordance with Article 2, 'commercial transactions' means 'transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration'.
- 4 Article 3 of Directive 2000/35 required Member States to ensure that the creditor is entitled to interest for late payment to the extent that he has fulfilled his contractual and legal obligations, and has not received the amount due on time, unless the debtor is not responsible for the delay, and it introduced rules relating to the date of entitlement to interest and determination of the rate. Article 3(3) read as follows:

'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.'

- 5 Article 6 of that directive provided:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 8 August 2002. ...

...

2. 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.

3. In transposing this Directive, Member States may exclude:

...

(b) contracts that have been concluded prior to 8 August 2002 ...

...'

6 Article 1 of Directive 2011/7 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.

...'

7 The definition of 'commercial transactions' set out in point 1 of Article 2 of Directive 2011/7 is identical to that given previously in Directive 2000/35.

8 Article 7 of Directive 2011/7 provides:

'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, from the payment period as referred to in Article 3(5), point (a) of Article 4(3), Article 4(4) and Article 4(6) or from the fixed sum as referred to in Article 6(1).

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.

...'

9 Article 12 of that directive provides:

'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.'

Italian law

- 10 In the wake of the Second World War, the Italian authorities introduced a system for the centralised management of the supply of cereals and other agri-food products, governed by Legislative Decree No 169 of 23 January 1948 on the fulfilment by the State of the obligations arising from imports of cereals, derivatives and other products intended for use in bread-making and the production of pasta, as from the cereal year 1946/47 (decreto legislativo n. 169 — Assunzione a carico dello Stato dell'onere risultante dalle importazioni di cereali derivati e prodotti comunque destinati alla pani-pastificazione a decorrere dalla campagna cerealicola 1946/47), then by Law No 1924 of 22 December 1957 on purchases abroad on behalf of the State of raw materials, food products and other essential products (legge n. 1294 — Acquisti dall'estero per conto dello Stato di materie prime, prodotti alimentari ed altri prodotti essenziali) (GURI No 9, of 13 January 1958).
- 11 Within that legislative framework, the management of the compulsory storage of those foodstuffs was entrusted to existing farming organisations, created in the form of cooperative societies in each province. The Federconsorzi was the organisation created at national level, bringing together all those cooperatives entrusted by the State with ensuring the supply of foodstuffs, and with an obligation to report annually on their management to the State which would reimburse their expenses.
- 12 The agricultural cooperatives were reformed by Law No 410 of 28 October 1999 laying down new rules for agricultural cooperatives (legge n. 410 — Nuovo ordinamento dei consorzi agrari) (GURI No 265, of 11 November 1999), by which the Federconsorzi was dissolved and placed under a collective insolvency procedure known as 'concordato preventivo'. Outstanding debts are covered by Article 8(1) of that law, which provides:

'Claims of the agricultural cooperatives arising from compulsory storage management and the marketing of domestic agricultural products carried out by those agricultural cooperatives on behalf and in the interests of the State as at the date this law enters into force, as they result from accounts approved by final and enforceable orders of the Minister of Agriculture and Forestry, and registered by the Corte dei conti [Court of Auditors], and also the expenses and interest due from the date of the closure of the relevant accounts, indicated in those orders, up to 31 December 1997, shall be satisfied by the allocation to the cooperatives of government securities by the Minister for the Treasury, the Budget and Economic Planning.'

- 13 That article was amended by Law No 388 of 23 December 2003 relating to provisions for drawing up the annual and pluriannual budget of the State (2001 Finance Law) (legge n. 388 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001)) (Ordinary Supplement to GURI No 302 of 29 December 2000), Article 130 of which provides:

'...

- (b) in Article 8(1) the following subparagraph is added at the end: "The interest referred to in the present paragraph is calculated up to 31 December 1995 on the basis of the official discount rate, plus 4.4 points, with annual capitalisation, and for the years 1996 and 1997, only at the statutory interest rate."

...

