

Anonymised version

Translation

C-78/22 – 1

Case C-78/22

Request for a preliminary ruling

Date lodged:

7 February 2022

Referring court:

Vrchní soud v Praze (Czech Republic)

Date of decision to refer:

24 January 2022

Appellant:

ALD Automotive s.r.o.

Other party to the appeal proceedings (defendant in the first-instance proceedings):

DY, insolvency administrator of the debtor GEDEM-STAV a.s.

VRCHNÍ SOUD V PRAZE (HIGH COURT, PRAGUE)

[...] Czech Republic

[...]

[procedural particulars pursuant to national law]

Parties to the original proceedings:

Applicant:

ALD Automotive s.r.o., [...] Having its registered office at [...] Prague 10
Czech Republic

[...]

Defendant:

DY, [...]

Having its registered office at [...] Nový Jičín
Czech Republic
[...]
[...]
Insolvency administrator of the debtor GEDEM-
STAV a.s., [...]
Having its registered office at [...] Pardubice
Czech Republic

Background and facts of the original proceedings

- 1 The applicant entered into agreements on the lease of movable assets ('Agreements No. 1 to 5') [...] with GEDEM-STAV a.s. ('the debtor'), which incorporated the applicant's General Contractual Terms and Conditions of Operating Leasing ('GCTC').
- 2 Pursuant to Article 4.1.4. GCTC, the applicant was obliged to charge the debtor for instalments pursuant to Agreements No. 1 to 5 by individual invoices and pursuant to Article 4.1.1. GCTC, and the debtor was obliged to pay all prescribed instalments in a timely manner and in the agreed amount.
- 3 The applicant billed rent to the debtor pursuant to Agreements No. 1 to 5 in the form of the following invoices:
 - [1] Invoice No. 005-09316/16, dated 27 April 2016, for the amount of CZK 1,762.60, due on 14 May 2016, representing rent from 27 April 2016 through to the end of that calendar month, pursuant to Agreement No. 4;
 - [2] Invoice No. 005-09317/16, dated 27 April 2016, for the amount of CZK 1,762.60, due on 14 May 2016, representing rent from 27 April 2016 through to the end of that calendar month, pursuant to Agreement No. 5;
 - [3] Invoice No. 005-09400/16, dated 2 May 2016, for the amount of CZK 5,361.50, due on 19 May 2016, representing rent from 2 May 2016 through to the end of that calendar month, pursuant to Agreement No. 1;
 - [4] Invoice No. 005-09401/16, dated 2 May 2016, for the amount of CZK 5,361.50, due on 19 May 2016, representing rent from 2 May 2016 through to the end of that calendar month, pursuant to Agreement No. 2;
 - [5] Invoice No. 005-09402/16, dated 2 May 2016, for the amount of CZK 5,361.50, due on 19 May 2016, representing rent from 2 May 2016 through to the end of that calendar month, pursuant to Agreement No. 3;
 - [6] Invoice No. 005-10178/16, dated 1 May 2016, for the amount of CZK 26,426.60, due on 18 May 2016, representing rent for the month of May 2016, pursuant to Agreements No. 4 and 5;

[7] Invoice No. 005-12822/16, dated 1 June 2016, for the amount of CZK 42,943.40, due on 18 June 2016, representing rent for the month of June 2016, pursuant to Agreements No. 1 to 5;

[8] Invoice No. 005-15548/16, dated 1 July 2016, for the amount of CZK 42,943.40, due on 27 July 2016, representing rent for the month of July 2016 pursuant to Agreements No. 1 to 5;

[9] Invoice No. 005-18257/16, dated 1 August 2016, for the amount of CZK 42,943.40, due on 18 August 2016, representing rent for the month of August 2016, pursuant to Agreements No. 1 to 5;

[10] Invoice No. 005-21034/16, dated 1 September 2016, for the amount of CZK 31,932.20, due on 19 September 2016, representing rent for the month of September 2016, pursuant to Agreements No. 1, 4, and 5;

(‘the invoices’). The debtor paid nothing on the basis of the invoices.

