

**Case C-725/23**

**Request for a preliminary ruling**

**Date lodged:**

27 November 2023

**Referring court:**

Sąd Rejonowy Katowice-Wschód w Katowicach (Poland)

**Date of the decision to refer:**

9 October 2023

**Applicant:**

M. spółka z ograniczoną odpowiedzialnością I. spółka komandytowa-akcyjna with its registered office in R.

**Defendant:**

R. W.

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[...] [case reference]

**ORDER**

On 9 October 2023

the Sąd Rejonowy Katowice-Wschód w Katowicach, VII Wydział Gospodarczy (District Court for Katowice-Wschód in Katowice, 7th Commercial division) [...]

[...] [composition of the court]

having examined on 9 October 2023 in Katowice

in closed session

the case brought by M. spółka z ograniczoną odpowiedzialnością I. spółka komandytowa-akcyjna [I. partnership limited by shares with the M. limited liability company as its general partner] with its registered office in R.

against R. W.

for payment

***decides:***

1. to refer the following question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

Must Article 2(8) 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) be interpreted as including within its scope, in addition to the principal sum for the performance characteristic of the contractual relationship in question leading to the supply of goods or the provision of a service, also the reimbursement of costs incurred in connection with the performance of the contract, which the debtor has contractually agreed to pay?

[...] [suspension of proceedings]

[...]

**- GROUNDS -**

***Request for a preliminary ruling***

***Parties***

***Applicant: M. spółka z ograniczoną odpowiedzialnością I. spółka komandytowa-akcyjna with its registered office in R.***

[...]

[...] [applicant's address and representative's details]

***Defendant: R. W.***

trading

under the name Firma Handlowo-Uslugowa A. in Katowice

[...]

[...] [defendant's address]

***Question referred for a preliminary ruling***

[...]

[repetition of the question referred for a preliminary ruling]

***Facts relevant to the question asked***

The parties are businesses. The applicant is a partnership limited by shares with a limited liability company as its general partner. The defendant is a sole trader.

In connection with their business activities, on 3 July 2019 the parties entered into a lease agreement for commercial premises located on a property in K., for an indefinite period.

Under the agreement, the defendant agreed to pay:

rent (as of the date of the agreement) amounting to PLN 270 net plus the applicable VAT (the rate was PLN 15 per square metre); it was also agreed that the rent would be payable in advance, by the 10th day of each month;

utility fees, which included the price for the energy ordered to meet the tenant's heating, gas and electricity needs as well as all fixed charges incurred by the lessor in connection with the supply of utilities; the billing periods and invoicing frequency were determined at the lessor's (applicant's) discretion; those fees, increased by the applicable VAT, were to be paid within 5 days from the date of delivery of the invoice to the tenant (the defendant);

a monthly flat fee to cover the tenant's share in all charges, expenses and costs related to the premises (as of the date of the agreement) amounting to PLN 10 per square metre of leased area (including PLN 0.42 net for the perpetual usufruct fee, PLN 1.93 net for property tax, PLN 1.00 net for municipal rubbish collection, and PLN 8.65 net for other charges and expenses); the flat fee included, in particular, public levies and other charges, depreciation charges related to the premises, the cost of staffing the porter's lodge, the cost of administering the premises, cleaning costs, and the costs of renovation, repair and maintenance of the premises; the fee was payable in advance, by the 10th day of each month.

During the course of the agreement, the applicant issued three separate invoices, one for each amount due under the agreement.

The applicant did not directly supply the utilities (listed in point 3(b)), but re-invoiced to the defendant the amounts it paid to the suppliers.

The parties contractually agreed on the amount of interest to which the applicant was entitled in the event of late payment of rent or any of the fees; the interest rate was set at the maximum level within the meaning of Article 481(2<sup>1</sup>) of the Kodeks Cywilny (Civil Code) (maximum interest for late payment).

On 13 September 2019, the parties drew up an annex to the agreement, expanding it to cover additional commercial premises.

By letter dated 28 May 2020, the applicant notified the defendant that it was terminating the lease agreement with immediate effect.

In the proceedings pending before the District Court for Katowice-Wschód in Katowice, the applicant is seeking from the defendant the amount of PLN 13 933.89, which corresponds to:

amounts due in regard to 26 unpaid invoices, with 11 invoices relating to unpaid utilities, 7 invoices relating to the flat fee covering the tenant's share in all charges, expenses and costs, and 8 invoices relating to rent; the sum of all the unpaid invoices is PLN 9 397.89;

a fixed amount of EUR 40 for each invoice not paid on time (that is to say, EUR 40 x 26 invoices), amounting to PLN 4 536.00 in total;

The defendant has not taken a position in the case.