- 14 Adopted after the case was brought before the Corte suprema di cassazione (Court of Cassation) in the main proceedings, Decree-Law No 16 of 2 March 2012 laying down urgent provisions related to fiscal simplification, improving effectiveness and reinforcing monitoring procedures (decreto-legge n. 16 — Disposizioni urgenti in materia di semplificazioni tributarie, di efficientamento e potenziamento delle procedure di accertamento) (GURI No 52, of 2 March 2012) ('Decree-Law No 16/2012'), converted into a law, with amendments, by Law No 44 of 26 April 2012 (Ordinary Supplement to GURI No 99 of 28 April 2012), provides in Article 12:

'Claims arising from compulsory storage management and the marketing of domestic agricultural products carried out by the agricultural cooperatives on behalf and in the interests of the State, other than those satisfied in accordance with Article 8(1) of Law No 410 of 28 October 1999, as amended by Article 130 of Law No 388 of 23 December 2000, as they result from accounts approved by final and enforceable orders of the Minister of Agriculture and Forestry and registered by the Corte dei conti, and which are to be satisfied in respect of the persons entitled to them, and also the expenses and interest due from the date of the closure of the relevant accounts, indicated in those orders, shall bear interest calculated up to 31 December 1995 on the basis of the official discount rate, plus 4.4 points, with annual capitalisation, and for the subsequent period only at the statutory interest rate.'

- 15 Moreover, Directive 2000/35 was transposed into Italian law by Legislative Decree No 231 of 9 October 2002 (decreto legislativo n. 231 — Attuazione della direttiva 2000/35/CE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali) (GURI No 249, of 23 October 2002), which provides in Article 11 that its provisions do not apply to contracts concluded before 8 August 2002.
- 16 Directive 2011/7 was transposed by Legislative Decree No 192 of 9 November 2012 amending Legislative Decree No 231 of 9 October 2002 for the complete transposition of Directive 2011/7/EU on combating late payment in commercial transactions, pursuant to Article 10(1) of Law No 180 of 11 November 2011 (decreto legislativo n. 192 — Modifiche al decreto legislativo 9 ottobre 2002, n. 231, per l'integrale recepimento della direttiva 2011/7/UE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali, a norma dell'articolo 10, comma 1, della legge 11 novembre 2011, n. 180) (GURI No 267, of 15 November 2012). Article 3 of that decree stipulates that its provisions apply to transactions concluded on or after 1 January 2013.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 17 By judgment of 22 November 2004, the Corte d'appello di Roma (Court of Appeal, Rome) fixed at EUR 511 878 997.39 the debt owed to Federconsorzi, as the assignee of the claims of 58 provincial agricultural cooperatives, by the Ministero in respect of expenses which the cooperatives incurred until 1967 in respect of compulsory storage management. In calculating that amount, the Corte d'appello di Roma ruled out the application of Article 8(1) of Law No 410 of 28 October 1999, taking the view that that provision was intended only to put an end to pending disputes with the agricultural cooperatives and did not apply to other assignees of the claims of those cooperatives. That court set interest to run from 31 January 1982, the date the claim was established, offset the reciprocal claims of both parties as at 4 July 1991 and calculated the interest due on the balance by capitalising that interest every six months from 5 July 1991 to 30 June 2004, with the full amount bearing interest until actual payment.
- 18 That judgment was set aside by the Corte suprema di cassazione by judgment of 13 December 2007, which referred the case back to the Corte d'appello di Roma which, by judgment of 14 October 2011, found again that the Ministero's liability, as at 30 June 2004, came to EUR 511 878 997.39, together with additional interest at the discount rate, plus 4.4 points, capitalised every six months from 1 July

2004 until actual payment. That court found, in particular, that there was a statute-based agreement between the State and the Federconsorzi, the purpose of which was to delegate the function of ensuring the supply of agri-food products, with provision for complete managerial and financial autonomy, an obligation to report annually and an entitlement to reimbursement of expenses.

