

**Case C-199/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

27 February 2019

**Referring court:**

Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-Śródmieście in Łódź, Poland)

**Date of the decision to refer:**

24 January 2019

**Applicant in the main action and defendant in the counterclaim:**

RL sp. z o.o.

**Defendant in the main action and applicant in the counterclaim:**

J.M.

**Subject matter of the case in the main proceedings**

In essence, the parties are in dispute as to whether the lease agreement between them can be regarded as a commercial transaction within the meaning of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions and the Ustawa z dnia 8 marca 2013 r. o terminach zapłaty w transakcjach handlowych (Law of 8 March 2013 on Payment Terms in Commercial Transactions; ‘the 2013 Law’). This is because the recognition of a lease agreement as a commercial transaction within the meaning of the aforementioned directive and law is a condition for applying the aforementioned law to the said agreement and for granting the creditor, in accordance with the applicant’s demand, the right to interest and the right to compensation for recovery costs in an amount and on the terms laid down in the aforementioned directive as transposed into Polish law by the provisions of the aforementioned law. Otherwise, the seeking of such interest and compensation by the creditor must be regarded, in line with the defendant’s demand, as an abuse of a subjective right within the meaning of Article 5 of the Kodeks Cywilny (Civil Code).

## Subject matter and legal basis of the reference

For the purposes of interpreting the national provisions contained in the 2013 Law in accordance with Directive 2011/7, the referring court seeks, in essence, to determine the meaning of the terms ‘commercial transaction’ and ‘payment schedules providing for instalments’ under Directive 2011/7. In regard to the first term, the referring court wishes to determine whether that directive and the Polish 2013 Law include within their scope contracts the characteristic performance of which consists in providing a temporary right to use goods in exchange for rent (for instance, lease or rental agreements), that is, whether these contracts constitute commercial transactions within the meaning of Article 2(1) of Directive 2011/7 and Article 4(1) of the 2013 Law. In regard to the second term, and only if the first question is answered in the affirmative, it is a question of clarifying whether an agreement that the debtor is to make periodic payments, also where the contract is concluded for an indefinite term, is tantamount to parties to a commercial transaction agreeing on a payment schedule providing for instalments within the meaning of Article 5 of the directive and Article 11(1) of the 2013 Law.

## Questions referred

1. Should 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 (OJ 2011 L 48, p. 1), as transposed into the Polish legal order by Article 4(1) of the Ustawa z dnia 8 marca 2013 r. o terminach zapłaty w transakcjach handlowych (Law of 8 March 2013 on Payment Terms in Commercial Transactions) (consolidated text: *Journal of Laws* [Dz. U.] of 2019, item 118), be interpreted as meaning that contracts the characteristic performance of which 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/EU, as transposed into the Polish legal order by Article 11(1) of the Law of 8 March 2013 on Payment Terms in Commercial Transactions, 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?

### **Applicable provisions of EU law**

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) — recitals: 2, 3, 11, 22; Article 2(1) and Article 5 ('Directive 2011/7' or 'the directive')

### **Applicable provisions of national law**

Ustawa z dnia 8 marca 2013 r. o terminach zapłaty w transakcjach handlowych (Law of 8 March 2013 on Payment Terms in Commercial Transactions) (consolidated text: *Journal of Laws* [Dz. U.] of 2019, item 118) — Article 4(1) [transposition of Article 2(1) of the directive], Article 7(1)(1) and (2), Article 10(1) and (3), Article 11(1) [transposition of the first sentence of Article 5 of the directive], Article 11(2)(1) and (2)

Ustawa z dnia 23 kwietnia 1964 r. — Kodeks cywilny (Law of 23 April 1964 — Civil Code) (consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 1025) — Article 5

### **Brief outline of the facts and procedure**

- 1 On 10 April 2018, the applicant, RL spółka z ograniczoną odpowiedzialnością (RL limited liability company) with its registered office in Ł. (a company incorporated under Polish law), filed a claim (in the main proceedings) with the District Court for Łódź-Śródmieście in Łódź against the defendant J.M., who resides in Poland, for payment of PLN 1 767.30 plus statutory interest for late payment in commercial transactions from the date of the claim until the payment date.
- 2 In the statement of claim, it is stated that the parties had concluded a lease agreement under which the applicant, as the lessor, made available for use by the defendant, as the lessee, commercial premises located in Łódź, and that the defendant was obliged to pay rent plus service charges equivalent to the building maintenance costs incurred by the applicant.
- 3 The agreement was concluded on 15 January 2015 for an indefinite term. The defendant was required to pay monthly rent in advance, by the 10<sup>th</sup> day of each month, in the amount determined in the agreement. Invoices for the lease were also to include the flat-rate service charges stipulated in the lease agreement. In accordance with its obligation under the lease agreement, the defendant paid a security deposit amounting to PLN 984 to the applicant.
- 4 The applicant indicated that, in the period from September 2015 to December 2017, the defendant was late in paying 16 VAT invoices raised by the applicant for the rent and service charges due for 16 billing periods. Therefore, the applicant

