



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

9 July 2020*

(Reference for a preliminary ruling – Combating late payment in commercial transactions – Directive 2011/7/EU – Concept of ‘commercial transaction’ – Provision of services – Article 2(1) – Lease or rental agreement – Periodic payments – Payment schedule providing for instalments – Article 5 – Scope)

In Case C-199/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court, Łódź – central district, Poland), made by decision of 24 January 2019, received at the Court on 27 February 2019, in the proceedings

RL sp. Z o.o.

v

J. M.,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- J. M., by A. Krakowińska, radca prawny,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. De Luca, avvocato dello Stato,
- the European Commission, by K. Mifsud-Bonnici and Ł. Habiak, acting as Agents,

* Language of the case: Polish.

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 Article 2(1) and Article 5 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 RL sp. Z o.o. and J. M. regarding 16 late payments of rent by J. M., and the related costs, in connection with a lease agreement of indefinite duration for business premises.

Legal context

European Union law

- 3 Recitals 2, 3, 8, 9, 11, 19 and 22 of Directive 2011/7 read as follows:
 - ‘(2) Most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis whereby the supplier gives its client time to pay the invoice, as agreed between parties, as set out in the supplier’s invoice or as laid down by law.
 - (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. ...
- ...
- (8) The scope of this Directive should be limited to payments made as remuneration for commercial transactions. This Directive should not regulate transactions with consumers, interest in connection with other payments, for instance payments under the laws on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance companies. Furthermore, Member States should be able to exclude debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.
- (9) This Directive should regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities ... It should therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

...

- (11) The delivery of goods and the provision of services for remuneration to which this Directive applies should also include the design and execution of public works and building and civil engineering works.

...

- (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. ...

...

- (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 According to Article 1 of Directive 2011/7, entitled 'Subject matter and scope':

'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].

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.'

5 Article 2 of that directive includes the following definitions:

' ...

- (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;

...

- (3) "undertaking" means 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;

- (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 Article 3 of that directive, entitled ‘Transactions between undertakings’, provides in paragraph 1:
- ‘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 According to Article 5 of that directive, 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 Directive 2011/7, entitled ‘Compensation for recovery costs’, provides in paragraph 1 :
- ‘Member States shall ensure that, where interest for late payment becomes payable in commercial transactions in accordance with Article 3 ..., the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40.’

Polish law

- 9 Article 4(1) of the ustawa o terminach zapłaty w transakcjach handlowych (Law on payment periods in commercial transactions, consolidated text) of 8 March 2013 (Dz. U. of 2019, item 118, ‘the Law of 8 March 2013’) defines a commercial transaction as ‘a contract for the delivery of goods or the provision of services for consideration, where the parties as referred to in Article 2 enter into that contract in connection with the activity carried out’.
- 10 According to Article 7(1) of that law:
- ‘1. In commercial transactions, with the exception of transactions in which the debtor is a public entity, the creditor shall be entitled to obtain, without giving formal notice, statutory interest for late payment in commercial transactions, unless the parties have agreed a higher rate of interest, from the date on which the payment became due until the date of the payment, where the following cumulative conditions are met:
- (1) the creditor has performed his contractual obligations;
 - (2) the creditor has not obtained payment within the period laid down in the contract.’
- 11 Article 10(1) and (3) of that law provides:
- ‘1. From the date on which he acquires the right to interest as referred to in Article 7(1) or Article 8(1), the creditor shall be entitled to obtain from the debtor, without giving formal notice,

the equivalent of EUR 40 converted into Polish zlotys [(PLN)] ... – that amount constituting compensation for recovery costs.

...

3. Entitlement to the amount referred to in paragraph 1 shall arise in relation to a commercial transaction, subject to Article 11(2)(2).'

12 Article 11(1) and (2)(1) and (2) of that law provides:

'1. The parties to a commercial transaction may in their contract establish a payment schedule providing for instalments, provided that the establishment of such a payment schedule is not grossly unfair to the creditor.

