



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

1 December 2022*

(Reference for a preliminary ruling – Directive 2011/7/EU – Combating late payment in commercial transactions – Compensation for recovery costs incurred by the creditor due to late payment by the debtor – Article 6 – Fixed minimum sum of EUR 40 – Several late payments for periodic supplies of goods or services under a single contract)

In Case C-370/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht München I (Regional Court, Munich I, Germany), made by decision of 19 April 2021, received at the Court on 15 June 2021, in the proceedings

DOMUS-Software-AG

v

Marc Braschoß Immobilien GmbH,

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), acting as President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DOMUS-Software-AG, by T. Schwartz, Rechtsanwalt,
- the European Commission, by G. Gattinara and C. Hermes, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and (2), read in conjunction with Article 3, 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 DOMUS-Software-AG ('Domus') and Marc Braschoß Immobilien GmbH ('MBI') concerning a claim for fixed compensation for recovery costs incurred as a result of successive late payments within the framework of a single contract.

Legal context

European Union law

- 3 Recitals 3, 17, 19 and 22 of Directive 2011/7 state:

'(3) Many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. ...

...

(17) A debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations.

...

(19) Fair compensation of creditors for the recovery costs incurred due to late payment is necessary to discourage late payment. Recovery costs should also include the recovery of administrative costs and compensation for internal costs incurred due to late payment for which this Directive should determine a fixed minimum sum which may be cumulated with interest for late payment. Compensation in the form of a fixed sum should aim at limiting the administrative and internal costs linked to the recovery. ...

...

(22) This Directive should not prevent payments by instalments or staggered payments. However, each instalment or payment should be paid on the agreed terms and should be subject to the rules for late payment set out in this Directive.'

4 Article 1 of that directive, entitled ‘Subject matter and scope’, provides, in paragraphs 1 and 2:

‘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 [small and medium-sized enterprises (SMEs)].

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

5 As set out in Article 2 of that directive:

‘For the purposes of this Directive, the following definitions shall apply:

(1) “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) “late payment” means payment not made within the contractual or statutory period of payment and where the conditions laid down in Article 3(1) or Article 4(1) are satisfied;

...’

6 Article 3 of that directive, entitled ‘Transactions between undertakings’, provides in paragraph 1:

‘Member States shall ensure that, in commercial transactions between undertakings, the creditor is entitled to 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.’

7 As provided in Article 5 of Directive 2011/7, entitled ‘Payment schedules’:

‘This Directive shall be without prejudice to the ability of parties to agree, subject to the relevant provisions of applicable national law, on payment schedules providing for instalments. In such cases, where any of the instalments is not paid by the agreed date, interest and compensation provided for in this Directive shall be calculated solely on the basis of overdue amounts.’

8 Article 6 of that directive, entitled ‘Compensation for recovery costs’, provides:

‘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.'

- 9 Article 7 of that directive, entitled 'Unfair contractual terms and practices', states in paragraph 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:

...

- (c) whether the debtor has any objective reason to deviate ... from the fixed sum as referred to in Article 6(1).'

German law

- 10 Paragraph 286(1) and (3) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') is worded as follows:

'(1) If the debtor, following a warning notice from the creditor that is issued after performance is due, fails to perform, he or she is in default as a result of the warning notice. Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice.

...

(3) The debtor of a claim for payment is in default at the latest if he or she does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment; ...'

- 11 Paragraph 288(5) of the BGB provides:

'The creditor of a claim for payment is also entitled to payment of a fixed sum of EUR 40.00 in the event that the debtor is in default, provided that the debtor is not a consumer. This also applies if the claim for payment relates to a staggered payment or other payment by instalments. The fixed sum referred to in the first sentence is to be set off against any compensation due, in so far as the damage is based on the costs of legal proceedings.'

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

- 12 On 21 August 2019, Domus and MBI, two undertakings governed by German law, concluded a contract for the maintenance of software, acquired by MBI, for a monthly payment of EUR 135 plus value added tax (VAT), which was payable at the beginning of each billing period.

