



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

20 October 2022*

(Reference for a preliminary ruling – Combating late payment in commercial transactions – Directive 2011/7/EU – Article 12(4) – Temporal scope – Practice established before 16 March 2013 consisting in not recovering interest for late payment or compensation for recovery costs – Practice applied to individual orders placed on or after that date – Article 7(2) and (3) – Grossly unfair contractual terms and practices – Waiver freely agreed to)

In Case C-406/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 1 July 2021, received at the Court on the same date, in the proceedings

A Oy

v

B Ky,

Joint heirs of C,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, I. Jarukaitis and Z. Csehi (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- A Oy, by K. Tenhovirta, asianajaja,
- the Finnish Government, by A. Laine, acting as Agent,
- the European Commission, by G. Gattinara, T. Simonen and I. Söderlund, acting as Agents,

* Language of the case: Finnish.

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 Article 7(2) and (3) and Article 12(4) 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 A Oy, of the one part, and B Ky and the joint heirs of C, of the other part, concerning the late settlement of 135 invoices with due dates between 10 April 2015 and 21 February 2018.

Legal context

European Union law

Directive 2011/7

- 3 Recitals 12, 16 and 28 of Directive 2011/7 state:
 - ‘(12) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift to a culture of prompt payment, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment. Such a shift should also include the introduction of specific provisions on payment periods and on the compensation of creditors for the costs incurred, and, inter alia, that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair.
 - ...
 - (16) This Directive should not oblige a creditor to claim interest for late payment. In the event of late payment, this Directive should allow a creditor to resort to charging interest for late payment without giving any prior notice of non-performance or other similar notice reminding the debtor of his obligation to pay.
 - ...
 - (28) 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. ... In particular, the outright exclusion of the

right to charge interest should always be considered as grossly unfair, whereas the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair. This Directive should not affect national provisions relating to the way contracts are concluded or regulating the validity of contractual terms which are unfair to the debtor.’

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 Under 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) ... are satisfied;

(5) “interest for late payment” means statutory interest for late payment or interest at a rate agreed upon between undertakings, subject to Article 7;

(6) “statutory interest for late payment” means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points ...’

6 Article 3 of Directive 2011/7, 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 Article 4 of Directive 2011/7 relates to transactions between undertakings and public authorities. Article 4(3) provides, inter alia, that Member States must ensure that, in commercial transactions where the debtor is a public authority, the period for payment does not exceed certain time limits which Article 4(3) lays down. Article 4(4) allows Member States to extend, in certain circumstances, the time limits referred to in Article 4(3).

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. ...’

9 Article 7 of Directive 2011/7, entitled ‘Unfair contractual terms and practices’, provides in paragraphs 1 to 3:

‘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 ... 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.’

10 Article 12 of that directive, entitled ‘Transposition’, states:

‘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. They shall forthwith communicate to the [European] Commission the text of those provisions.

...

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

11 Under the first paragraph of Article 13 of Directive 2011/7:

‘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)] 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).’

Finnish law

12 Directive 2011/7 was transposed into Finnish law by the Laki kaupallisten sopimusten maksuehdoista (30/2013) (Law on payment terms in commercial contracts (30/2013)) of 18 January 2013 (‘the Law on payment terms’).

13 According to Paragraph 1(1) of the Law on payment terms, that law applies to payments which an undertaking or a contracting authority is required to make to an undertaking in consideration for goods or services.

14 Under Paragraph 1(2) of that law, the law’s provisions on contractual terms also apply to contractual practices.

15 According to Paragraph 8(1) of the Law on payment terms, a contractual term under which the creditor is not entitled to interest for late payment is invalid. Under Paragraph 8(3) of that law, a contractual term according to which a creditor is not entitled to compensation for recovery costs under Paragraphs 10 and 10e of the saatavien perinnästä annettu laki (513/1999) (Law on the recovery of claims (513/1999)) of 1 September 1999, in the version applicable to the dispute in the main proceedings (‘the Law on the recovery of claims’) is invalid unless there is a legitimate reason for the use of that term.