2. If the parties to a commercial transaction have in their contract provided that payment will be made in instalments, entitlement:

(1) to interest as referred to in Article 7(1) or Article 8(1),

(2) to the amount referred to in Article 10(1), and to reimbursement of the recovery costs incurred, as referred to in Article 10(2),

shall be payable in relation to each unpaid instalment.'

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

13 On 15 January 2011, RL and J. M. concluded a lease agreement of indefinite duration for business premises located in Łódź (Poland). Under the terms of the lease agreement, J. M., as lessee, is required to pay monthly rent, plus service charges equivalent to the building maintenance costs, to RL, the lessor, by the 10th day of each month. Pursuant to that agreement, J. M. paid RL a security deposit of PLN 984 (approximately EUR 229).

14 It is apparent from the order for reference that J. M. made monthly rent payments late on 16 occasions between September 2015 and December 2017. RL subsequently sent J. M. an accounting note in the amount of PLN 2 751.30 (approximately EUR 640), representing 16 times the Polish zloty equivalent of the sum of EUR 40 by way of compensation for those late payments, together with a statement concerning the partial offsetting of that claim against J. M.'s claim against RL for the security deposit. After the offsetting of those amounts, the debt claimed by RL amounted to PLN 1 767.30 (approximately EUR 411).

15 On 10 April 2018, RL brought an application before the referring court for an order for payment to be issued against J. M. That application was granted.

16 J. M. lodged an objection to the order for payment, as well as a counterclaim relating to the security deposit and the interest for late payment, arguing that the Law of 8 March 2013, which transposes Directive 2011/7, does not apply to the lease agreement. He claimed that the agreement does not constitute a commercial transaction, for the purposes of Article 2(1) of that directive, since it did not lead to the delivery of goods or the provision of a service, but led to the provision, for payment of a temporary right to use goods.

- 17 In that context, the referring court seeks to ascertain, in the first place, whether a lease or rental agreement concluded between undertakings may be classified as a ‘commercial transaction’, leading to the delivery of goods or the provision of services for remuneration, for the purposes of Article 2(1) of Directive 2011/7. The referring court notes, on the one hand, that those concepts are not defined by that directive and, on the other hand, that the Polish legal literature is divided in so far as their interpretation is concerned.
- 18 According to the referring court, although a literal and systematic interpretation of the concept of ‘commercial transaction’ would lead to the conclusion that that concept does not include lease or rental agreements, a ‘functional’ interpretation of that concept supports the view that those contracts fall within the scope of Directive 2011/7.
- 19 In the second place, if that question is answered in the affirmative, the referring court seeks to ascertain, in essence, whether the first sentence of Article 5 of Directive 2011/7, in so far as it allows the parties to agree a payment schedule providing for instalments, must be interpreted as meaning that it applies only to commercial transactions involving a single payment, even though such payment may be made in instalments, and that it therefore excludes commercial transactions involving a periodic payment which must be made at predetermined intervals, such as the monthly rent under a lease or rental agreement.
- 20 It was in those circumstances that the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court, Łódź – central district, Poland) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Should Article 2(1) of Directive 2011/7 ..., as transposed into the Polish legal order by Article 4(1) of the [Law of 8 March 2013], be interpreted as meaning that contracts [under which the main obligation] consists in providing a temporary right to use goods in exchange for rent (for instance, lease or rental agreements) must also be regarded as transactions which lead to the delivery of goods or the provision of services for remuneration (commercial transactions)?
- (2) If the answer to the first question is in the affirmative, should Article 5 of Directive 2011/7, as transposed into the Polish legal order by Article 11(1) of the Law of 8 March 2013 ..., be interpreted as meaning that an agreement that the debtor is to make periodic payments, also in the case where the contract is concluded for an indefinite term, is tantamount to the parties to a commercial transaction agreeing on a payment schedule providing for instalments?’

The questions referred

The first question

- 21 By its first question, the referring court asks essentially whether Article 2(1) of Directive 2011/7 must be interpreted as meaning that a contract under which the main obligation is the provision, for payment, of a property for temporary use, such as lease or rental agreement for business premises, is a commercial transaction for the purposes of that provision and therefore falls within the material scope of that directive.

