

Case C-643/23

**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:

26 October 2023

Referring court:

Tribunal da Relação de Lisboa (Portugal)

Date of the decision to refer:

4 July 2023

Appellant:

Agenciart – Management Artístico, Sociedade Unipessoal, Lda.

Respondent:

CT

Subject matter of the main proceedings

The appeal being heard by the Tribunal da Relação de Lisboa (Appeal Court, Lisbon) concerns determination of the scope of application of the payment order procedure, that is to say, whether or not the requirements *ratione materiae* and *ratione personae* governing that procedure are satisfied; the concepts of ‘commercial transaction’ and ‘undertaking’ in paragraphs (1) and (3) respectively of Article 2 of Directive 2011/7/EU; the concept of acting as an organisation in respect of an independent professional activity and the structured exercise of that activity

Subject matter and legal basis of the request

Interpretation of EU law, specifically of recital 5 and Article 2(3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48, p. 1); Article 267 TFEU

Question referred for a preliminary ruling

Should a natural person who habitually carries on the acting profession on a freelance basis for financial remuneration be categorised as an ‘undertaking’ within the meaning and for the purposes of recital 5 and Article 2(3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011, even though that person has no organised structure of resources (merely carrying on that activity but having no premises of his or her own, staff or tools or equipment related to the professional activity)?

Provisions of European Union law relied on

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions ('Directive 2011/7'), in particular recitals 5 and 10 and Article 2(1) and (3)

Provisions of national law relied on

Decreto-Lei n.º 62/2013, de 10 de maio, que estabelece medidas contra os atrasos no pagamento de transações comerciais, e transpõe a Diretiva n.º 2011/7/UE, do Parlamento Europeu e do Conselho, de 16 de fevereiro de 2011 (Decree-Law No 62/2013 of 10 May 2013 on combating late payment in commercial transactions, transposing Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011), in particular Article 3(b) and (d)

‘Article 3

Definitions

For the purposes of this decree-law, the following definitions shall apply:

...
(b) “commercial transactions” means transactions between undertakings or between undertakings and public authorities for the purpose of the delivery of goods or the provision of services for remuneration;

...
(d) “undertaking” means any entity, 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’

Regime dos procedimentos para cumprimento de obrigações pecuniárias emergentes de contratos de valor não superior à alçada do tribunal de 1.ª Instância, aprovado pelo Decreto-Lei n.º 269/98, 1 de setembro (Provisions governing proceedings to enforce financial obligations arising under contracts where the

value does not exceed the jurisdiction of the first-instance court, approved by Decree-Law No 269/98 of 1 September 1998) ('the RPCOPEC'), in particular Article 7

Brief summary of the facts and procedure in the main proceedings

- 1 The appellant is a commercial company that operates as an acting agency and is engaged in managing the artistic careers of the artists with whom it has entered into agency contracts. CT, the respondent, carries on the profession of actor and concluded an agency contract with the appellant which terminated on 30 June 2017.
- 2 In May 2017, the appellant negotiated with a television producer for the respondent's participation in a soap opera and agreed the terms of her engagement in return for a fee for the agency services provided. The respondent's participation in the soap opera began in June 2017 and ceased at the end of May 2018.
- 3 In respect of those services, the appellant issued invoice No 2019/1 of 17 July 2019, for EUR 19 188, which have not yet been paid by the respondent. The appellant states that it is entitled to the fee regardless of the fact that the agency contract expired on 30 June 2017, since the appellant had promoted, negotiated and concluded that engagement, before the agency relationship ended.
- 4 The appellant brought enforcement proceedings for payment of a quantified amount against the respondent, before the Tribunal Judicial da Comarca de Lisboa (District Court, Lisbon, Portugal).
- 5 By way of an enforceable title it submitted a payment order bearing an order for enforcement, issued in a payment order procedure processed by the Balcão Nacional das Injunções (National Payment Orders Service, Portugal). That procedure was commenced on 24 October 2019 and the order for enforcement was issued on 23 January 2020.
- 6 The amount payable claimed by the appellant is EUR 19 188, as shown in invoice No 2019/1, plus default interest. The application for a payment order referred to a contract for the supply of goods and services of 1 June 2017 for the period between 1 June 2017 and 31 May 2018.
- 7 The respondent raised an objection to the enforcement proceedings, claiming that notice of the payment order procedure had not been served or was invalid; that the incorrect proceedings had been used; that she had no capacity to be sued in respect of the enforcement; and that the claim being enforced was time barred.
- 8 The Lisbon District Court upheld the objection to the enforcement proceedings and therefore terminated the enforcement.