16 The Law on the recovery of claims provides for fixed-sum compensation. According to Paragraph 10e of that law, where a payment within the meaning of Paragraph 1 of the Law on payment terms has been delayed with the result that the creditor is entitled to interest for late payment, the creditor is entitled to obtain from the debtor fixed-sum compensation of EUR 40 for recovery costs.

17 Paragraph 11(1) of the Law on payment terms provides that that law is to enter into force on 16 March 2013. According to Paragraph 11(2), a contract concluded before the date of entry into force of that law is to be governed by the provisions in force on the date concerned.

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

18 Since April 2009, B Ky (‘B’), which is engaged in the sale of books, has been a customer of A Oy (‘A’) and has acquired books and other bookstore items from A by placing individual orders. A delivered books to B and sent it a separate invoice for each order. No written framework contract or other contract was concluded between those parties in respect of the ordering and supply of the goods concerned. Consequently, there was also no separate written agreement between those parties on the settlement of invoices or on the payment of interest for late payment.

- 19 By application lodged on 7 May 2018, A claimed that the käräjäoikeus (District Court, Finland) should order B and its general partner C to be made jointly and severally liable to pay A interest for late payment in the amount of EUR 172.81 and, pursuant to Article 10e of the Law on the recovery of claims, fixed-sum compensation for recovery costs in the total amount of EUR 5 400. In support of its action, A stated that B was late in settling 135 invoices that became due for payment between 10 April 2015 and 21 February 2018.
- 20 B and C opposed those claims. While they admitted that the payment of the 135 invoices concerned had been delayed by between two days to three weeks after the due dates, they stated that all those invoices had been settled.
- 21 In that regard, B and C relied, inter alia, on the common practice in the book sector and on the fact that, during the eight years of cooperation between them, A had never before demanded from B and C interest for late payment or compensation for recovery costs, even though B had settled most of A's invoices after they had become due for payment. B and C submitted that there was at least a 'tacit agreement' between A and B whereby B could pay the invoices issued, within a reasonable time, after the due dates, without incurring interest for late payment. Thus, A and B also had an agreement whereby A was not entitled to fixed-sum compensation for recovery costs under Paragraph 10e of the Law on the recovery of claims.
- 22 The käräjäoikeus (District Court) dismissed the action brought by A.
- 23 In that regard, that court stated that the decisive factor was whether A was entitled to interest for late payment. The court referred to Paragraph 8(1) of the Law on payment terms, which provides that a contractual term according to which a creditor is not entitled to interest for late payment is invalid. It stated that, since that provision is mandatory, A and B could not have agreed that A had no entitlement whatsoever to interest for late payment.
- 24 However, the käräjäoikeus (District Court) considered it established that there had been a long-standing commercial practice between A and B whereby an invoice could be settled within a reasonable time after the due date without interest for late payment being incurred. According to that court, that practice does not infringe Paragraph 8(1) of the Law on payment terms, with the result that A was not entitled to interest for late payment, and nor was it, therefore, entitled to fixed-sum compensation for recovery costs.
- 25 A appealed to the hovioikeus (Court of Appeal, Finland) which upheld the judgment at first instance, holding that the practice of A and B had become an integral part of the agreement between them. According to that court, the applicable provisions did not preclude, on the basis of that practice, the date on which interest for late payment began to accrue from being different from the due date of the invoice concerned. Lastly, that court found that the practice in question was also not unreasonable or unfair, and it therefore did not infringe mandatory statutory provisions.
- 26 A brought an appeal before the Korkein oikeus (Supreme Court, Finland), which is the referring court.
- 27 In support of that appeal, A argues, in essence, that, in view of the mandatory nature of the applicable legislation, A and B were not entitled to conclude agreements, tacitly or otherwise, on the payment of interest for late payment in a manner that infringed the rights of the creditor concerned.

