

Case C-585/20

Request for a preliminary ruling

Date lodged:

5 November 2020

Referring court:

Juzgado Contencioso-Administrativo No 2 de Valladolid (Spain)

Date of the decision to refer:

22 September 2020

Applicant:

BFF Finance Iberia S.A.U

Defendant:

Gerencia Regional de Salud de la Junta de Castilla y León

JUZGADO CONTENCIOSO-ADMINISTRATIVO NO 2 (Administrative Court No 2)

VALLADOLID

[...]

[...] [identification of court, proceedings and parties]

ORDER

VALLADOLID, 22 September 2020.

FACTS

FIRST.- From 2014 to 2017, the companies ALIFAX SPAIN S.L., BIOTRONIK SPAIN S.A., EVOMED SL, EXACTECH IBÉRICA SL, FERRING SA, GETINGE GROUP SPAIN S.L., GlaxoSmithKline S.A., JUSTE FARMA SLU, JUSTE SAQF, L.F. GUERBET SA, LABORATORIOS ERN S.A., LABORATORIOS NORMON, S.A., LABORATORIOS RUBIÓ S.A., Laboratorios ViiV Healthcare S.L., LELEMAN, S.L., MEDCOM TECH S.A., Merck, Sharp & Dohme de España S.A., NACATUR 2 ESPAÑA, S.L. PHARMA

MAR, S.A., RECOLETAS CASTILLA LEON, SHIRE PHARMACEUTICALS IBERICA SL, TEXTIL PLANAS OLIVERAS, S.A., and ZIMMER BIOMET SPAIN S.L made deliveries and provided services to medical establishments under the control of the GERENCIA REGIONAL DE SALUD DE LA JUNTA DE CASTILLA Y LEON (Regional Health Management Board of the Autonomous Government of Castile and Leon).

The latter failed to pay the invoices issued by those companies on the due date.

SECOND.- Under contracts for the assignment of rights of recovery, the company BFF FINANCE IBERIA, S.A.U. purchased from [OR 2] those companies certain book debts arising from the unpaid invoices.

THIRD.- On 31 May 2019, BFF FINANCE IBERIA, S.A.U. submitted to the Gerencia Regional de Salud de la CONSEJERÍA DE SANIDAD DE LA JUNTA DE CASTILLA Y LEON a letter requesting payment of: EUR 124 662.71 in respect of the principal in addition to late-payment interest thereon at the rate provided for in Law 3/04; EUR 43 296.61 in respect of late-payment interest at the rate provided for in Law 3/04, in relation to invoices already settled late; and EUR 40 in respect of the recovery costs of each invoice not paid within the statutory deadlines laid down for that purpose in accordance with Article 8 of Law 3/2004.

The administrative authority failed to pay.

FOURTH.- BFF FINANCE IBERIA, S.A.U commenced administrative proceedings contesting the failure to act as a result of the letter submitted on 31 May 2019.

[...] [national provisions on which the action is based]

FIFTH.- It subsequently lodged an application seeking:

1. A declaration that the contested failure to act is unlawful.
2. An order that the defendant administrative authority make payment in respect of the following items and in the following amounts:
 - a. The amount of EUR 40 per invoice in respect of recovery costs.
 - b. The amount of EUR 51 610.67 in respect of the principal, in addition to late-payment interest thereon until actual recovery of that amount in accordance with Law 3/2004.
 - c. The amount of EUR 43 626.79 in respect of late-payment interest. [OR 3]
 - d. Statutory interest accrued on the late-payment interest from the date on which the administrative proceedings were lodged.

e. Legal costs.

It requested that a reference for a preliminary ruling be made to the COURT OF JUSTICE OF THE EUROPEAN UNION.

SIXTH.- On 27 February 2020, the Gerencia Regional de Salud de la Junta de Castilla y León lodged a defence.

It claimed that the action should be dismissed.

[...]

[...]. [procedural aspects of national law]

NINTH.- For the purpose of deciding on this dispute, this court is uncertain about the interpretation of the applicable EU law and about the compatibility with that EU law of the Spanish law applied [...].

