

Case C-327/20**Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

22 July 2020

Referring court:

Sąd Okręgowy w Opolu (Poland)

Date of the decision to refer:

10 March 2020

Applicant:

Skarb Państwa – Starosta Nyski

Defendant:

New Media Development & Hotel Services Sp. z o.o.

Subject matter of the main proceedings

Claim for statutory interest for late payment in commercial transactions due to failure to pay the fee for perpetual usufruct.

Subject matter and legal basis of the reference

Interpretation of Directive 2011/7/EU in the context of perpetual usufruct; the question whether the concept of goods includes immovable property and whether the concept of delivery of goods includes the leasing of immovable property in perpetual usufruct; the scope of the concepts of commercial transaction and public authority; the question of intertemporal provisions.

Questions referred

- 1 Must the provisions of Article 2(1) of Directive 2011/7/EU of 16 February 2011 (OJ 1993 L 95, p. 29, as amended) on combating late payment in commercial transactions (recast) (OJ 2011 L 48, p. 1) be interpreted as precluding an

interpretation of Article 2 and Article 4(1) of the Ustawa z dnia 8 marca 2013 r. o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych (Law of 8 March 2013 on counteracting excessive delays in commercial transactions) which does not include immovable property in the concept of goods and does not include the leasing of immovable property in perpetual usufruct within the meaning of Article 232 et seq. of the Kodeks Cywilny (Polish Civil Code) in the concept of delivery of goods, or must they be interpreted as meaning that such action cannot be regarded as the provision of services?

- 2 If the answer to question 1 is in the affirmative, must the provisions of Article 2(1) of Directive 2011/7/EU of 16 February 2011 (OJ 1993 L 95, p. 29, as amended) on combating late payment in commercial [Or. 2] transactions (recast) (OJ 2011 L 48, p. 1) be interpreted as precluding an interpretation of Article 71 et seq. of the Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Law of 21 August 1997 on the management of immovable property) and Article 238 of the Civil Code according to which the collection of annual fees for perpetual usufruct by the Skarb Państwa (State Treasury, Poland) from entities which engage in economic activity but were not the original entities for the benefit of which the State Treasury established the right of perpetual usufruct, but rather acquired that right from other perpetual usufructuaries, does not fall within the scope of the concept of a commercial transaction and of a public authority within the meaning of Article 2(1) and (2) of the abovementioned directive and of Article 2 and Article 4(1) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions, or must they be interpreted as meaning that that activity does not fall within the scope of the provisions of that directive and of that law?
- 3 If the answers to questions 1 and 2 are in the affirmative, must the provisions of Article 12(4) of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (recast) (OJ 2011 L 48, p. 1) and of Article 6(3)(b) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions be interpreted as precluding an interpretation of Article 15 of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions and Article 12 of the Ustawa z dnia 12 czerwca 2003 r. o terminie zapłaty w transakcjach handlowych (Law of 12 June 2003 on payment terms in commercial transactions) whereby they exclude the possibility of applying the provisions of the abovementioned directive and of the law implementing it to contracts for the sale of the right of perpetual usufruct to the current perpetual usufructuary, who is required to pay an annual fee, which were concluded after 28 April 2013 and 1 January 2004, if the original leasing of the land in perpetual usufruct by the State Treasury to another entity took place before 28 April 2013 and 1 January 2004?

Provisions of Community law cited

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions;

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

Provisions of national law cited

- Ustawa z dnia 12 czerwca 2003 r. o terminie zapłaty w transakcjach handlowych (Law of 12 June 2003 on payment terms in commercial transactions);
- Ustawa z dnia 8 marca 2013 r. o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych (Law of 8 March 2013 on counteracting excessive delays in commercial transactions);
- Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 – the Civil Code);
- Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (Law of 21 August 1997 on the management of immovable property).