- 4 By the creditor’s insolvency application, filed against the debtor, delivered to the Krajský soud v Hradci Králové – poboč[ka] v Pardubicích (Regional Court, Hradec Králové – Pardubice Division (Czech Republic)) (‘the insolvency court’) on 27 July 2016, insolvency proceedings were initiated against the debtor, in which the insolvency court, in its decision of 12 April 2017, [...] found the debtor insolvent, declared bankruptcy over its assets, and appointed an insolvency administrator (‘the administrator’);
- 5 By claim registration [...] (‘the registration’), the applicant registered, inter alia [...], individual claims amounting to CZK 249,036.42 (‘Claim 1’) arising from the agreements. Claim 1 consists of a principal of CZK 206,799.13 in unpaid rent instalments, statutory interest for late payment of CZK 12,237.29, and costs associated with the recovery of the claims, of CZK 30,000, corresponding to CZK 1,200 per each individual rent payment owed, pursuant to Agreements No. 1 to 5 (a total of 25 payments) determined pursuant to § 3 nařízení vlády č. 351/2013 Sb., kterým se určuje výše úroků z prodlení a nákladů spojených s uplatněním pohledávky, určuje odměna likvidátora, likvidačního správce a člena orgánu právnické osoby jmenovaného soudem a upravují některé otázky Obchodního věstníku, veřejných rejstříků právnických a fyzických osob a evidence svěrenských fondů a evidence údajů o skutečných majitelích (Paragraph 3 of Government Decree No 351/2013) setting the amount of default interest and the costs of recovery of a debt, establishing the remuneration of court-appointed liquidators and members of the administrative body of the legal person, and clarifying certain questions relating to the Official Bulletin of Civil and Commercial Announcements and public registers of legal and natural persons, trust funds and beneficial owners) (‘the Decree’).
- 6 At the special review proceedings held before the insolvency court on 30 October 2017, the Defendant denied, inter alia, Claim No. 1, as to its cause and as to the amount of CZK 30,000, on the grounds that costs associated with the recovery of

rent payments may be recognised only if they have been granted with the force of *res judicata*.

- 7 The applicant filed a timely application with the insolvency court, seeking the determination of its denied claims, including the denied part of Claim 1, on the grounds that the right to compensation for costs pursuant to Paragraph 3 of the Decree arises at the time of the delay, in support of which it referred to § 513 zákona č. 89/2012 Sb., občanský zákoník (Paragraph 513 of Law 89/2012, the Civil Code) (“the CC”) and to Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (‘the Directive’). [...] [detailed information concerning the insolvency proceedings]
- 8 In its judgment of 28 May 2018, [...], the insolvency court ruled with respect to Claim 1 that the costs associated with the recovery of the claims are correctly set at CZK 6,000 (paragraph I of the operative part of the judgment) and it dismissed the application for the determination of the existence of Claim 1 to the extent of the costs associated with the recovery of the claims of CZK 24,000 (paragraph II of the operative part of the judgment). In the rationale of its decision, the court stated (essentially) that the right to cost compensation pursuant to Paragraph 3 of the Decree arises if the creditor has taken any action against the debtor aimed at collecting the claim; in the case at hand, (only) the Registration may be deemed to constitute that act. The court pointed out that the concept of ‘each claim made’ under Paragraph 3 of the Decree means claims with a separate legal basis. In a situation when the applicant lodged claims arising from five agreements, it was appropriate to grant it compensation of the costs associated with the recovery of each receivable, of 5 x CZK 1,200, i.e., CZK 6,000, and to dismiss the rest of its application concerning that claim.
- 9 The applicant appealed paragraph II. of the operative part (and paragraph III. of the operative part, concerning the costs of the proceedings) of that judgment in a timely manner, requesting that the High Court, Prague (‘the court of appeal’ or ‘the referring court’) alter the judgment such that it would determine the denied portion of the costs associated with the recovery of Claim 1 to the extent of the principal beyond its determination in paragraph I. of the operative part (CZK 24,000), and order the defendant to compensate it for the costs of the proceedings, or for the appeal court to set the challenged part of the judgment aside and return the case to the court of first instance for retrial. It objected, in particular, that (essentially)

[1] In Agreements 1 to 5, concluded pursuant to Paragraph 1723 CC, amounts were charged to the debtor pursuant to Article 4. 1. 4. GCTC by means of individual invoices which can be, pursuant to the conclusions reached by the Nejvyšší soud (Supreme Court) in its judgment of 19 September 2011, file No. 28 Cdo 4936/2010[,] deemed to constitute a request for the payment of an outstanding amount or as a means of identifying a claim arising from a relationship of obligation and the payment by which the claim is to be settled;

[2] The debtor's default is linked to the issuance of 25 specific invoices which must be deemed to constitute a cause for accrual of a claim to the costs incurred associated with the recovery of the claims to rent from Agreements 1 to 5,

[3] National courts must proceed in line with EU law, and thus are bound, inter alia, by Article 2(4) and Article 3(1) of the Directive.