- 22 In that regard, it should be recalled at the outset that, under Article 1(2) of Directive 2011/7, that directive is to apply to all payments made as remuneration for ‘commercial transactions’ and that that concept is defined in Article 2(1) of Directive 2011/7 as ‘transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration’. The latter provision must be read in the light of recitals 8 and 9 of that directive, from which it is clear that the directive covers all payments made as remuneration for commercial transactions, including those between private undertakings, but excluding transactions with consumers and other types of payment (see, to that effect, judgment of 28 November 2019, *KROL*, C-722/18, EU:C:2019:1028, paragraph 31).
- 23 It follows that Article 1(2) of Directive 2011/7, read in conjunction with Article 2(1) thereof, defines the scope of that directive very broadly (see, to that effect, judgment of 28 November 2019, *KROL*, C-722/18, EU:C:2019:1028, paragraph 32).
- 24 Article 2(1) of Directive 2011/7 sets out two conditions which must be satisfied for a transaction to fall within the concept of ‘commercial transactions’ within the meaning of that provision. It must, first, be carried out either between undertakings or between undertakings and public authorities and, secondly, lead to the delivery of goods or the provision of services for remuneration.
- 25 As regards the first condition, it should be recalled that the concept of ‘undertaking’ is defined in Article 2(3) of Directive 2011/7 as ‘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 In the main proceedings, it is common ground that RL, which is a limited liability company, has the status of ‘undertaking’ within the meaning of Article 2(3) of that directive. However, it is not clear from the order for reference whether J. M., in concluding the lease agreement for business premises with RL, was acting as an organisation in the course of its independent economic or professional activity and therefore also has the status of ‘undertaking’. The fact that the premises forming the subject matter of the lease agreement are for business use is an indication to that effect. Nevertheless, it is for the referring court to carry out the necessary verifications in that connection.
- 27 As regards the second condition referred to in Article 2(1) of Directive 2011/7, that directive contains no definition of the concepts of ‘delivery of goods’ and ‘provision of services’, and nor is any reference made to the law of the Member States for the purposes of defining those terms. In those circumstances, such concepts must be given an autonomous and uniform interpretation throughout the European Union, in the light of the need for the uniform application of EU law in conjunction with the principle of equality. Those concepts thus constitute autonomous concepts of EU law and their scope cannot be determined by reference either to concepts known to the laws of the Member States or to classifications made at national level, but must be established by simultaneously taking into account the wording, context and objectives of the provision in which those concepts are used (see, to that effect, judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 25, and the case-law cited).
- 28 As regards, in the first place, the wording of Article 2(1) of Directive 2011/7, it is not possible to determine from that wording alone whether a contract under which the main obligation is the provision, for payment, of a property for temporary use, such as lease or rental agreement for business premises, entails the ‘delivery of goods’ or the ‘provision of services’ within the meaning of that provision.