Brief summary of the facts and procedure

- 1 As a result of the taking of evidence, the court of first instance found that the defendant had been obliged to pay until 31 March 2018 an annual fee of PLN 3 365.55 for perpetual usufruct of a plot of land in Głuchołazy, owned by the State Treasury, which it failed to do. Therefore, the Sąd Rejonowy (District Court) ordered the defendant to pay the amount of PLN 3 365.55 together with statutory interest for late payment calculated from 1 April 2018 until the date of payment. The ruling on interest is justified by Article 481 of the Civil Code.
- 2 However, the District Court dismissed the claim for statutory interest for late payment in commercial transactions. The court of first instance took the view that the obligation to pay annual fees for perpetual usufruct of land arises from the provisions of the Law on the management of immovable property and from the Civil Code, and not, as the applicant claimed, from a commercial transaction. Furthermore, the District Court indicated that the applicant was not party to the contract of sale of 15 May 2014, by which the defendant acquired the ownership of the immovable property and the right of perpetual usufruct of land.
- 3 The applicant brought an appeal with regard to the dismissed claim for statutory interest for late payment in commercial transactions under the Law on payment terms in commercial transactions.

Essential arguments of the parties in the main proceedings

- 4 In the grounds for the appeal, the applicant indicated that although the right of perpetual usufruct arises from statute, a contract must be concluded in order for this right to arise with respect to a specific person, and the contract must be in the form of a notarial deed or else it is invalid. The Law on the management of immovable property sets out the time limit for and method of payment of the amount due, but the obligation itself arises from the contract. The applicant also indicated the basic methods of acquiring the right of perpetual usufruct: pursuant to a contract, pursuant to an administrative decision, and by operation of law. According to the applicant, it is clear from the circumstances of the case and the documents in the case file that the defendant's obligation to pay the fee for perpetual usufruct arises from the contract concluded in the form of a notarial deed which concerned the acquisition of that right.

Brief statement of and reasons for the reference

- 5 In the present case, the State Treasury represented by the Governor of the Nysa District brought an action against New Media Development & Hotel Services Sp. z o.o., established in Warsaw, seeking payment of the annual fee for perpetual usufruct. While the claim concerning the principal amount was not challenged by either party and the judgment of the court of first instance awarding this fee is final, the subject of the appeal was the applicant's claim, dismissed by the court of first instance, for statutory interest for late payment in commercial transactions within the meaning of Article 4(3) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions pursuant to Article 7(1) of that law. The District Court dismissed that claim, finding that the fees for perpetual usufruct arise from the law itself rather than from the contract between the parties. However, in the light of the provisions of Article 73(5) of the Law of 21 August 1997 on the management of immovable property, the Sąd Okręgowy (Regional Court) in its present composition has found that this obligation results from the contract leasing the immovable property in perpetual usufruct or, if such right is established by statute, it results in a contractual relationship between the owner of the immovable property and the perpetual usufructuary by operation of law, and therefore the position of the court of first instance in this respect is incorrect.
- 6 In this situation, therefore, the question has arisen as to whether, when collecting such fees, the State Treasury may claim statutory interest for late payment in commercial transactions or just ordinary statutory interest for late payment, that is, whether the leasing of immovable property in perpetual usufruct falls within the scope of delivery of goods or provision of services within the meaning of Articles 2 and 4(1) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions, transposing Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions.