- 28 As regards, moreover, the provisions of Article 11(1) and (2) of the Law on payment terms, A submits that each individual order constitutes a contract and that, in the present case, it could not be said that there was a long-standing agreement or practice which arose before the date on which that law entered into force.
- 29 B and the joint heirs of C contend, by contrast, that, by a contractual term or practice, it is possible to derogate from the date on which interest for late payment starts to accrue.
- 30 The referring court considers that the case-law of the Court, in particular the judgment of 1 June 2017, *Zarski* (C-330/16, EU:C:2017:418), does not provide a clear answer to the scope of the expression ‘contracts concluded before 16 March 2013’, in Article 12(4) of Directive 2011/7, where the practice engaged in by the parties concerned, relating to the payment of interest for late payment, is regarded as having arisen before that date, but each of the individual orders on the basis of which interest for late payment and compensation for recovery costs are claimed was placed after that date. Similarly, nor do the applicable legislation or that case-law indicate clearly whether the practice engaged in by the parties concerned, whereby the creditor did not enforce any penalties for late payment in the event of a short delay in payment, may be considered to be a grossly unfair contractual term or practice.
- 31 The referring court observes in that regard that, when Directive 2011/7 was transposed into Finnish law, the national legislature made use of the power provided for in Article 12(4) of that directive.
- 32 Furthermore, as was held at first instance and on appeal, the contractual practice, engaged in by A and B on a continuous basis since 2009, whereby the penalties for late payment were not enforced in respect of invoices remaining unpaid for a period of up to one month, had, in accordance with national law, become an integral part of the agreements between those parties.
- 33 However, in the light of the Court’s case-law, it is not clear whether such a practice – if it were regarded as having already been binding on those parties before 16 March 2013 – and all the individual orders placed between those parties on or after that date must be considered to constitute a ‘contract concluded before 16 March 2013’, within the meaning of Article 12(4) of Directive 2011/7, with the result that all those orders would be excluded from the scope of Directive 2011/7.
- 34 If Directive 2011/7 were applicable to the orders placed after 16 March 2013, even though the practice in question was established before that date, the referring court asks whether that practice constitutes a contractual term or a practice which excludes, first, the payment of interest for late payment, within the meaning of Article 7(2) of Directive 2011/7 and, secondly, compensation for recovery costs, within the meaning of Article 7(3) of that directive, and whether, consequently, the practice should be ‘considered as grossly unfair’, within the meaning of Article 7(2), and ‘presumed to be grossly unfair’, within the meaning of Article 7(3), respectively.
- 35 According to the referring court, the waiver of interest for late payment and of the compensation for recovery costs linked thereto is based, in the present case, on the practice whereby the creditor concerned agreed not to recover them in the case of short delays in payment, that is to say, delays of less than one month, in exchange for payment of the principal sum. However, the case-law of the Court does not, it is reasoned, allow an answer to be given to the question whether such a practice may bind that creditor without being precluded by Directive 2011/7.

- 36 In that regard, the referring court raises the question, in essence, of the applicability of the guidance provided in the judgments of 16 February 2017, *IOS Finance EFC* (C-555/14, EU:C:2017:121), and of 28 January 2020, *Commission v Italy (Directive combating late payment)* (C-122/18, EU:C:2020:41), on the ground that, in the cases giving rise to those judgments, the delays in payment were attributable to public authorities, whereas, in the dispute in the main proceedings, those delays are attributable to a private-law entity.
- 37 In those circumstances the Korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 12(4) of Directive 2011/7 to be interpreted as meaning that Member States may exclude from the scope of that directive a contractual practice relating to [the payment of interest for late payment and compensation for recovery costs] which the parties engaged in on a consistent basis in respect of individual orders prior to 16 March 2013, even if the individual orders in respect of which the enforcement of penalties for late payment is sought were placed after that date?
- (2) If the first question is answered in the negative, is Article 7(2) and (3) of Directive 2011/7 to be interpreted as meaning that the contractual practice described in Question 1 is to be regarded as a contractual term or practice which excludes interest for late payment or compensation for recovery costs?’