TENTH.- The parties to the proceedings and the MINISTERIO FISCAL (Public Prosecutor's Office) were asked for their views on whether a reference should be made to the COURT OF JUSTICE OF THE EUROPEAN UNION for a preliminary ruling under Article 267 of the TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, in response to which they made the following submissions: **[OR 4]**

BFF FINANCE IBERIA, S.A.U, restating the position it had previously adopted, argued, in short, that JUZGADO CONTENCIOSO-ADMINISTRATIVO NUM. 2 DE VALLADOLID is required to seek a preliminary ruling [...].

The DEFENDANT ADMINISTRATIVE AUTHORITY opposed a reference for a preliminary ruling.

The PUBLIC PROSECUTOR'S OFFICE, applying to the present proceedings the considerations set out in case-law and legal literature at both national and EU level, submitted that it is neither necessary nor appropriate to make a reference for a preliminary ruling in this case.

LEGAL REASONING

FIRST.- [...]: [reiteration of the court's uncertainties]

1.- The version of Article 8 of Law 3/2004 (to which the TRLCSP (Texto Refundido de la Ley de Contratos del Sector Público: Consolidated text of the Law on public-sector contracts) and the LCSP (Ley de Contratos del Sector Público: Law on public-sector contracts) refer) resulting from the adoption of Directive 2011/7/EU provides as follows:

'1. Where the debtor delays payment, the creditor shall be entitled to recover from the debtor a fixed sum of EUR 40 which will be added to the principal debt

in all cases without the need for an explicit request. In addition, the creditor shall be entitled to claim from the debtor compensation for all duly substantiated recovery costs which he has incurred as a result of the debtor's delay and which exceed the amount indicated in the previous subparagraph.' **[OR 5]**

The [applicant] submits that the fixed amount of EUR 40 continues to be due in respect of each invoice and not per proceedings.

2.- The commencement date for the calculation of late-payment interest is set as 30 days from the date of issue of the invoice, that being the date on which the contractor is deemed to have supplied the services in accordance with the TRLCSP and the LCSP.

In that connection, recital 23 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions states:

'... Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed ... and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.'

The directive lays down a general rule pursuant to which the payment period must not exceed 30 days, and it permits payment to be made within 60 days only (i) where it is expressly agreed by the parties and (ii) where it is objectively justified in the light of the particular nature or features of the contract.

The European Commission, which proposed Directive 2011/7/EU, also states that public authorities must pay within 30 days and may only pay within 60 days in exceptional circumstances.

3.- Inclusion of VAT in the basis for calculating interest. **[OR 6]**

Directive 2011/7/EU on combating late payment in commercial transactions, from which the current wording of Law 3/2004 is derived, defines 'amount due' in Article 2 as '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'.

Does the interpretation of the directive support the conclusion that the basis for calculating late-payment interest recognised in the directive includes the VAT due on the service provided, the amount of which is included in the invoice?

[...] [the defendant submits that it is not necessary to request a preliminary ruling]

THIRD.- FRAMING OF THE QUESTIONS

The EU law applicable to late-payment interest and compensation for recovery costs is laid down in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

Under the heading ‘Transactions between undertakings and public authorities’, Article 4(1) reads: **[OR 7]**

‘1. Member States shall ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled upon expiry of the period defined in paragraphs 3, 4 or 6 to statutory 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.’

Under the heading ‘Compensation for recovery costs’, Article 6 of the directive provides:

‘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.

3. The creditor shall, in addition to the fixed sum referred to in paragraph 1, be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor’s late payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency.’ **[OR 8]**

Finally, under the heading ‘Unfair contractual terms and practices’, Article 7(1) of the directive is worded as follows:

‘1. Member States shall provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor.

In determining whether a contractual term or a practice is grossly unfair to the creditor, within the meaning of the first subparagraph, all circumstances of the case shall be considered, including:

- (a) any gross deviation from good commercial practice, contrary to good faith and fair dealing;
- (b) the nature of the product or the service; and
- (c) whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment, from the payment period as referred to in Article 3(5), point (a) of Article 4(3), Article 4(4) and Article 4(6) or from the fixed sum as referred to in Article 6(1).'

In addition, Article 7(2) and (3) provides:

'2. For the purpose of paragraph 1, a contractual term or a practice which excludes interest for late payment shall be considered as grossly unfair.