issued to the defendant — as compensation for recovery costs provided for in Article 10 of the 2013 Law — an accounting note for the total amount of PLN 2 751.30, which corresponded to 16 times the PLN equivalent of EUR 40. The applicant also deducted the amount of its claim (PLN 2 751.30) from the defendant's claim for the return of the deposit in the amount of PLN 984. As a result of that deduction, claims amounting to PLN 984 were mutually offset; this, if justified, would mean that the defendant is no longer entitled to claim the return of the deposit. On the basis of this assumption, the applicant seeks payment of PLN 1 767.30 — the sum which remains after the deposit has been deducted from the original claim.

- 5 The order for payment issued in writ-of-payment proceedings was for the entire amount claimed in the main proceedings.
- 6 The defendant lodged an objection to that order for payment, challenging the order in its entirety, with the result that the order ceased to have effect. The defendant moved for the claim to be dismissed in its entirety. At the same time as the objection, the defendant lodged a counterclaim against the applicant (defendant in the counterclaim) for refund of the deposit paid as security for the lease agreement between the parties and for the payment of PLN 984 plus statutory interest for late payment from 16 February 2018 until the payment date.
- 7 The referring court, which has been requested to rule on the objection and on the counterclaim, has referred questions connected with the case for a preliminary ruling.

### **Principal arguments of the parties in the main proceedings**

- 8 The applicant believes that the lease agreement which it concluded with the defendant constitutes a commercial transaction within the meaning of the directive and the provisions of Polish law which transpose it, since the agreement must be regarded as the provision of services for remuneration (which is one of the two possibilities provided for in the definition of commercial transaction in the directive and the law transposing it). From this fact, the applicant submits, it derives its right to add to the outstanding receivables under the lease agreement the statutory interest referred to in Article 7(1) and Article 11(2)(1) of the 2013 Law and also its right to claim compensation for recovery costs referred to in Article 10 of the 2013 Law.
- 9 The defendant claims, inter alia, that there was no delay in the payment of several VAT invoices listed by the applicant in the statement of claim. It also claims that the applicant abused its subjective right in connection with the applicant's claim for compensation for recovery costs which related to delays of a few days in the payment of the other VAT invoices. In its most far-reaching objection concerning the merits of the applicant's case (the purpose of which was to provide grounds for the dismissal of the main claim in its entirety and for the granting of the counterclaim, also in its entirety), the defendant stated that the 2013 Law could

not be applied to the assessment of the lease agreement between the parties, under which the applicant (the defendant in the counterclaim) originally demanded payment of PLN 2 751.30 in total. The defendant claims that a lease agreement is not a commercial transaction within the meaning of the aforementioned law since, contrary to the applicant's assertion, it is not a contract for the provision of services, but rather a contract providing a temporary right to use goods, which is outside the scope of application of the directive and of the 2013 Law.

### **Brief statement of and reasons for the reference**

- 10 As far as the first question referred for a preliminary ruling is concerned, Directive 2011/7 defines 'commercial transactions' as 'transactions between undertakings [...] which lead to the delivery of goods or the provision of services for remuneration'. However, those individual concepts are not defined in the directive. Nor are they defined in the 2013 Law.
- 11 In Polish civil law, there is no dichotomous division into contracts for the delivery of goods and contracts for the provision of services. Instead, contracts are divided into those governing the transfer of rights, the use of goods, the provision of services, and contracts which govern credit relations. For this reason, the scope of the term 'commercial transaction' is not interpreted uniformly in Polish civil law doctrine.
- 12 It is generally accepted that delivery of goods as referred to in Article 4(1) of the 2013 Law should not be taken to include the delivery contracts referred to in Article 605 of the Civil Code, which consist in the supplier's undertaking to manufacture generic items and to deliver them in parts or periodically and the buyer's undertaking to accept those items and to pay their price, but it should be taken to include any contract which transfers ownership or the right to dispose of goods as owner (that is, contracts of sale, exchange, delivery, and agricultural production contracts). The emphasis is therefore on the economic aspect rather than on terminological alignment between the Civil Code and the 2013 Law. Considering that in the Civil Code the term 'goods' does not refer exclusively to things, some authors claim that the presented interpretation of 'delivery of goods' makes it possible for this term to cover both contracts which concern things and those which concern intellectual property rights. However, lease or rental agreements are excluded from the scope of application of the law as understood in this manner, since providing a temporary right of use of 'goods' does not come within the scope of delivery as it is commonly understood.
- 13 There is no doubt as to the minimum scope of the term 'provision of services' because, as mentioned earlier, in Polish civil law there is a distinction related to contracts which govern the provision of services; under the 2013 Law, these contracts include not only those where due diligence is of particular importance (contracts for the provision of services in the narrow sense, such as contracts of mandate), but also contracts where results are important (contracts for the

