

**Case C-370/21**

**Request for a preliminary ruling**

**Date lodged:**

15 June 2021

**Referring court:**

Landgericht München I (Germany)

**Date of the decision to refer:**

19 April 2021

**Appellant:**

DOMUS-SOFTWARE-AG

**Respondent:**

Marc Braschoß Immobilien GmbH

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[...]

**Landgericht München I (Regional Court, Munich I, Germany)**

[...]

In the case of

**DOMUS-SOFTWARE-AG, [...]**

[...] Ottobrunn  
– applicant and appellant –

[...]

v

**Marc Braschoß Immobilien GmbH, [...]** Hürth  
– defendant and respondent –

concerning a claim,

the Regional Court, Munich I – 13th Civil Chamber – [...] [formation of the court] made the following

### **Order**

- I. The appeal proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union:

Is Article 6(1) and (2) of Directive 2011/7/EU, read in conjunction with Article 3 of Directive 2011/7/EU, to be interpreted as meaning that, in the case of periodic claims for payment arising from a single contractual relationship, there is an entitlement to payment of a fixed sum of at least EUR 40 for each individual claim for payment[?]

### **Grounds:**

#### **I.**

The parties to the dispute concluded a software maintenance agreement on 21 August 2019, commencing on that date, in respect of the licences for the program ‘Domus 4000’ purchased by the defendant. The monthly service charge amounts to EUR 135.00 plus VAT.

During the period from September to December 2019, the applicant performed all of the maintenance services required of it.

On 11 September 2019, the applicant issued an invoice for EUR 133.04 gross for the software maintenance fee in respect of September 2019. Invoice number 201698309, for EUR 399.13 gross, was issued on 1 October 2019 for the software maintenance fee in respect of October to December 2019.

Under section 6.1 of the software maintenance conditions, the fees for the contractual maintenance services are due at the start of each calculation period.

The defendant received each of the invoices on the day after it was issued.

Despite reminders, the defendant had not made any payments on the claim arising from those invoices, in the total amount of EUR 532.17, before service of the application initiating proceedings of 12 March 2020.

The applicant relies on Paragraph 288(5) of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB') as a basis for justifying the fixed sum for late payment of EUR 40.00 applied in respect of each entitlement, thus amounting to EUR 80.00.

For the period from January to March 2020, the applicant issued an invoice, dated 1 January 2020, in the amount of EUR 399.13.

That being the case, the applicant extended its claim and requested that:

The defendant be ordered to pay the applicant an additional sum of EUR 399.13 plus interest from 2 January 2020 at nine percentage points above the relevant base rate, and a pre-litigation fixed sum for late payment of EUR 40.00 plus interest from the moment at which the extension of claim was lodged in the amount of five percentage points.

On 15 April 2020, it was declared that there was no need to adjudicate on the most recently asserted claim with regard to the principal sum.

By final judgment of 22 July 2020, the Amtsgericht München (Local Court, Munich) ordered the defendant to pay the claim in the main proceedings of EUR 532.16, interest, and a fixed sum for late payment of EUR 40.00 plus interest from 22 January 2020 at five percentage points above the base rate. As regards the two other fixed sums for late payment claimed ( $2 \times \text{EUR } 40.00 = \text{EUR } 80.00$ ), the Local Court, Munich dismissed the action.

By way of its appeal, the applicant pursued two entitlements to payment of fixed sums for late payment amounting to EUR 80.00 in total ( $2 \times \text{EUR } 40.00$ ) and requested that:

The judgment of the Local Court, Munich be amended in part and the defendant be ordered to pay a further EUR 80.00 in addition to the amount recognised at first instance, plus interest from 22 January 2020 at five percentage points above the base rate on EUR 40.00 and on a further EUR 40.00 from the moment at which the extension of claim was lodged at first instance.