- 9 The appellant then lodged an appeal before the Lisbon Appeal Court, the referring court.

The essential arguments of the parties in the main proceedings

The appellant's position

- 10 In the appellant's view, the agency relationship between the parties under the agency contract is a commercial transaction in accordance with the definition in Article 3(b) of Decree-Law No 62/2013.
- 11 The services provided by the appellant are related to the profession of the respondent, who is an actor, and their objective is the carrying on of the respondent's professional activity, which means that neither party can be considered to be a consumer, a key factor for the purposes of Article 2(2)(a) of Decree-Law No 62/2013, under which consumer contracts are excluded from its scope of application.
- 12 Furthermore, precisely because the respondent carries on the profession of actor on a self-employed basis and concluded the agency contract at issue in that capacity, she must fall within the definition of 'undertaking' in Article 3(d) of Decree-Law No 62/2013.
- 13 It can be inferred from the foregoing that the appellant's use of the payment order procedure meets the requirements *ratione materiae* and *ratione personae* of the legislation and is the appropriate procedural means by which to enforce compliance with the respondent's outstanding obligation, with the effect that the enforceable title should be found to be valid.
- 14 The appeal should therefore be upheld, the judgment under appeal be set aside and the case be referred back to the first-instance court so that it can continue the proceedings.

The respondent's position

- 15 According to the respondent, the first-instance court correctly found that the payment order procedure could not be used to obtain judicial enforcement of payment of the amount claimed, because the contract that gave rise to that payment obligation does not fall within the definition of a commercial transaction. According to the legislation, in order for there to be a commercial transaction the parties must be undertakings or undertakings and public authorities, which is clearly not the situation in the present case, since it does not concern a relationship between undertakings or undertakings and public authorities or a person engaged in a commercial activity, because the respondent carries on the profession of actor.
- 16 In support of her case the respondent refers to the Court's judgment of 15 December 2016, *Nemec* (C-256/15, EU:C:2016:954), in so far as concerns

interpretation of the concepts of ‘commercial transaction’ and ‘undertaking’ for the purposes of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000. In that judgment the Court held that it is not enough for a person to conclude a transaction relating to an economic activity in order to be an ‘undertaking’ and for the transaction to be classified as ‘commercial’. It is also necessary (i) that the person in question acts as an organisation in respect of that activity or of an independent professional activity, meaning that, whatever the form and legal status of that person in national law, he or she must exercise an economic activity in a structured and stable manner, so that the activity cannot be limited to an isolated one-off supply, and (ii) that the transaction in question forms part of that activity.

- 17 The purported agency contract at issue was not a contract between undertakings and therefore cannot be considered to be a commercial transaction. It cannot be inferred that by concluding such a contract the respondent, who carries on the profession of actor, exercises an economic activity in a structured and stable manner or that she operates in the commercial sector by exercising an independent professional activity.
- 18 The fact that the respondent initially regarded the contract in question as a ‘commercial distribution’ contract has no bearing on the legal categorisation of the parties to the contract.
- 19 The respondent carries on the liberal profession of actor and provides intellectual services founded on a specific professional qualification, on a personal basis and as part of a relationship of trust, and therefore does not fall within the concept of ‘merchant’.
- 20 Moreover, the respondent states that the appellant failed to demonstrate that it issued an initial notice to pay in the order for payment procedure, and it must therefore be found not to have been proven that the respondent received invoice No 2019/1. She also asserts that no valid notice to file an objection in the order for payment procedure was served, with the effect that the steps taken are invalid. Since the respondent was not given notice, the case should henceforth be heard in special declaratory judgment proceedings, and the application for a payment order should not include an order for enforcement.
- 21 The respondent also asserts that the agency contract was not concluded between her and the appellant but between the appellant and CT Unipessoal, Lda. The respondent therefore has no capacity to be a party to these proceedings as the party against whom enforcement is sought.
- 22 In addition, claims relating to the provision of agency services become time barred after two years. When the appellant filed its application for a payment order, the fee it allegedly should have been paid had long been time barred.
- 23 The respondent also claims, first, that the contract concluded between her and the appellant terminated long before the production contract with the television