- 13 On 11 September 2019, 1 October 2019 and 1 January 2020, Domus issued, pursuant to that contract, successive invoices for September 2019 (EUR 133.04), the period from October to December 2019 (EUR 399.13) and the period from January to March 2020 (EUR 399.13), respectively. In each case, MBI received the invoices the day after they were issued.
- 14 Since those invoices were not paid on time, Domus brought an action before the Amtsgericht München (Local Court, Munich, Germany) for an order that MBI be required to pay it the principal claim outstanding, together with default interest, and fixed compensation of EUR 40 for each of the three unpaid invoices, thus a total of EUR 120, on the basis of Article 288(5) of the BGB in respect of recovery costs incurred.
- 15 The Amtsgericht München (Local Court, Munich) ruled in favour of Domus in respect of the outstanding principal claim. However, it ordered MBI to pay, with interest, just one fixed sum of EUR 40 and held that, in the case of a single contract giving rise to periodic payments, Domus was entitled, on a teleological interpretation of Article 288(5) of the BGB, which transposes Article 6 of Directive 2011/7 into German law, to only one fixed sum.
- 16 Domus brought an appeal against that judgment before the Landgericht München I (Regional Court, Munich I, Germany), the referring court, requesting that MBI be ordered to pay the sum of EUR 80, corresponding to the other two fixed sums claimed.
- 17 The referring court indicates that it is inclined to interpret Directive 2011/7 as meaning that, in the case of a number of claims arising from a single contract and from late payment of periodic payments, there is an entitlement, as a minimum, to payment of a fixed sum of EUR 40 for each individual claim.
- 18 In those circumstances, the Landgericht München I (Regional Court, Munich I) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 6(1) and (2) of Directive [2011/7], read in conjunction with Article 3 of Directive [2011/7], to be interpreted as meaning that, in the case of periodic claims for payment arising from a single contractual relationship, there is an entitlement to payment of a fixed sum of at least EUR 40 for each individual claim for payment?’

Consideration of the question referred

- 19 By its question, the referring court asks, in essence, whether Article 6(1) of Directive 2011/7, read in conjunction with Article 3 thereof, must be interpreted as meaning that, where a single contract provides for periodic deliveries of goods or provision of services, each requiring payment within a specified period, the fixed minimum sum of EUR 40 is payable for each late payment, by way of compensation for the creditor’s recovery costs, or whether it is payable only once, irrespective of the number of late payments.
- 20 In that regard, it should be recalled, in the first place, that Article 6(1) of Directive 2011/7 requires Member States to ensure that, where interest for late payment becomes payable in commercial transactions, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 by way of compensation for recovery costs. Furthermore, under Article 6(2), Member States are obliged to ensure that that fixed minimum sum is payable automatically, even without a reminder to the debtor, and as compensation for the creditor’s own recovery costs. Lastly,

Article 6(3) recognises that the creditor is, in addition to the fixed minimum sum of EUR 40, to 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.

- 21 The concept of 'late payment', which gives rise to the creditor's entitlement to obtain from the debtor not only interest for late payment under Article 3(1) of Directive 2011/7, but also a fixed minimum sum of EUR 40 under Article 6(1) of that directive, is defined in Article 2(4) of that directive as payment not made within the contractual or statutory period of payment. Since Directive 2011/7 covers, in accordance with Article 1(2) thereof, 'all payments made as remuneration for commercial transactions', that concept of 'late payment' is applicable to each individual commercial transaction (see, to that effect, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraph 28).
- 22 In the second place, Article 6(1) of Directive 2011/7 defines the conditions under which the fixed minimum sum of EUR 40 is to become payable by reference, as regards commercial transactions between undertakings, to Article 3 of that directive. Article 3 provides, in paragraph 1, that Member States are to ensure that, in such commercial transactions, a creditor which has fulfilled its obligations and has not received the amount due on time is entitled to interest for late payment without the necessity of a reminder, unless the debtor is not responsible for that delay (see, by analogy, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraph 31 and the case-law cited).
- 23 It follows from the foregoing, first, that the entitlement to interest for late payment provided for in Article 3(1) of Directive 2011/7, and the entitlement to a fixed minimum sum provided for in Article 6(1) of that directive, which arise from a 'late payment' within the meaning of Article 2(4) of that directive, are linked to individual 'commercial transactions'. Second, that interest, like that fixed sum, is to become payable automatically upon expiry of the period for payment laid down in Article 3(3) to (5) of that directive, provided that the conditions set out in paragraph 1 thereof are satisfied. Recital 17 of Directive 2011/7 makes clear in that regard that 'a debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations' (see, to that effect, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraph 32).
- 24 As regards the conditions under which interest for late payment and the fixed minimum sum respectively become payable, neither Article 3(1) nor Article 6(1) of Directive 2011/7 draws a distinction as to whether or not the payments that are not made on time arise from a single contract. Therefore, the wording of those provisions cannot support the interpretation that, in the case of a single contract, the fixed minimum sum of EUR 40, by way of compensation for recovery costs, is payable to the creditor only once, irrespective of the number of individual late payments.
- 25 That finding is supported by Article 5 of Directive 2011/7, which concerns a situation comparable, for the purposes of the application of that directive, to the situation at issue in the main proceedings. It follows from that article, read in the light of recital 22 of that directive, that where the parties have agreed a payment schedule providing for instalments, a fixed minimum sum of EUR 40 by way of compensation for recovery costs is payable for each instalment not paid by the agreed date.