- 7 The possibility of applying the provisions of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions to annual fees for perpetual usufruct should be examined. Therefore, it should be determined whether such contracts fall within the scope of Articles 2 and 4(1) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions.
- 8 As regards the provisions of the abovementioned Polish Law, a dispute has arisen in the legal literature as to whether the term 'goods' includes immovable property. It is pointed out that the Law on payment terms in commercial transactions and Directive 2011/7/EU do not define the concept of 'delivery of goods' or 'goods' themselves.
- 9 Traditionally, in the literature on sales contracts, the term 'goods' is defined as generic items in the form of raw materials, semi-finished products or finished products. From a slightly different perspective, the term 'goods' is considered to be a synonym for 'movable items'. It has even been pointed out that in many provisions, especially those concerning economic transactions, the legislature uses the concept of goods to mean something that is sold.
- 10 In the case-law of the Court of Justice, goods are defined as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions' (judgment of 10 December 1968, 7/68, *Commission v Italy*, [1968] ECR 617). Additionally, the literature and the case-law of the Court of Justice indicate that goods are essentially material objects (judgment of the Court of Justice of 30 April 1974, 155/73, *Sacchi*, [1974] ECR 409). As the case-law developed, it was clarified that the concept of the material character of the product cannot be understood literally. Consequently, electricity was also considered to be a form of goods (judgment of the Court of Justice of 15 July 1964), 6/64, *Costa v ENEL*, [1964] ECR 1141). It was further clarified that goods may have a negative value. Thus, waste was classified as goods (judgment of the Court of Justice of 9 July 1992, C-2/90, *Commission v Belgium*, [1992] ECR I-4431).
- 11 The legal literature indicates that the term 'delivery' should be understood to mean the transfer of rights to the goods or making the goods available for temporary use. Therefore, a 'delivery of goods' should be understood as a transfer of rights to movable items, electricity, water, gas or central heating or of a corresponding other right (sale). It also appears that the concept of 'delivery of goods' should include making an item or, respectively, a right, available for temporary use (e.g. hire, rental, lease).
- 12 Therefore, a distinction is made between, on the one hand, contracts such as sale, exchange or donation, and, on the other hand, contracts where the subject matter is making an item or right available for temporary use. It should be noted, however, that in the literature the view has been expressed that making goods or rights available for temporary use under a hire, rental or lease agreement lies outside the category of delivery of goods. The rationale for this view is that making goods

available for temporary use does not correspond to the common understanding of the concept of delivery. There are divergent positions in the legal literature in this respect.

- 13 Court of Justice case-law indicates that the personal element is the determining factor characterising the concept of service (judgments of 5 June 1997, C-398/95, *SETTG v Ministry of Labour*, [1997] ECR I-3091; of 5 June 1997, C-360/89, *Commission of the European Communities v Italy*, [1992] ECR I-3401; of 28 March 1996, C-272/94, *Guiot*, [1996] ECR I-1905). Additional characteristics of the provision of services include the fact that services are provided against payment, as well as their temporary and cross-border nature.
- 14 In addition, it should be stated that the question whether the concept of goods within the meaning of the abovementioned law includes immovable property and whether the concept of delivery includes making goods available for temporary use have not been the subject of the case-law of the Sąd Najwyższy (Supreme Court, Poland) in connection with that law or of the case-law of the Court of Justice of the European Union.
- 15 It should be considered whether the leasing of immovable property in perpetual usufruct constitutes delivery of goods, or, if minority views are accepted, provision of services within the meaning of the abovementioned law and directive. In accordance with the abovementioned rules of the Civil Code and of the Law on the management of immovable property, the leasing of immovable property in perpetual usufruct is a peculiar construct, since only the State Treasury and local government units may lease immovable property in perpetual usufruct. In the Civil Code, perpetual usufruct is classified as a right *in rem*. At the same time, this right includes a considerable administrative component. Perpetual usufruct is a form of absolute right to another person's property, which entitles the holder to long-term use of public immovable property.
- 16 Within the framework of the system of rights *in rem*, the right of perpetual usufruct is situated between ownership and limited rights *in rem*. For this reason, the view that this right is of an indirect nature prevails in the literature and in case-law. Owing to this fact, perpetual usufruct exhibits characteristics typical of both ownership and limited rights *in rem*. It should be pointed out that this dualism is best seen in the two relationships involved in perpetual usufruct, since vis-à-vis third parties, the perpetual usufructuary has a position similar to that of the owner.
- 17 On the other hand, in the relationship between the perpetual usufructuary and the owner of the land, perpetual usufruct has characteristics of the right to another person's property. Consequently, the view is expressed that provisions on limited rights *in rem* should be applied to this relationship. It should be added, however, that in some areas the relationship between the owner and the perpetual usufructuary will exhibit characteristics typical of obligation relationships, which will complement the fundamental legal relationship based on rights *in rem*.