provision of services in the broader sense, such as, for instance, contracts for a specific work). However, even the broadest literal interpretation of ‘provision of services’ does not cover contracts the characteristic performance of which consists in providing a temporary right to use goods in exchange for rent (for instance, lease or rental agreements).

- 14 However, within doctrine there are also indications that the concepts ‘supply of goods against consideration’ and ‘provision of services against consideration’ as used in the 2013 Law and in the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on Goods and Services Tax) (consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 2174) are similar in meaning. Under the Law on Goods and Services Tax, goods are to be understood as things and parts thereof as well as all forms of energy (Article 2(6)), supply of goods is to be understood as the transfer of the right to dispose of goods as owner (Article 7(1)), and provision of services is to be understood as any performance for the benefit of a natural person, legal person or unincorporated organisational unit which does not constitute a supply of goods within the meaning of Article 7 of the Law (Article 8(1)). If the concepts used in the two laws are considered to be equivalent, a lease agreement could be regarded as a contract for the provision of services.
- 15 Despite the fact that a broad interpretation of contracts for the supply of goods against consideration and contracts for the provision of services against consideration, analogously as under the Law on Goods and Services Tax, would make it possible to extend the scope of application of the 2013 Law to include the majority of contracts concluded by entrepreneurs, including lease or rental agreements, and would be in line with the legislative objective indicated in recital 3 of Directive 2011/7, this postulate is not generally accepted. First of all, it is pointed out that the conceptual frameworks of civil law, which is an area of private law, and of tax law, which is an area of public law, differ significantly. Therefore, trying to draw any equivalence between the concepts used in the two separate legal systems could lead to undesirable results, including in particular for the uniform understanding of certain legal institutions and, consequently, also for the uniform application of law. Furthermore, it is pointed out that tax law is autonomous in relation to private law and, consequently, that the concepts of tax law are autonomous as well. The differences are so far-reaching that, for instance, a legal transaction which is invalid under civil law due to its improper form may constitute a supply of goods under tax law, and thus give rise to a tax liability.
- 16 Recital 2 of Directive 2011/7 appears to militate against classifying contracts providing a temporary right of use of goods in exchange for rent (as interpreted in accordance with the intention of the European legislature) as commercial transactions within the meaning of Article 4(1) of the 2013 Law. In that recital, it is stated 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 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. In the case of lease or rental agreements, the characteristic performance is not fulfilled and payment is not deferred, since the characteristic performance is of a complex nature (it includes a one-off performance in the form of handing over the object of lease to the lessee and, primarily, a continuous performance in the form of agreeing to the lessee using the object of lease), while the cash benefit is of a periodic nature (as will be discussed below) and is payable at the beginning ('in advance') or after the end ('in arrears') of successive billing periods.

- 17 Recital 11 of Directive 2011/7 also appears to militate against the classification of lease and rental agreements as commercial transactions. In that recital, it is stated that the delivery of goods and the provision of services for remuneration to which the directive applies should also include the design and execution of public works and building and civil engineering works. This means that the European legislature recognised that there may be doubts as to whether the design and execution of public works and building and civil engineering works constitute a supply of goods or a provision of services. At the same time, these performances have much more in common with the provision of services than a performance which consists in providing a temporary right of use of goods. It can therefore be assumed that if contracts providing a temporary right of use of goods in exchange for rent were to be covered by Directive 2011/7, this would also be indicated in the recitals of the directive in order to prevent any doubts as to its interpretation.
- 18 In one case, the problem outlined here was the subject of interpretation by the Sąd Najwyższy (Supreme Court, Poland). In the grounds of its judgment of 6 August 2015, which was delivered under Article 2 of the earlier Ustawa z dnia 12 czerwca 2003 r. o terminach zapłaty w transakcjach handlowych (Law of 12 June 2003 on Payment Terms in Commercial Transactions) (*Journal of Laws* [Dz. U.] No 139, item 1323), wherein a commercial transaction was defined similarly as in Article 4(1) of the 2013 Law, the Supreme Court pointed out: 'If we assume that the purpose of the Law is to ensure broad creditor protection, the notion of contracts for the provision of services should also cover contracts providing a temporary right of use of goods, for instance, lease or rental agreements, which are not contracts for the provision of services in the narrow sense'.
- 19 Therefore, a linguistic and systemic interpretation of the 'commercial transaction' concept leads to the conclusion that its scope does not cover lease or rental agreements, since these agreements do not lead to the delivery of goods or the provision of services for remuneration. On the other hand, a functional interpretation militates in favour of including these agreements within the scope of Directive 2011/7 and of the 2013 Law, since these agreements account for a large part of legal transactions concluded by professionals (business transactions), and for lessors or landlords they are often their core business and main source of income, and therefore delays in the payment of rent negatively affect their financial liquidity and complicate the financial management of their undertakings. The need to prevent such effects is indicated in recital 3 of Directive 2011/7.