3. For the purpose of paragraph 1, a contractual term or a practice which excludes compensation for recovery costs as referred to in Article 6 shall be presumed to be grossly unfair.' [OR 9]

FOURTH.- At this juncture, this court has, as stated above, uncertainties of its own, in addition to those raised by [...] [BFF FINANCE IBERIA, S.A.U.], regarding the resolution of this dispute.

To be specific, the uncertainties which have arisen and which are the subject of the questions are:

1.- Article 6 of Directive 2011/7/EU provides that Member States must ensure that, where interest for late payment becomes payable in commercial transactions, the creditor is entitled to obtain from the debtor a minimum fixed sum of EUR 40. That rule was transposed in the current version of Article 8 of Law 3/2004. THE UNCERTAINTY WHICH HAS ARISEN IS WHETHER THE SUM OF EUR 40 IS TO BE TREATED AS PER INVOICE OR WHETHER THAT SUM OF EUR 40 APPLIES PER JOINED CLAIM. If the first interpretation is accepted, the question arises whether, as a prerequisite for the payment of EUR 40 per invoice, the applicant must individually identify those invoices in all his claims in both administrative proceedings and contentious administrative proceedings or whether a joint and general claim will suffice in order then to be able to claim EUR 40 per invoice.

That point is disputed [...] in many courts [...].

2.- [...] [OR 10] [reiteration of recital 23 of Directive 2011/7]

[...]. [reiteration of the general rule laid down in the directive]

Article 198(4) of Law 9/2017 lays down a payment period of 60 days in all circumstances and for all contracts, providing for an initial period of 30 days for approval and another, additional period of 30 days for payment.

Does the interpretation of the directive support the conclusion that it is lawful for a Member State to establish in law a payment period of 60 days in all circumstances, without express agreement and without additional justification in the light of the nature or specific features of the contract? Does that rule conflict with the EU law set out above?

3.-[...] Inclusion of VAT in the basis for calculating interest.

[...] [reiteration of Article 2 of the directive] [...] Does the interpretation of the directive support the conclusion that the basis for calculating late-payment interest recognised in the directive includes the VAT due on the service provided, the amount of which is included in the invoice? Or is it necessary to identify and determine the time when the contractor paid the tax to the tax administrative authority?

If the contractor paid the VAT applicable to the invoices or certificates of completion of work in respect of which payment is delayed – and which will give rise to late-payment interest – when it settled the amount of VAT due for the period in which it provided the service, that is to say, it prepaid the VAT, it will be [OR 11] entitled to late-payment interest on that prepaid tax, a matter which the contractor must provide evidence of in any event.

Otherwise, [if] the contractor did not prepay the VAT, it is not appropriate to calculate late-payment interest on an amount that has not come out of its assets, since there is no loss to be compensated for.

That point is not common ground and the interpretations given by Spanish courts are not uniform.

[...] [procedural aspect of national law][...]OPERATIVE PART

In the light of the foregoing considerations, these proceedings are hereby stayed so that the following questions can be referred to the Court of Justice of the European Union for a preliminary ruling:

‘In the light of Articles 4(1), 6, and 7(2) and (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:

Is Article 6 of the directive to be interpreted as meaning that the sum of EUR 40 applies per invoice in all circumstances, provided that the creditor has individually identified the invoices in his claims before the administrative authorities and the administrative courts, or does the sum of EUR 40 apply per invoice in all circumstances, even if joint and general claims have been lodged?

How must Article 198(4) of Law 9/2017 [which lays down] a payment period of 60 days in all circumstances and for all contracts, providing for an initial period of

30 days for approval and another, additional period of 30 days for payment, be interpreted, in so [OR 12] far as [recital] 23 of the directive is worded as follows:

‘Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed ... and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.’[?]

How is Article 2 of the directive to be interpreted? Does the interpretation of the directive support the conclusion that the basis for calculating late-payment interest recognised in the directive includes the VAT due on the service provided, the amount of which is included in the invoice? Or is it necessary to identify and determine the time when the contractor paid the tax to the tax administrative authority?

[...].

[...] [References to notification of the order, statement that the order is not subject to appeal, and signature]

[OR 13]