***EU law relevant to the answer***

Article 1(2) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions

This Directive shall apply to all payments made as remuneration for commercial transactions.

Article 2(8) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions

‘For the purposes of this Directive, the following definitions shall apply: ‘amount due’ means the principal sum which should have been paid within the contractual or statutory period of payment, including the applicable taxes, duties, levies or charges specified in the invoice or the equivalent request for payment;’

Article 3(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February on combating late payment in commercial transactions

‘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.’

Article 6(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February on combating late payment in commercial transactions

‘Member States shall ensure that, where interest for late payment becomes payable in commercial transactions in accordance with Article 3 or 4, the creditor is entitled to obtain for the debtor, as a minimum, a fixed sum of EUR 40.’

Judgment of 20 October 2022, *BFF Finance Iberia* (C 585/20, EU:C:2022:806).

***Provisions of national law relied on***

Article 659(1) of the ustawa z dnia 23 kwietnia 1964 roku Kodeks cywilny (Law of 23 April 1964 on the Civil Code)

‘By the contract of lease the lessor undertakes to give to the lessee the thing for use for a definite or an indefinite period of time and the lessee undertakes to pay the lessor the agreed rent.’

Article 4(1a) of the ustawa z dnia 8 marca 2013 roku o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych (Law of 8 March 2013 on Preventing Excessive Delays in Commercial Transactions)

‘For the purposes of this law, ‘financial consideration’ means remuneration for the supply of goods or provision of a service in a commercial transaction.’

Article 7(1) of the Law of 8 March 2013 on Preventing Excessive Delays in Commercial Transactions

‘In commercial transactions, with the exception of transactions in which the debtor is a public entity, the creditor shall, without demand, be entitled to 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, if both the following conditions are met:

- (1) the creditor has performed his or her contractual obligations;
- (2) the creditor has not received payment within the period laid down in the contract.’

Article 10(1) of the Law of 8 March 2013 on Preventing Excessive Delays in Commercial Transactions

‘From the date on which he or she 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, compensation for recovery costs, which shall be equivalent to:

- (1) EUR 40 – if the payment amount does not exceed PLN 5 000;
- (2) EUR 70 – if the payment amount exceeds PLN 5 000, but is lower than PLN 50 000;

(3) EUR 100 – if the payment amount is equal to or exceeds PLN 50 000.’

***Reasons for the request for a preliminary ruling***

As indicated above, the subject of the main proceedings is a demand for payment by the defendant, who is the tenant (user of the premises), to the applicant, who is the lessor (gives the premises for use), of rent, fees for utilities consumed (including, in particular, electricity, heat and water) and other charges related to the maintenance of the building. In addition, the applicant is seeking compensation for recovery costs on each unpaid invoice.

The obligation to pay rent and fees arises from the lease agreement concluded in writing between the parties. The applicant raised an invoice for each of the amounts due listed above (three separate invoices). Under the agreement, the billing period for rent and maintenance fees was monthly, and these were payable in advance by the 10th day of each month. However, in the case of utility fees, the lessor was free to set the billing period and invoicing frequency, and payment was to be made within five days of the relevant invoice being delivered.

In the case of the utilities, the suppliers were third parties with which the applicant had contractual relationships and to which it made payments. Subsequently, those costs were recharged (re-invoiced) to the defendant, who actually used the utilities in question. The fee for maintenance of the building was a flat-rate fee, and its purpose was to cover the applicant’s expenses related to, inter alia, public levies, repairs and cleaning of the premises, administration costs, and depreciation charges.

Of the 26 invoices covered by the demand for payment in the main proceedings, 11 concern fees for utilities consumed, 7 concern flat fees related to building maintenance, and 8 concern the rent itself.

The facts in the present case are essentially undisputed. The defendant, having received a copy of the lawsuit, did not respond to the action, nor did he appear at the hearing or take a position in the case. However, the national court has doubts about the legal assessment of the case.

In the opinion of the referring court, an issue has arisen in this case which requires an interpretation of EU law, namely Article 2(8) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast) (OJ 2011 L 48, p. 1), because there is doubt as to whether the applicant is entitled to compensation for recovery costs on invoices that do not concern rent for a given month. In other words, the issue is whether an amount due within the meaning of the directive is any amount arising from a contract, even in cases where it is merely a reimbursement of costs incurred by the business rather than an amount equivalent to the performance characteristic of the legal relationship in question.