20 As far as the second question referred for a preliminary ruling is concerned, Article 5 of Directive 2011/7 has been transposed almost literally into the Polish legal order by the provisions of Article 10(3) and of Article 11(1) and (2)(2) of the 2013 Law. There is a certain terminological difference as the directive uses the term ‘agreeing payment schedules providing for instalments’, whereas the Polish Law uses the term ‘determining the schedule for providing a cash benefit in parts’. However, the terminological differences indicated here do not support the argument that the Polish legislature wished to make the scope of the provision of Article 11(1) of the Law either broader or narrower than that stipulated by the European legislature in the first sentence of Article 5 of the directive. In Polish civil law doctrine, one of the most important divisions as regards performances under contracts (which give rise to obligations) is between one-off, periodic and continuous performances. Since the third group (continuous performances) is irrelevant to the present case, it is important to identify the criterion of division between one-off and periodic performances. It is generally accepted that, in the case of one-off performances, the nature and extent of the debtor’s obligation can be determined without invoking the factor of time. Obviously, as with any other human undertaking, fulfilling a one-off performance takes a shorter or longer time, but this element does not affect the nature and extent of the performance. The element of time, in turn, is indispensable if we wish to describe the nature and extent of periodic performances, since these recur cyclically, at predetermined intervals. As a rule, they involve the periodic provision of cash benefits or fungible things. The time factor determines not only the nature of the performance but also its global extent: the longer such an obligation relationship lasts, the more benefits the creditor should receive from the debtor. This characteristic distinguishes periodic performances from one-off performances fulfilled in parts (which should be construed as the division of a one-off performance into instalments), since in the latter case, the extent of the performance is determined in advance and without reference to the element of time. Irrespective of how many instalments the performance includes and over what period, its extent (amount) does not change. On the other hand, a periodic performance does not cease to be such and is not treated as a one-off performance solely because the obligation lasts for a definite period of time. Thus, irrespective of whether a lease or rental agreement is concluded for a fixed or definite period of time, rent which is payable for successive periods is treated as a periodic performance.

21 For the foregoing reasons, the interpretation of Article 11(1) of the 2013 Law and of the first sentence of Article 5 of Directive 2011/7 may lead to the conclusion that these provisions apply only to those cases where the performance by the supplier or service provider is of a one-off nature, but the parties have agreed that it will be fulfilled in parts (instalments). Such an interpretation would, however, lead to the conclusion that a creditor cannot have a claim for the payment of interest as referred to in Article 7(1), in conjunction with Article 11(2)(1), of the 2013 Law or for the payment of the PLN equivalent of EUR 40 as referred to in Article 10(1) and (3), in conjunction with Article 11(2)(2), of the 2013 Law (and, under the directive, in Article 3(1) and Article 6(1), in conjunction with the second sentence of Article 5) where the debtor is late in paying lease or rent

amounts for successive billing periods. If it is acknowledged that this interpretation of the aforementioned provisions of the 2013 Law and of Directive 2011/7 is correct, this could be an argument in favour of assuming that the aforementioned directive and the Polish law do not cover contracts the characteristic performance of which consists in providing a temporary right to use goods in exchange for rent (for instance, lease or rental agreements), that is, these contracts are not commercial transactions within the meaning of both aforementioned legal acts.

- 22 However, it should be noted that the interpretation presented in the previous paragraph may result in effects which would be incompatible with the objectives of Directive 2011/7, since accepting it would mean depriving creditors of the right to interest in the amount and on the terms set out in the directive as well as of the right to compensation for recovery costs also where a transaction, which is clearly a commercial transaction, is concluded for a fixed or indefinite period of time (for instance, a contract for the provision of accounting services concluded for an indefinite term, under which remuneration is paid for monthly billing periods).

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