- 29 It should be noted, however, that the Court ruled, in its judgment of 15 December 2016, *Nemec* (C-256/15, EU:C:2016:954, paragraph 33), that a transaction relating to an economic activity may fall within the concept of ‘commercial transaction’ for the purposes of Article 2(1) of Directive 2011/7 provided that the person carrying out the transaction is acting as an ‘undertaking’ within the meaning of Article 2(3) of that directive. It follows that a contract under which the main obligation is the provision, for payment, of a property for temporary use, such as lease or rental agreement for business premises, is capable of constituting a ‘delivery of goods’ or a ‘provision of services’ within the meaning of that provision.
- 30 As regards, in the second place, the legislative context of Directive 2011/7, it should be noted that, having been adopted on the basis of Article 114 TFEU, Directive 2011/7 forms part of the approximation of the laws of the Member States having as its object the establishment and functioning of the internal market in the field of combating late payment within that market. Thus, the concepts of ‘delivery of goods’ and ‘provision of services’, or even the concept of ‘commercial transactions’, as referred to in Article 2(1) of Directive 2011/7, should be interpreted in the light of the provisions of the FEU Treaty establishing free movement of goods and services, respectively Articles 34, 56 and 57 thereof, and the case-law of the Court interpreting those fundamental freedoms.
- 31 In that regard, it should be noted that, under Article 57 TFEU, activities are to be classified as ‘services’ where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. The second paragraph of Article 57 sets out, by way of example, various activities which are covered by the concept of ‘services’, including activities of a commercial character.
- 32 It follows that the FEU Treaty defines the concept of ‘service’ broadly, so as to include any supply which is not covered by the other fundamental freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms (see, to that effect, judgment of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 32).
- 33 The Court has already held, in that regard, that the letting of immovable property must be considered to be a provision of services for remuneration within the meaning of Article 57 TFEU, and that the fact that the service is provided over a number of years does not preclude that classification (see, to that effect, judgment of 26 October 2010, *Schmelz*, C-97/09, EU:C:2010:632, paragraph 41 and the case-law cited).
- 34 In the light of that broad definition of the concept of ‘service’, provided for in Article 57 TFEU as interpreted by the Court, a lease or rental agreement under which the main obligation is the provision, for payment, of a property for use for a fixed or indefinite period but without a transfer of ownership, such as a lease or rental agreement for business premises, entails the provision of a ‘service’ within the meaning of Article 57 TFEU. From that point of view, a transaction relating to such a contract may lead to a ‘provision of services’, within the meaning of Article 2(1) of Directive 2011/7.
- 35 That interpretation is supported, in the third place, by the objective of Directive 2011/7, which, according to Article 1(1) thereof, 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 undertakings. Such late payment, as is

apparent from recital 3 of that directive, negatively affects the liquidity of those undertakings, complicates their financial management and also affects their competitiveness and their profitability, when they need to obtain external financing because of late payment.

- 36 An interpretation of Directive 2011/7 to the effect that lease or rental agreements do not entail a ‘provision of services’ and fall outside the concept of ‘commercial transactions’ within the meaning of Article 2(1) of that directive, and therefore fall outside its material scope, would not fulfil that objective, since that interpretation would exclude all lease or rental agreements for business premises from that protection. This finding is confirmed by recital 9 of Directive 2011/7, according to which that directive applies to ‘all’ commercial transactions, irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities.
- 37 That conclusion cannot be invalidated by recitals 2 and 11 of Directive 2011/7.
- 38 On the one hand, it is clear from recital 2 of that directive that most goods and services are supplied within the internal market by economic operators to other economic operators and to public authorities on a deferred payment basis, whereas, as the referring court points out, transactions in the context of the leasing of property are not made on a deferred payment basis. However, in the absence of any reference in the wording of Article 1(2) or Article 2(1) of Directive 2011/7 to a requirement that the delivery of goods or the provision of services must be carried out on a deferred payment basis, application of those provisions cannot be made subject to such a requirement.
- 39 On the other hand, the express indication, in recital 11 of Directive 2011/7, that the design and execution of public works and building and civil engineering works fall within the concepts of ‘delivery of goods’ or ‘provision of services’ within the meaning of Article 2(1) of that directive and, therefore, within the material scope of that directive cannot be interpreted *a contrario* as meaning that transactions relating to lease or rental agreements are excluded from it.
- 40 First, Directive 2011/7 provides no list of the various types of contracts which entail a delivery of goods’ or a ‘provision of services’ as referred to in Article 2(1) thereof. Secondly, lease or rental agreements are not included among the transactions and payments made in fields which, according to recital 8 of Directive 2011/7, fall outside the scope of that directive.
- 41 In the light of all the foregoing considerations, the answer to the first question is that Article 2(1) of Directive 2011/7 must be interpreted as meaning that a contract under which the main obligation is the provision, for payment, of a property for temporary use, such as lease or rental agreement for business premises, is a commercial transaction leading to a provision of services, within the meaning of that provision, provided that that transaction is between undertakings or between undertakings and public authorities.