Under the Polish Civil Code, the lessor undertakes to give to the lessee the thing for use for a definite or an indefinite period of time, and the lessee undertakes to pay the lessor the agreed rent. Rent is the equivalent due to the lessor in exchange for the tenant's use of the property. Thus, it represents remuneration to the lessor for the tenant's use of the thing that is leased to him. The parties may also include in the contract the obligation to pay other amounts – additional payments or fees independent of the lessor. Those payments, however, do not constitute rent.

There is no doubt that the agreement between the parties is a commercial transaction (see [judgment of 9 July 2020, *RL (Directive combating late payment)* (C 199/19, EU:C:2020:548)]), but pursuant to national legislation implementing the abovementioned directive, the possibility of claiming interest for late payment in commercial transactions, and thus compensation for recovery costs, refers to financial consideration understood as remuneration for the supply of goods or provision of a service in a commercial transaction. Although the case-law in this regard is not extensive, there is a view that 'financial consideration' means consideration that corresponds to the non-monetary performance of the other party to the contract (see also: Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw, Poland) in its judgment of 3 January 2020 [...]). A similar position is taken by certain legal scholars [...]. [reference to the literature].

The court's doubts have likewise not been dispelled by an analysis of the provisions of the directive and the preceding recitals. It appears that Article 1(2), which indicates the scope of application of the directive, and Article 2(8) are relevant here.

Article 1(2) refers to all payments made as remuneration for commercial transactions. Recital 8 indicates that the directive should be limited to payments made as remuneration for commercial transactions and 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. However, the concept of remuneration itself has not been defined. The examples indicated in the recital that do not fall within the scope of the directive involve situations in which the payment obligation is not even close in nature to the payments arising from the agreement made between the parties to the present dispute.

The EU legislature has, on the other hand, defined 'amount due', which means the principal sum which should have been paid within the contractual or statutory period of payment, including the applicable taxes, duties, levies or charges specified in the invoice or the equivalent request for payment. The Court of Justice has already dealt with the interpretation of this concept (Case C-585/20), but in a different context than that presented here.

The correct interpretation of this norm is of considerable importance, since one of the conditions of claiming interest for late payment (Article 3(1)) is the creditor

not having received the amount due on time. The right to claim compensation for recovery costs only arises after the right to claim interest has arisen. The directive was implemented in the Polish legal order in an identical manner.

In the light of the above considerations, it should be noted that there is a connection between the concepts of remuneration and amount due. If the scope of the directive covers only payments that constitute remuneration in commercial transactions, the concept of amount due cannot include payments made for other reasons. Thus, it must be considered whether the principal sum referred to in Article 2(8) of the directive constitutes solely payment for a non-monetary performance which is characteristic of the legal relationship in question and which the business entering into the contract has undertaken to fulfil.

The referring court takes the position that the amount due in a commercial transaction is solely the amount intended to constitute payment for the creditor's own non-monetary performance (supply of goods or provision of a service), and it does not include the reimbursement of expenses or other temporarily incurred costs if those expenses or costs have not been included in the amount due for that performance. It appears that in business relationships, the rule is that remuneration is calculated by taking into account the costs incurred and the expected profit. Where those elements are contractually separated, the part covering the expenses incurred should not be deemed to constitute payment for the provision of a service or supply of goods. Otherwise, the creditor could be entitled to claim several fixed-sum compensations for – in principle – a single performance. Payments that are related to a commercial transaction, but which cannot be included in the amount owed to the creditor due to their nature and origin, should be treated similarly. For instance, such payments could include the abovementioned costs of supplying utilities, which utilities are supplied by third parties. The party to the contract neither provides those services itself nor is it obliged to do so (it does not use subcontractors to fulfil its own obligation), but only recharges (re-invoices) the costs incurred in that regard. Those expenses are incurred solely in connection with the creditor's characteristic performance.

On the other hand, however – and this, *inter alia*, is related to the national court's doubts – if the creditor has incurred certain costs that the debtor was supposed to reimburse within a specified deadline, then late payment may have a negative impact on the creditor's financial situation, forcing the creditor to resort to external sources of financing in order to fund its ongoing operations. The purpose of the directive, was, *inter alia*, to prevent such situations, which have an impact on the competitiveness and profitability of companies in the internal market.

Therefore, the answer to the question referred is relevant to deciding the claim for fixed-sum compensation on invoices issued and not paid on time, which invoices include amounts due as a flat fee related to building maintenance and the reimbursement of expenses for utilities consumed. Despite the fact that the defendant is not contesting the claim in that regard, the national court is obliged to correctly apply substantive law *ex officio*.

[...]

[...] [composition of the court]

[...]

[...] [national procedural matters]

K., 9 October 2023

[...]

[...] [composition of the court]

WORKING DOCUMENT