- 18 The classification of perpetual usufruct as a right *in rem* clearly indicates that this right has an absolute character and is a property right. Moreover, it is a right granted in return for payment, which is also transferable, hereditary and enforceable. Due to the objectives which it is intended to serve in the legal order, perpetual usufruct is a temporary right, since it may be established for a maximum period not exceeding 99 years and, exceptionally, for a shorter period, but not less than 40 years. Similarly, the functions of that right have determined that it is classified as a specific-purpose right in the sense that the contract establishing that right should specify the use of the land.
- 19 As a rule, perpetual usufruct is currently established on the basis of a contract, but before 1990 it was established on the basis of an administrative decision, and in several statutes the legislature established the right of perpetual usufruct by operation of law.
- 20 According to the notarial deed, the immovable property in question is leased in perpetual usufruct until 5 December 2089. This right can be subject to further transactions and the current usufructuary acquired the right of perpetual usufruct under a contract of 15 May 2014.
- 21 In the opinion of the Regional Court, it appears that in the present case one can accept the view expressed in the legal literature that, in the light of the definition included in the abovementioned directive and in the implementing law, immovable property constitutes goods. There are also no obstacles to assuming that, as a rule, the leasing of immovable property in perpetual usufruct falls within the concept of the delivery of goods, or possibly within the scope of the concept of the provision of services within the meaning of the abovementioned law and directive, as making items available for temporary use.
- 22 Assuming that the Court shares the above view, that is, that the leasing of immovable property in perpetual usufruct falls within the concept of the delivery of goods, or possibly within the scope of the concept of the provision of services, the question arises in the present case whether the collection of fees for perpetual usufruct by the State Treasury from entities which were not a party to the original transaction in the form of leasing immovable property in perpetual usufruct falls within the concept of a commercial transaction within the meaning of Article 2 and paragraph 4(1) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions, transposing Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions, as Article 2(2) of that directive indicates that 'public authority' means any contracting authority, as defined in point (a) of Article 2(1) of Directive 2004/17/EC and in Article 1(9) of Directive 2004/18/EC, regardless of the subject or value of the contract. This provision appears to indicate that where the State Treasury is concerned, the provisions of the directive, and thus also of the abovementioned law, apply only in the case of contracts concluded through public procurement, which is unlikely in the case of the leasing of immovable property in perpetual usufruct.

- 23 Assuming that the scope of the directive, and thus of the law, covers any economic activity of the State in relation to other entities, and thus also covers the conclusion of contracts, including contracts for perpetual usufruct, then, as previously indicated above, the initial leasing of the immovable property in perpetual usufruct could also take place by way of an administrative decision or by operation of law. Moreover, there is a theoretical possibility of the immovable property being sold to a person who was originally not an entrepreneur, for the purposes of an activity other than economic activity, and subsequently, as a result of a change in the purpose of the plot of land or the commencement of economic activity by the person in question, of that immovable property being used for the purposes of economic activity, or being sold by a person who was not an entrepreneur to an entrepreneur who commences economic activity on the immovable property in question.
- 24 Therefore, the question arises whether in cases concerning payment of an annual fee, which is always charged to the current perpetual usufructuary who, as in the present case, is already a successive holder of the right under a contract for the sale of the right of perpetual usufruct, the circumstances in which the right of perpetual usufruct itself arose should be examined, that is, whether it arose by way of a contract (and additionally by way of a tender) or by way of statute or an administrative decision, and whether the original acquirer of the right was an entrepreneur at the time of its acquisition and acquired the plot of land for the purposes of economic activity.
- 25 The question also arises whether only the original contract establishing perpetual usufruct can be regarded as a commercial transaction and whether only in such a case the State Treasury is able to charge higher interest if the perpetual usufructuary is in arrears with the payment of the annual fee, and if this right is sold, the State Treasury loses that ability, or whether it should be considered that the acquirer of the right of perpetual usufruct replaces his predecessor as party to the original contract establishing perpetual usufruct and the State Treasury can extend the effects of the original commercial transaction to another entity. Both these questions indicate the need to examine the original circumstances in which the right of perpetual usufruct arose in order to assess whether the conditions of a commercial transaction within the meaning of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions and of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions have been met. It is also possible that the contract transferring the right of perpetual usufruct to another usufructuary, concluded without the involvement of the State Treasury, constitutes a commercial transaction, and its effects under Article 71 of the Law on the management of immovable property extend to the State Treasury, which may claim higher interest for late interest pursuant to the Law of 8 March 2013 on counteracting excessive delays in commercial transactions precisely on the basis of this commercial transaction.
- 26 Moreover, it should also be pointed out that although the amount of annual fee for perpetual usufruct is, as a rule, determined by way of a contract in accordance