- 19 The Ministero lodged an appeal in cassation against that judgment, relying *inter alia* on an infringement of Article 8(1) of Law No 410 of 28 October 1999.
- 20 In the course of the proceedings, the court-appointed liquidator of the Federconsorzi submitted, *inter alia*, that Article 12(6) of Decree-Law No 16/2012, adopted after the appeal was lodged and which the Ministero seeks to have applied, was incompatible with Directives 2000/35 and 2011/7. In that regard, the liquidator claimed that, by that legislative act introduced after those directives, the Italian State imposed on its creditor, not only a reduction of the interest for late payment accrued up to 1995 by carrying out an annual capitalisation of that interest instead of a six-monthly capitalisation, but also required merely statutory interest to be applied from 1995 onwards, whereas those directives, in the opinion of the liquidator, preclude the national legislature from intervening to exclude the entitlement of a creditor of the State to interest for late payment of existing debts, including debts arising out of relations which pre-date 8 August 2002 or 16 March 2013.
- 21 The Ministero took the view that Directive 2000/35 and Legislative Decree No 231 of 9 October 2002 do not apply to the facts at issue in the main proceedings on the grounds, first, that there was no commercial transaction between the parties, only a relationship governed by public law, and secondly, that that directive and that legislative decree do not apply to contracts concluded before 8 August 2002.
- 22 The Corte suprema di cassazione states, as a preliminary point, that Article 12(6) of Decree-Law No 16/2012 is applicable to the dispute in the main proceedings because, at the time that decree-law entered into force, the applicable interest rate and the capitalisation of interest were not covered by a *res judicata* decision.
- 23 The referring court observes, first, that it is possible that the statute-based agreement between the agricultural cooperatives and the State for compulsory storage management constitutes a commercial transaction for the purposes of Directives 2000/35 and 2011/7.
- 24 Secondly, it considers that the argument of the liquidator of Federconsorzi that those directives do not permit the adoption of provisions which apply to relations established before 8 August 2002 or 16 March 2013, and which exclude late payment interest, is not manifestly unfounded. It takes the view, therefore, that it is necessary to assess the compatibility of Article 12(6) of Decree-Law No 16/2012 with the provisions of EU law.
- 25 It was in those circumstances that the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is the statute-based agreement between the State administrative authorities and the agricultural cooperatives (an agreement under which arose a claim that was subsequently assigned by the cooperatives to the Federconsorzi and, in turn, to the latter’s creditors in the context of insolvency proceedings) for the supply and distribution of agricultural products, as established by Legislative Decree No 169 of 23 January 1948 and Law No 1294 of 22 December 1957, covered by the definition of a commercial transaction, as defined in Article 2 of Directive 2000/35 and Article 2 of Directive 2011/7?

- (2) If the answer to Question 1 is in the affirmative, do the transposition requirements of Directive 2000/35 (Article 6(2)) and Directive 2011/7 (Article 12(3)), under which it is possible to maintain in force provisions which are more favourable, mean that it is not possible to alter for the worse, or indeed to exclude, the late-payment interest rate applicable to agreements that were already in existence when the directives entered into force?
- (3) If the answer to Question 2 is in the affirmative, must the obligation not to alter for the worse the late-payment interest rate applicable to agreements that were already in existence be construed as imposing — as regards a legislative measure governing interest, which provides, up to a certain point (in the present case, from 31 January 1982 to 31 December 1995), for the application of a non-statutory rate and capitalisation, even on an annual basis and not six-monthly, as claimed by the creditor, and, after that point, only for the payment of statutory interest — a set of rules which, in view of the particular circumstances of the present dispute ..., is not necessarily unfavourable to the creditor?
- (4) In so far as Directive 2000/35 and Directive 2011/7 provide, in Articles 3(3) and 7 respectively, in relation to the prohibition of the abuse of freedom of contract to the disadvantage of the creditor, that unfair contractual terms and practices are invalid, do the transposition requirements of those directives (Articles 6 and 12, respectively) have the effect of precluding the State from adopting measures which, as regards agreements to which the State is a party and which were in existence at the time the directives entered into force, exclude late-payment interest?
- (5) If the answer to Question 4 is in the affirmative, does the prohibition on intervening in agreements that are already in existence and to which the State is a party by adopting measures which preclude late-payment interest impose — as regards a legislative measure governing interest, which provides, up to a certain point (in the present case, from 31 January 1982 to 31 December 1995), for the application of a non-statutory rate and capitalisation, even on an annual basis and not six-monthly, as claimed by the creditor, and, after that point, only for the payment of statutory interest — a set of rules which, in view of the particular circumstances of the present dispute, is not necessarily unfavourable to the creditor?