The second question

- 42 The second question should be understood as asking essentially whether, where a fixed-term or indefinite contract providing for periodic payments at predetermined intervals, such as the monthly rent relating to a lease or rental agreement for business premises, falls within the material scope of Directive 2011/7 as a commercial transaction leading to the provision of services for remuneration, within the meaning of Article 2(1) of that directive, Article 5 of that directive must be interpreted as meaning that in order for such a contract to give rise, in the

event of payment which is not regulated by a payment schedule, to the rights to interest and compensation provided for in Article 3 and Article 6 of that directive, it must be considered to be an agreement on a payment schedule providing for instalments, within the meaning of Article 5 thereof.

- 43 In that regard, it must be noted, first, that, in accordance with Article 5 of Directive 2011/7, that directive is to be without prejudice to the ability of parties to agree, subject to the 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 that directive are to be calculated solely on the basis of overdue amounts. Recital 22 of that directive states that the directive should not prevent payments by instalments or staggered payments and explains that each instalment or payment must be paid on the agreed terms and be subject to the rules for late payment set out in that directive.
- 44 It follows that the purpose of Article 5 of Directive 2011/7 is not to delimit the material scope of that directive, by excluding from that scope *inter alia* contracts which are not for a single supply, but to clarify that that directive does not prevent payments by instalments or staggered payments, regardless of whether the contracts concerned provide for a single payment or for a periodic payment at regular predetermined intervals.
- 45 It should be noted, secondly, that, in commercial transactions between undertakings, the interest for late payment provided for in Article 3 of Directive 2011/7 is payable when the conditions laid down in Article 3(1) thereof are satisfied. To that end, it is necessary for the creditor to have fulfilled its contractual and legal obligations and to have not received the amount due on time, unless the debtor is not responsible for the delay. That provision therefore does not make entitlement to interest for late payment subject to the condition that, in the case of a contract involving periodic payments, the parties have agreed on a payment schedule providing for instalments under Article 5 of Directive 2011/7.
- 46 Similarly, in accordance with Article 6 of Directive 2011/7, in commercial transactions between undertakings, entitlement to compensation for recovery costs arises only where interest for late payment is also payable, in accordance with Article 3 of that directive. Thus, in the case of a contract providing for a periodic payment, that entitlement is in no way subject to the condition that the parties to the commercial transaction have agreed on a payment schedule providing for instalments, pursuant to Article 5 of Directive 2011/7.
- 47 In the light of all the foregoing considerations, the answer to the second question is that, since a fixed-term or indefinite contract providing for periodic payments at predetermined intervals, such as the monthly rent relating to a lease or rental agreement for business premises, falls within the material scope of Directive 2011/7 as a commercial transaction leading to the provision of services for remuneration, within the meaning of Article 2(1) thereof, Article 5 of that directive must be interpreted as meaning that in order for such a contract to give rise, in the event of payment which is not regulated by a payment schedule, to the rights to interest and compensation provided for in Article 3 and Article 6 of that directive, it must not necessarily be considered to be an agreement on a payment schedule providing for instalments, within the meaning of Article 5 thereof.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Ninth Chamber) hereby rules:

1. **Article 2(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 must be interpreted as meaning that a contract under which the main obligation is the provision, for payment, of a property for temporary use, such as lease or rental agreement for business premises, is a commercial transaction leading to a provision of services, within the meaning of that article, provided that that transaction is between undertakings or between undertakings and public authorities.**
2. **Since a fixed-term or indefinite contract providing for periodic payments at predetermined intervals, such as the monthly rent relating to a lease or rental agreement for business premises, falls within the material scope of Directive 2011/7 as a commercial transaction leading to the provision of services for remuneration, within the meaning of Article 2(1) thereof, Article 5 of that directive must be interpreted as meaning that in order for such a contract to give rise, in the event of payment which is not regulated by a payment schedule, to the rights to interest and compensation provided for in Article 3 and Article 6 of that directive, it must not necessarily be considered to be an agreement on a payment schedule providing for instalments, within the meaning of Article 5 thereof.**

[Signatures]