with Article 73(5) of the Law on the management of immovable property, the manner of determining that amount as well as the procedure for changing it are also regulated by statute in such a way that first, by way of an administrative procedure, the authority leasing the immovable property in perpetual usufruct establishes a new amount of the fee or declines to change it, and after the administrative procedure has been exhausted, the user has the right to demand that the amount of that fee be determined by an ordinary court (and not an administrative court).

- 27 According to well-established legal literature and case-law, the obligation to pay the annual fee is of a civil law nature. It resembles a typical obligation relationship. However, taking into account the formalised manner in which that fee is established and changed, as well as the fact that only the State Treasury and local government authorities are entitled to collect it, as the only entities which can establish the right of perpetual usufruct, fees for perpetual usufruct resemble a public levy. Nevertheless, in the Polish legal system, claims for payment of that fee are ultimately subject to the jurisdiction of the ordinary courts, as in the present case, and those fees are enforced under the provisions of the Kodeks Postępowania Cywilnego (Code of Civil Procedure).
- 28 Another issue relating to whether the fees for perpetual usufruct fall into the category of a commercial transaction within the meaning of the abovementioned regulations arises in connection with the interpretation of Article 4(1) of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions, which contains the phrase 'in connection with the activity performed'. The question arises as to whether this concerns any activity undertaken by public authorities or only the economic activity of those authorities rather than the performance of their public tasks imposed by law.
- 29 If the intention of the EU legislature was to include only those actions of public authorities which relate to economic activity, then there is also no clear position in Polish case-law as to whether collecting fees for perpetual usufruct is an economic activity.
- 30 Another unresolved issue is whether Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions was intended to cover all commercial transactions conducted by public entities irrespective of whether they were carried out for the purposes of economic activity or whether they merely constituted performance of the entity's own tasks, irrespective of the form of the transaction in question, namely, whether it was conducted through public procurement or not.
- 31 If it is assumed that contracts leasing immovable property in perpetual usufruct fall within the scope of the concept of delivery of goods and provision of services and that the activity of the State Treasury consisting in the collection of annual fees from subsequent perpetual usufructuaries falls within the scope of application of the provisions of the Law of 8 March 2013 on counteracting excessive delays in

commercial transactions, which was enacted to implement Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions, the issue of intertemporal provisions remains.

- 32 Both Article 6 of Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions and Article 12 of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions allowed Member States not to extend the application of the rules contained therein to contracts concluded before their entry into force. However, the case at issue concerns periodic payments, which are made annually.
- 33 Although the original contracts or legal events establishing perpetual usufruct often date back to the period before the entry into force of those rules, the contracts transferring perpetual usufruct and thus the obligation to pay annual fees for perpetual usufruct were concluded after the entry into force those rules, as in this case (15 May 2014).
- 34 Therefore, the question arises as to whether only the original contract leasing immovable property in perpetual usufruct should be regarded as a commercial transaction subject to the abovementioned laws and directives, or whether only the contract by which a particular perpetual usufructuary has acquired his right from the previous perpetual usufructuary is a commercial transaction, with effect in respect of the public authority which is not party to that contract.