Consideration of the questions referred

- 26 As a preliminary point, it must be stated that Decree-Law No 16/2012 was adopted while Directive 2000/35 was still in force, after the adoption and entry into force of Directive 2011/7, but before the period prescribed for transposition of the latter had expired.
- 27 Furthermore, as is clear from paragraphs 15 and 16 above, the Italian Republic made use of the option given to Member States under Article 6(3)(b) of Directive 2000/35, when transposing that directive, of excluding contracts concluded before 8 August 2002, and after adopting Decree-Law No 16/2012, it also made use of the option under Article 12(4) of Directive 2011/7 of excluding contracts concluded before 16 March 2013.
- 28 It is clear from the order for reference that the claim of the Federconsorzi at issue in the main proceedings arose in the context of relations, considered by the referring court to be a statute-based agreement, having existed up to 1967 between the Italian State and agricultural cooperatives, that claim having originated in a transfer of claims for expenditure incurred by those cooperatives before that date on behalf, and in the interests, of the State in the context of that agreement.

- 29 The referring court is, however, unsure whether it follows from the obligation to transpose Directives 2000/35 and 2011/7 and from Articles 3(3) and 6 of Directive 2000/35 and Articles 7 and 12 of Directive 2011/7 that the Italian Republic could not validly adopt the provisions of Decree-Law No 16/2012, converted into law, which are capable of modifying the interest on the claim of Federconsorzi to the detriment of the latter.
- 30 In light of the above, it must be held that, by its second to fifth questions which should be examined together and in the first place, the referring court asks whether the third paragraph of Article 288 TFEU and Articles 3(3) and 6 of Directive 2000/35 and Articles 7 and 12 of Directive 2011/7 must be interpreted as precluding a Member State, which made use of the option under Article 6(3)(b) of Directive 2000/35, from adopting, during the period prescribed for transposition of Directive 2011/7, legislative provisions, such as those at issue in the main proceedings, which are capable of modifying, to the detriment of a creditor of the State, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002.
- 31 In that regard, suffice it to note that the option for a Member State, when transposing Directive 2000/35, of excluding contracts concluded before 8 August 2002, as the Italian Republic did by adopting Article 11 of Legislative Decree No 231 of 9 October 2002, is expressly provided for in Article 6(3)(b) of that directive and, when exercised, that option has the effect of rendering all the provisions of that directive inapplicable *ratione temporis* to those contracts.
- 32 Furthermore, modifications to the disadvantage of a creditor of the State, made by a legislative act adopted during the period prescribed for transposition of Directive 2011/7, of the interest on a debt arising from the performance of a contract concluded before 16 March 2013 may not in any event be regarded as being capable of seriously compromising the attainment of the objective pursued by that directive (see judgment in *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45), as Article 12(4) of that directive gives Member States the option of excluding contracts concluded before that date, and the Member State concerned could therefore consider exercising that option.
- 33 Consequently, it does not follow from the obligation to transpose Directive 2011/7, nor can it be inferred from Article 12(3) of that directive, allowing Member States to retain or adopt provisions more favourable to the creditor than the provisions necessary to comply with that directive, or from Article 7 of that directive, on abusive agreements, terms or practices, that a Member State which has made use of the option under Article 6(3)(b) of Directive 2000/35 may not modify, to the detriment of a creditor of the State, during the period prescribed for transposition of Directive 2011/7, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002, without prejudice, however, to the possibility of there being remedies under domestic law against such a modification.
- 34 Thus, in the case in the main proceedings, assuming that the relationship which existed between the State and the agricultural cooperatives may be treated as a ‘commercial transaction’ within the meaning of Article 2 of Directive 2011/7 and therefore falling within the material scope of that directive, the directive did not, in any event, prohibit the adoption of the provisions of Decree-Law No 16/2012.
- 35 In the light of those considerations, the answer to the second to fifth questions is that the third paragraph of Article 288 TFEU and Articles 3(3) and 6 of Directive 2000/35 and Articles 7 and 12 of Directive 2011/7 must be interpreted as not precluding a Member State which has made use of the option under Article 6(3)(b) of Directive 2000/35 from adopting, during the period prescribed for transposition of Directive 2011/7, legislative provisions, such as those at issue in the main proceedings, which are capable of modifying, to the detriment of a creditor of the State, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002.

- 36 In view of the answer given to the second to fifth questions, there is no need to answer the first question.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

The third paragraph of Article 288 TFEU and Articles 3(3) and 6 of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions and Articles 7 and 12 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 not precluding a Member State which has made use of the option under Article 6(3)(b) of Directive 2000/35 from adopting, during the period prescribed for transposition of Directive 2011/7, legislative provisions, such as those at issue in the main proceedings, which are capable of modifying, to the detriment of a creditor of the State, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002.

[Signatures]