Consideration of the questions referred

The first question

- 38 By its first question, the referring court asks, in essence, whether Article 12(4) of Directive 2011/7 must be interpreted as meaning that Member States may exclude from the scope of that directive a contractual practice relating to the payment of interest for late payment and compensation for recovery costs, where that practice was established between the parties concerned before 16 March 2013, but individual orders, on the basis of which interest for late payment and such compensation are claimed, were placed on or after that date.
- 39 Article 12(4) of Directive 2011/7 allows Member States to decide, in transposing that directive, whether to exclude ‘contracts concluded before 16 March 2013’ from the scope of that directive.
- 40 The Court has already stated that that provision must be given an independent and uniform interpretation throughout the European Union (see, to that effect, judgment of 1 June 2017, *Zarski*, C-330/16, EU:C:2017:418, paragraphs 25 and 26).
- 41 In addition, the Court has already held, first, that the examination of the wording of Article 12(4) led to the conclusion that, by using the term ‘contracts concluded’, the EU legislature intended to allow Member States to exclude from the scope of Directive 2011/7 contractual relationships concluded before 16 March 2013, in their entirety, including the effects of those contractual relationships which arise after that date (judgment of 1 June 2017, *Zarski*, C-330/16, EU:C:2017:418, paragraphs 25, 26 and 29).

- 42 Secondly, it has held that that interpretation was supported by the context of the provision in question and, in particular, by the scope of Article 13 of Directive 2011/7, which repeals Directive 2000/35 with effect from 16 March 2013, while providing that that directive nevertheless remains applicable to contracts concluded before that date to which Directive 2011/7 does not apply pursuant to Article 12(4) of that directive (see, to that effect, judgment of 1 June 2017, *Zarski*, C-330/16, EU:C:2017:418, paragraphs 30 and 31).
- 43 The Court has inferred from those factors that, where a Member State has made use of the power granted to it under Article 12(4) of Directive 2011/7, contracts concluded before 16 March 2013 continue – subject to the exercise of the power provided for in Article 6(3)(b) of Directive 2000/35 as regards contracts concluded prior to 8 August 2002 – to be governed by Directive 2000/35, including as regards their future effects. Accordingly, the claims relating to payments due after 16 March 2013 cannot fall within the scope of Directive 2011/7 where the contract, pursuant to which those payments are due, was concluded before that date and the Member State concerned has made use of the power granted to it under Article 12(4) of Directive 2011/7 (see, to that effect, judgment of 1 June 2017, *Zarski*, C-330/16, EU:C:2017:418, paragraphs 32 and 33).
- 44 The Court has thus held that Article 12(4) of Directive 2011/7 must be interpreted as meaning that Member States may exclude from the scope of that directive late payments in the performance of a contract concluded before 16 March 2013, even where those late payments occur after that date (judgment of 1 June 2017, *Zarski*, C-330/16, EU:C:2017:418, paragraph 34).
- 45 It follows from the foregoing that the decisive factor for the purposes of determining whether a contractual practice such as that at issue in the main proceedings may, pursuant to Article 12(4) of Directive 2011/7, avoid the requirements of that directive, is the date on which the contract under which payments are due was concluded.
- 46 It must, however, be noted that the last sentence of recital 28 of that directive states that the directive should not affect, inter alia, national provisions relating to the way contracts are concluded. It follows that it is in accordance with the applicable national law that the national court must determine whether the circumstances submitted for its assessment gave rise to the conclusion of a contract and, if so, the date on which that contract was concluded.
- 47 In the present case, the referring court states that, under national law, the practice in question, followed without interruption since 2009, has become an ‘integral part’ of the contractual relationship between A and B. It is also apparent from the order for reference that that practice became binding on those parties before 16 March 2013 and, consequently, would relate to a contractual relationship entered into before that date, which it is, however, for the referring court to ascertain.
- 48 It therefore remains to be determined by that court whether, in accordance with the applicable national law, it must be held that a new contract was concluded each time an individual order for goods was placed with A by B, with the result that, if that contract was concluded on or after 16 March 2013, it cannot then fall outside the scope of Directive 2011/7, pursuant to Article 12(4) thereof. By contrast, if the referring court finds that such individual orders do not constitute independent contracts, but rather the performance of a contract concluded before 16 March 2013, that contractual framework as a whole falls outside the scope of that directive, since the Republic of Finland has made use of the power provided for in that provision.