production company did so and, secondly, that the appellant was not a party to the contract with the television production company and did not promote that contract, since it was the respondent alone who negotiated the final terms of that contract. For those reasons, no fee is payable to the party seeking enforcement.

- 24 By reason of the foregoing, although the first-instance court did not properly examine the grounds set out above, that failure did not affect the outcome of the case. The judgment under appeal did not err in the interpretation of Article 3(b) and (d) of Decree-Law No 62/2013 and must therefore be upheld in its entirety.

Brief summary of the reasons for the referral

- 25 The referring court examines whether the correct form of proceedings was used.
- 26 According to the legislation, every enforcement action must be based on a title that determines the subject matter and limits of the enforcement, and the absence or unenforceability of the title is a ground for opposing enforcement. This means that wherever the obligation to be performed is not duly covered by an enforceable title or where it exceeds the limits of that title, the action will be defective for lack of an enforceable title. The absence of an enforceable title therefore necessarily terminates the enforcement.
- 27 In the present case, the first-instance court held that the payment order at issue was not an enforceable title, because the amount shown on the invoice contained in the case file of the enforcement proceedings was more than EUR 15 000 and because, as the respondent was not a commercial undertaking, the appellant was not entitled to bring those proceedings against her.
- 28 Under Article 10 of Decree-Law No 62/2013, the creditor in a commercial transaction not involving consumers is entitled to apply for a payment order irrespective of the amount of the claim, that is to say, even where the amount claimed is more than EUR 15 000, the upper limit in the general regime governing payment orders (under Article 7 of the RPCOPEC).
- 29 In the light of Article 2(1) and (2)(a) and Article 3(b) of Decree-Law No 62/2013, this relates to claims arising from commercial transactions where no consumer is a party to the transaction.
- 30 The referring court then examines the requirements *ratione materiae* and *ratione personae* of payment order procedures.
- 31 The key concepts in relation to the requirements *ratione materiae* are ‘financial obligation arising under the contract’ (Article 1 of Decree-Law No 269/98) and ‘commercial transaction’ (Article 3(b) of Decree-Law No 62/2013). The key concepts in relation to the requirements *ratione personae* are ‘consumer’ (Article 2(2)(a) of Decree-Law No 62/2013), ‘public authorities’ (Article 3(c) of

Decree-Law No 62/2013) and ‘undertaking’ (Article 3(d) of Decree-Law No 62/2013).