- 10 In its judgment of 4 December 2019, [...], the Vrchní soud v Praze (High Court, Prague), as the appeal court ('the referring court') confirmed the judgment of the Regional Court, Hradec Králové – Pardubice Division, of 28 May 2018, [...] in paragraphs II. and III. of the operative part of its judgment [...], ruling that none of the parties is entitled to a reimbursement of its costs in the appeal proceedings [...]. In the rationale of its decision, it identified with the interpretation of the term 'each claim made' pursuant to Paragraph 3 of the Decree by the court of first instance in respect of each of the agreements (Agreements 1 to 5) and disagreed with the applicant who holds that the term referred to above should be interpreted in relation to each individual invoice. The court concluded that the conclusions reached by the court of first instance correspond to Article 2(4) of the Directive, having equated the term 'payment due' with the term 'incurred claim', which is applied in the case at hand such that the applicant had a total of 5 receivables from the debtor arising from Agreements 1 to 5, regardless of the monthly invoicing of individual rent instalments.
- 11 [...] [information about proceedings concerning the constitutional complaint lodged by the applicant before the Ústavní soud (Constitutional Court)]
- 12 [...] [The Constitutional Court found that the High Court, Prague, breached the applicant's constitutionally guaranteed right to a lawful judge by not making a reference to the Court of Justice]

Applicable legislation

European Union legislation

- 13 Article 267 of the Treaty on the Functioning of the European Union ('TFEU') stipulates:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

[...]

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

14 Recitals 2, 3, 8, 9, 12, 18, 19, and 22 of the Directive stipulate:

(2) 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.

(3) Many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult.

(8) The scope of this Directive should be limited to payments made as remuneration for commercial transactions. This Directive 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. Furthermore, Member States should be able to exclude debts that are subject to insolvency proceedings, including proceedings aimed at debt restructuring.

(9) This Directive should regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings. It should therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

(12) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift to a culture of prompt payment, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment. Such a shift should also include the introduction of specific provisions on payment periods and on the compensation of creditors for the costs incurred, and, inter alia,

that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair.

(18) Invoices trigger requests for payment and are important documents in the chain of transactions for the supply of goods and services, inter alia, for determining payment deadlines. For the purposes of this Directive, Member States should promote systems that give legal certainty as regards the exact date of receipt of invoices by the debtors, including in the field of e-invoicing where the receipt of invoices could generate electronic evidence and which is partly governed by the provisions on invoicing contained in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax .

(19) Fair compensation of creditors for the recovery costs incurred due to late payment is necessary to discourage late payment. Recovery costs should also include the recovery of administrative costs and compensation for internal costs incurred due to late payment for which this Directive should determine a fixed minimum sum which may be cumulated with interest for late payment. Compensation in the form of a fixed sum should aim at limiting the administrative and internal costs linked to the recovery. Compensation for the recovery costs should be determined without prejudice to national provisions according to which a national court may award compensation to the creditor for any additional damage regarding the debtor's late payment.

(22) This Directive should not prevent payments by instalments or staggered payments. However, each instalment or payment should be paid on the agreed terms and should be subject to the rules for late payment set out in this Directive.

15 Article 1 of the Directive stipulates:

1. The aim of this Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of SMEs.
2. This Directive shall apply to all payments made as remuneration for commercial transactions.
3. Member States may exclude debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring.

16 Article 2(1), (3), (4), and (5) of the Directive stipulate that for the purpose of the Directive, the following definitions shall apply:

- 1) "commercial transactions" means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration;

3) “undertaking” [...] any organisation, 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;

4) “late payment” [...] payment not made within the contractual or statutory period of payment and where the conditions laid down in Article 3(1) ... are satisfied;

5) “interest for late payment” means statutory interest for late payment or interest at a rate agreed upon between undertakings, subject to Article 7;

17 Article 3(1) of the Directive stipulates:

1. 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.

18 Article 5 of the Directive stipulates:

This Directive shall be without prejudice to the ability of parties to agree, subject to the relevant provisions of applicable national law, on payment schedules providing for instalments. In such cases, where any of the instalments is not paid by the agreed date, interest and compensation provided for in this Directive shall be calculated solely on the basis of overdue amounts.

19 Article 6(1) and (2) of the Directive stipulates:

1. 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 from the debtor, as a minimum, a fixed sum of EUR 40.

2. Member States shall ensure that the fixed sum referred to in paragraph 1 is payable without the necessity of a reminder and as compensation for the creditor’s own recovery costs.

Czech legislation

20 Paragraph 2(3) of CC stipulates:

(3) The interpretation and application of legislation shall not run contrary to good morals and shall not result in cruelty or ruthlessness offending ordinary human sensibilities.