49 In the light of all the foregoing considerations, the answer to the first question is that Article 12(4) of Directive 2011/7 must be interpreted as meaning that Member States may exclude from the scope of that directive a contractual practice relating to the payment of interest for late payment and compensation for recovery costs, if that practice falls under a contract concluded before 16 March 2013, pursuant to the applicable national law. Individual orders on the basis of which interest for late payment and such compensation are claimed, which were placed on or after that date, may be excluded from the scope of Directive 2011/7 provided that they constitute only the performance of a contract concluded prior to 16 March 2013, pursuant to the applicable national law. By contrast, if, pursuant to that law, those individual orders constitute independent contracts concluded on or after that date, they may not be excluded from the scope of that directive.

The second question

50 By its second question, the referring court asks, in essence, in the event that Directive 2011/7 is applicable to the dispute in the main proceedings, whether Article 7(2) and (3) thereof must be interpreted as precluding a practice under which, in the case of delays in payment of less than one month, the creditor does not recover interest for late payment or compensation for recovery costs, in exchange for payment of the principal amount of the debts payable.

51 In accordance with Article 1(1) of Directive 2011/7, the aim of that directive is to combat late payment in commercial transactions, that delay constituting, according to recital 12 of that directive, a breach of contract which has been made financially attractive to debtors because, inter alia, low or no interest is charged on late payments (judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 24).

52 In order to achieve that aim, Directive 2011/7 does not, however, harmonise fully all of the rules relating to late payments in commercial transactions (judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 25 and the case-law cited).

53 Like Directive 2000/35, Directive 2011/7 lays down only certain rules in this area, which include those relating to interest for late payment and to compensation for recovery costs (see, to that effect, judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 26).

54 In that regard, Member States must, in accordance with Article 3(1) and Article 6 of Directive 2011/7, ensure that, in commercial transactions between undertakings, a creditor who has fulfilled his or her obligations, and who has not received the amount due on time, is entitled to interest for late payment without the necessity of a reminder, as well as to obtain compensation for the recovery costs which he or she has incurred, unless the debtor concerned is not responsible for such a delay in payment.

55 To that end, Article 7(1) of that directive requires Member States to provide that a contractual term or a practice relating, inter alia, to the 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 addition, for the purposes of Article 7(1), Article 7 provides first, in paragraph 2, that a contractual term or a practice which excludes interest for late payment must be considered as grossly unfair and, secondly, in paragraph 3, that a contractual term or a practice which excludes compensation for recovery costs as referred to in Article 6 of Directive 2011/7 must be presumed to be grossly unfair.