- 32 In the present case, the payment order bearing an enforcement order concerned the payment of an invoice for services provided under an agency contract, which the appellant claims were provided to the respondent by it, as agent, in the context of the respondent’s activity as a professional actor.
- 33 It flows from the foregoing that the requirements *ratione materiae* are satisfied: there is a contract giving rise to the amount claimed and the obligation is financial in the strict sense, that is to say, it is an obligation to pay a sum of money. The parties have not contested those points.
- 34 The dispute in fact centres on whether the requirement *ratione materiae* of a commercial transaction and the requirement *ratione personae* that the parties must be undertakings, established in paragraphs (b) and (c) respectively of Article 3 of Decree-Law No 62/2013, should be found to be satisfied.
- 35 The referring court notes that Decree-Law No 62/2013 transposed Directive 2011/7, replacing and repealing Directive 2000/35/EC, which governed the same matters, into the national legal order.
- 36 Under Article 3(b) of the decree-law, a transaction involving undertakings and which relates to the delivery of goods and services for (financial) remuneration is categorised as a commercial transaction.
- 37 It is therefore necessary to examine the structure of the contract between the parties. In order to examine which form of proceedings is applicable, regard must be had to the subject matter and the cause of action as they are apparent from the application for a payment order, bearing in mind that the appellant asserts in that application that it ‘acted as an agency’ for the respondent.
- 38 Agency contracts are governed by Decreto-Lei n.º 178/86, de 3 de julho (Decree-Law No 178/86 of 3 July 1986), which defines them as contracts by which one of the parties undertakes to promote the conclusion of contracts on behalf of the other, for remuneration.
- 39 On the one hand, academic commentators have classified agency contracts as commercial contracts. On the other, the case-law has not given a unanimous answer on whether agency contracts for artistic careers must be described as agency contracts.
- 40 Quite clearly, since an agency contract is one form of the commercial contract of engagement, there is no doubt that the activity carried on by the appellant must be categorised as a provision of services. The definition of a commercial transaction is therefore met as regards the subject matter of the transaction.

- 41 The referring court finds that the requirements *ratione materiae* governing use of the payment order procedure are satisfied in the present case as regards the commercial nature of the transaction.
- 42 In respect of the requirement *ratione personae* that the parties must be undertakings, the referring court notes that the services referred to in the invoice submitted with the application for a payment order were provided under an agency contract between the appellant, which is a commercial company, and the respondent, who is a natural person.
- 43 It is therefore necessary to determine whether they both fall within the legal definition of an undertaking, that is to say, any organisation acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person (Article 2(3) of Directive 2011/7).
- 44 It is beyond doubt that the appellant falls within that category. The point at issue relates to the respondent.
- 45 Since the appellant claimed in the application for a payment order that the respondent carried on the profession of actor, and the subject matter of the agency contract was the promotion of her career, regard must be had to the notion of a professional – as opposed to an economic – activity, exercised by a natural person.
- 46 Recital 10 of Directive 2011/7, which states expressly that the liberal professions ‘are covered by this Directive’, suggests that the liberal professions fall within a broad definition of ‘undertaking’.
- 47 Since it was claimed in the application for a payment order that the respondent carries on the profession of actor and since the core element of the agency contract that she concluded with the appellant was the promotion of her professional activity, as a member of a liberal profession, that circumstance suggests, *prima facie*, that she can be categorised as an undertaking.
- 48 The referring court cites the judgment in *Nemec*, which has been adduced by the respondent, and observes in that regard that the notion of ‘stable’ to which the Court refers can be clarified without leaving any room for doubt, since the regular and continuous exercise of a particular activity on a professional basis will be considered to be stable. The uncertainty relates to what must be understood by acting *as an organisation* and by the *structured exercise* of that activity. *Nemec* relates to the professional activity of a craftsman holding a licence to carry on an activity as a self-employed craftsman. The exercise of that activity presupposes that the craftsman has a structured set of means of production.
- 49 That uncertainty persists in the context of Directive 2011/7, since the definitions of ‘commercial transaction’ and ‘undertaking’ in Directive 2011/7 are identical to those in Directive 2000/35/EC, which underpins *Nemec*.

- 50 Given the differences between the factual situation examined in *Nemec* and that in the present case, the findings that the Court made in that case cannot be extrapolated with clarity to the present case. Nor has the referring court found any other judgment of the Court in which it has ruled on the interpretation of those provisions.
- 51 Reasonable doubt therefore remains as regards the interpretation of recitals 5 and 10 and Article 2(1) and (3) of Directive 2011/7, which plays a key role in determining the dispute in the present case.
- 52 The referring court therefore decides to stay the proceedings and refer the question set out above to the Court for a preliminary ruling under Article 267 TFEU.

WORKING DOCUMENT