- 26 Accordingly, it is apparent from a literal and contextual interpretation of Article 6(1) and (2) of Directive 2011/7 that the fixed minimum sum of EUR 40, by way of compensation for recovery costs, is payable to a creditor which has fulfilled its obligations for each payment that is not made on time as remuneration for a commercial transaction, as evidenced by an invoice or equivalent payment demand, including where several payments made as remuneration for periodic deliveries of goods or provision of services under a single contract are late, unless the debtor is not responsible for those delays (see, to that effect, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraph 34).
- 27 In the third place, that interpretation of Article 6 of Directive 2011/7 is confirmed by its aims. It follows from Article 1(1) of that directive, read in the light of recital 3, that it is intended not only to discourage late payment by preventing it from being financially attractive for the debtor because of a low rate or lack of interest being charged in such a situation, but also to protect the creditor effectively against such delays by ensuring that the creditor is afforded the fullest possible compensation for recovery costs incurred. In that regard, recital 19 of that directive makes clear, first, that recovery costs should also include the recovery of administrative costs and compensation for internal costs incurred due to late payment and, second, that compensation in the form of a fixed sum should aim at limiting the administrative and internal costs linked to the recovery (see, to that effect, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraphs 35 and 36).
- 28 From that perspective, the fact that a debtor is responsible for a number of delays in making payment for periodic deliveries of goods or provision of services under a single contract cannot have the effect of reducing, to a single fixed sum, the fixed minimum sum payable by way of compensation for the recovery costs in respect of each late payment. Such a reduction would, first of all, effectively deprive Article 6 of Directive 2011/7 of any practical effect, the objective of that directive being, as has been pointed out in the preceding paragraph, not only to discourage late payment but also for those sums to serve as compensation ‘for the creditor’s own recovery costs’, costs which tend to rise in proportion to the number of payments and amounts which the debtor fails to pay on time. That reduction would moreover be equivalent to granting the debtor a derogation from the entitlement to the fixed sum referred to in Article 6(1) of that directive, without that derogation being justified by any ‘objective reason’ within the meaning of point (c) of the second subparagraph of Article 7(1) of that directive. Lastly, the reduction at issue would effectively exempt the debtor from part of the financial burden arising from the debtor’s obligation to pay, in respect of each payment not paid on time, the fixed sum of EUR 40 provided for in Article 6(1) (see, to that effect, judgment of 20 October 2022, *BFF Finance Iberia*, C-585/20, EU:C:2022:806, paragraph 37).
- 29 In the light of the foregoing, the answer to the question referred is that Article 6(1) of Directive 2011/7, read in conjunction with Article 3 of that directive, must be interpreted as meaning that, where a single contract provides for periodic deliveries of goods or provision of services, each requiring payment within a specified period, the fixed minimum sum of EUR 40 by way of compensation for recovery costs is payable to the creditor for each late payment.

Costs

- 30 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:

Article 6(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, read in conjunction with Article 3 of that directive,

must be interpreted as meaning that:

where a single contract provides for periodic deliveries of goods or provision of services, each requiring payment within a specified period, the fixed minimum sum of EUR 40 by way of compensation for recovery costs is payable to the creditor for each late payment.

[Signatures]