- 56 However, it is apparent from those provisions that they do no more than guarantee that the circumstances envisaged in, inter alia, Article 3(1) and Article 6 of Directive 2011/7 grant the creditor the right to demand interest for late payment and compensation for recovery costs. As is apparent from recital 28 of that directive, the impossibility of excluding such a right by contractual means is intended to prevent abuse of the freedom of contract to the disadvantage of the creditor, who, at the time when the contract is entered into, is not in a position to renounce such a right (see, by analogy, judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 29).
- 57 In other words, the purpose of Article 7(2) and (3) of Directive 2011/7 is to prevent a creditor's waiver of the right to interest for late payment or to compensation for recovery costs from occurring at the time when the contract is entered into, that is to say, at the time of the exercise of the creditor's freedom of contract and therefore of the possible risk of an abuse of that freedom by the debtor to the disadvantage of the creditor (judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraph 30).
- 58 By contrast, when the conditions laid down in Directive 2011/7 are met and the interest for late payment and the compensation for recovery costs are payable, a creditor must, having regard to his or her freedom of contract, remain free to waive the payment of the sums owed in respect of that interest and compensation, inter alia, in exchange for immediate payment of the principal sum. This is, moreover, confirmed by recital 16 of that directive, which states that the directive should not oblige a creditor to claim interest for late payment (judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraphs 31 and 32).
- 59 Consequently, there is nothing in Directive 2011/7 to suggest that it prohibits a creditor from freely waiving the right to demand interest for late payment and compensation for recovery costs. That said, such a waiver is conditional on its having actually been freely agreed to, with the result that it must not amount to an abuse of the creditor's freedom of contract which is attributable to the debtor (judgment of 16 February 2017, *IOS Finance EFC*, C-555/14, EU:C:2017:121, paragraphs 33 and 34).
- 60 In that regard, in view of the doubts expressed by the referring court, it should also be added, first, that the guidance from the case-law referred to in paragraphs 56 to 59 above is indeed applicable to circumstances such as those at issue in the main proceedings. Although, admittedly, the case which gave rise to that case-law concerned transactions between undertakings and public authorities, whereas the main proceedings concern transactions between undertakings, it is nonetheless clear that that guidance relates to the scope of Article 7(2) and (3) of Directive 2011/7 and that, as regards the classifications provided for by those provisions, the latter do not distinguish according to the type of commercial transaction concerned. Secondly, as regards the case that gave rise to the judgment of 28 January 2020, *Commission v Italy (Directive combating late payment)* (C-122/18, EU:C:2020:41), it is sufficient to note that that case concerned the provisions of Article 4(3) and (4) of that directive, which are not at issue in the dispute in the main proceedings.
- 61 In the present case, the order for reference does not indicate whether, by the practice at issue in the main proceedings, the creditor freely waived its right to demand interest for late payment and compensation for recovery costs, within the meaning of the case-law referred to in paragraphs 57 to 59 above. It is, therefore, for the referring court, which alone has jurisdiction to assess the facts, to determine whether it may be considered that, by its practice of not recovering the sums corresponding to that interest and that compensation, the creditor freely agreed to

waiving payment of the sums due in respect of that interest and compensation, bearing in mind that such agreement cannot be expressed at the time of the conclusion of the contract under which the payments concerned were due.

- 62 In the light of all the foregoing considerations, the answer to the second question is that Article 7(2) and (3) of Directive 2011/7 must be interpreted as not precluding a practice under which, in the case of delays in payment of less than one month, the creditor does not recover interest for late payment or compensation for recovery costs, in exchange for payment of the principal amount of the debts payable, provided that, in so doing, the creditor has freely agreed to waiving payment of the sums due in respect of that interest and compensation.

Costs

- 63 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 (Tenth Chamber) hereby rules:

1. Article 12(4) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions

must be interpreted as meaning that Member States may exclude from the scope of that directive a contractual practice relating to the payment of interest for late payment and compensation for recovery costs, if that practice falls under a contract concluded before 16 March 2013, pursuant to the applicable national law. Individual orders on the basis of which interest for late payment and such compensation are claimed, which were placed on or after that date, may be excluded from the scope of Directive 2011/7 provided that they constitute only the performance of a contract concluded prior to 16 March 2013, pursuant to the applicable national law. By contrast, if, pursuant to that law, those individual orders constitute independent contracts concluded on or after that date, they may not be excluded from the scope of that directive.

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

must be interpreted as not precluding a practice under which, in the case of delays in payment of less than one month, the creditor does not recover interest for late payment or compensation for recovery costs, in exchange for payment of the principal amount of the debts payable, provided that, in so doing, the creditor has freely agreed to waiving payment of the sums due in respect of that interest and compensation.

[Signatures]