## II.

The relevant provision of German law (Paragraph 288(5) of the BGB) reads as follows:

The creditor of a claim for payment is also entitled to payment of a fixed sum of EUR 40.00 in the event that the debtor is in default, provided that the debtor is not a consumer. This also applies if the claim for payment relates to a staggered

payment or other payment by instalments. The fixed sum referred to in the first sentence is to be set off against any compensation due, in so far as the damage is based on the costs of legal proceedings.

The relevant provision on default reads as follows:

Paragraph 286(1) of the BGB:

If the debtor, following a warning notice from the creditor that is made after performance is due, fails to perform, he or she is in default as a result of the warning notice. Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice.

Paragraph 286(3) of the BGB:

The debtor of a claim for payment is in default at the latest if he does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment; this applies to a debtor who is a consumer only if these consequences are specifically referred to in the invoice or statement of payment. If the time at which the invoice or payment statement is received by the debtor is uncertain, a debtor who is not a consumer is in default at the latest thirty days after the due date and receipt of the consideration.

### III.

By way of grounds for its decision in the final judgment of 2 October 2020, the Local Court, Munich held, *inter alia*, as follows:

The second sentence of Paragraph 288(5) of the BGB provides that the entitlement to payment of a fixed sum for late payment also exists if the claim for payment relates to a staggered payment or other payment by instalments. The wording suggests that the entitlement to payment of a fixed sum for late payment arises for each claim for payment in respect of which the debtor is in default. However, account must be taken of the existence, in the present case, of a single contractual relationship involving individual claims for payment arising repeatedly or periodically. In such a case, in which various entitlements arise from a single circumstance and legal relationship, the first sentence of Paragraph 288(5) of the BGB must be teleologically reduced to the effect that the entitlements should be combined and it should be assumed that the fixed sum of compensation is applied only once.

In its judgment of 22 August 2019 (ECLI:DE:BGH:2019:220819UVIIZR115.18.0), the Bundesgerichtshof (Federal Court of Justice, Germany) held, *inter alia*, as follows:

On the basis of the findings made by the appellate court, it is not possible to assess whether the applicant is entitled to more than one fixed sum under the first sentence of Paragraph 288(5) of the BGB. In accordance with that provision, which transposes Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions ('the Late Payment Directive'), the creditor of a claim for payment is entitled to payment of a fixed sum of EUR 40.00 in the event that the debtor is in default. As regards the application of the fixed sum, it is necessary to determine whether the principal sum claimed constitutes a claim for payment. Claims for payment within the meaning of the first sentence of Paragraph 288(5) of the BGB are – in accordance with the Late Payment Directive – claims for payment of a consideration in return for a service performed or to be performed by the creditor.

If the appellate court then finds that the maintenance services owed by the applicant have been performed and that, therefore, the principal sums recognised constitute claims for payment in that regard, it would have to determine whether, in the case of a number of claims for payment arising from similar contractual relationships, there is an entitlement to payment of only one fixed sum or of several fixed sums, in accordance with the first sentence of Paragraph 288(5) of the BGB, and to what extent that conclusion is compatible with the Late Payment Directive, in particular with Article 6(1) and (2) and Article 3 of that directive. It will also have to determine whether, in the case of periodic claims for payment arising from a single contractual relationship, there is an entitlement to payment of only one fixed sum or of several fixed sums, in accordance with the first sentence of Paragraph 288(5) of the BGB, and to what extent that conclusion is compatible with the Late Payment Directive, in particular with Article 6(1) and (2) and Article 3 of that directive.

In that regard, different views are put forward in the literature [...].

#### IV.

Since, in any event, it is common ground that the applicant performed its services from September to December, this constitutes a claim for payment to which Paragraph 288(5) of the BGB applies.

In addition, the defendant was in default.

The Chamber takes the view that the question referred should be answered as follows:

Article 6(1) and (2) of Directive 2011/7/EU, read in conjunction with Article 3 of Directive 2011/7/EU, must be interpreted as meaning that, in the case of a number of periodic claims for payment arising from a single contractual relationship, there

is an entitlement to payment of a fixed sum of at least EUR 40 for each individual claim for payment.

[...]

[...] [Indication of means of redress]

[...]

[Signatures, formalities]

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