21 Paragraph 513 of CC stipulates:

The accessories of a claim shall be interest, interest for late payment, and the costs associated with its recovery.

22 Paragraph 1721 of CC stipulates:

Under an obligation, the creditor has a right to specific performance from the debtor, constituting the claim, and the debtor has the obligation to satisfy that right by settling the debt.

23 Paragraph 1968 of CC stipulates:

A debtor who fails to settle his or her debt in a due and timely manner, is in default. A debtor is not liable for default if he is unable to settle the debt due to the creditor's default.

24 Paragraph 2 of the Decree stipulates:

The amount of interest for late payment shall correspond to the annual repo rate set by the Czech National Bank for the first day of the calendar half year in which the default occurred, plus 8 percentage points.

25 Paragraph 3 of the Decree stipulates:

In the case of reciprocal obligations on undertakings, or when the contents of the reciprocal obligation between an undertaking and a public contracting entity pursuant to a public procurement statute is the responsibility to deliver goods or provide a service to a public contracting entity in exchange for consideration, the minimum amount of costs associated with making each claim shall be CZK 1,200.

Grounds for the preliminary reference

26 The referring court, being in the position of the court against whose decisions there is no judicial remedy under national law (Article 267 TFEU), concluded that it is appropriate to ask the Court of Justice of the European Union to decide about questions pertaining to the [...] interpretation of the Directive.

27 The question addressed by the referring court involves the assessment of how to interpret the term 'commercial transaction' for the purpose of the Directive, in the case of agreements with recurring or ongoing performance, the claims from which are invoiced to the debtor by the creditor on a regular basis. In the case at hand, several interpretations are possible, namely that, for the purpose of Article 6(1) and Article 3 and Article 4 of the Directive, a 'commercial transaction' means:

(a) Each individual payment under the agreement, i.e., for example, each monthly rent, as well as other independent claims arising from the agreement (damages, etc.);

(b) Each payment billed on the basis of the agreement, i.e., for example, the sum of several sub-claims that were billed together in one invoice;

- (c) The sum of all claims from the agreement for which the right to interest for late payment arose at the same time;
- (d) The sum of claims from recurrent or ongoing performance of the agreement (e.g., rent), with other claims from the same agreement (e.g., penalties for late payment) constituting independent transactions;
- (e) The sum of all claims arising from one agreement as the joint contractual basis.
- 28 Furthermore, it must be noted that the accrual of a claim to the fixed amount of EUR 40 is linked to the point at which the right to interest for late payment arises in the commercial transaction (Article 6(1) of the Directive), whereas the Czech legislation on the claim to the fixed amount of CZK 1,200 does not explicitly regulate the point at which the claim accrues (Paragraph 3 of the Decree).
- 29 In connection with the foregoing, the referring court does not consider it clear whether the purpose of the Directive would be attained if one lump-sum payment of compensation covered several late payments arising from the same agreement or, conversely, whether it would be attained in the event of a full application of compensation for each individual late payment even if the late payments amounted only to low amounts (in particular, if they were lower, or lower by an order of magnitude, than the lump-sum compensation). In the case of Czech law, it would be possible to consider in such cases whether the exercise of such a claim does not run contrary to good morals (Paragraph 2(3) CC), and hence, whether it would not be appropriate to grant it.
- 30 For the sake of completeness, the court adds that it is aware of the proceedings on the reference for a preliminary ruling dated 5 November 2020 [...], conducted before the Court of Justice of the European Union under ref. No. C-585/20 [...], in which the contents of the question referred [No. 1] are similar to that of the question [No. 1] referred by the referring court. Given that, however, the question [No. 1] referred in the proceedings in Case C-585/20 concerns primarily specific issues of the application of Article 6(1) of the Directive in administrative proceedings, the referring court is not certain whether the response to that preliminary reference would constitute an eligible foundation for the questions addressed by the referring court.

Questions referred

- 31 For the reasons above, the referring court hereby refers the following questions to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union:

[1] On the basis of what criteria does the entitlement to obtain the fixed sum of at least EUR 40 arise pursuant to Article 6(1) of [Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combatting late

payment in commercial transactions] in the case of agreements with recurring or ongoing performance?

[2] Can the claim pursuant to Article 6(1) of the Directive be refused by Member State courts on the grounds of the application of general private-law principles?

[3] If the response to the second question is in the affirmative, subject to what conditions can Member State courts refuse to award the amount of the claim under Article 6(1) of the Directive?

Prague, 24 January 2022

[...]

[...] [signature]

WORKING DOCUMENT