

**Case C-157/24****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:**

28 February 2024

**Referring court:**

Corte suprema di cassazione (Italy)

**Date of the decision to refer:**

27 February 2024

**Appellant in cassation:**

GMG srl, in liquidation

**Respondent in cassation:**

Ministero della Giustizia

**Subject matter of the main proceedings**

Appeal in cassation against a judgment in which it was ruled that, despite a delay in the payment of sums due for the rental of wiretapping instruments to a public prosecutor's office, default interest cannot be applied under decreto legislativo n. 231/2002 (Legislative Decree No 231/2002) because the legal relationship between the parties (the rental company and the Ministero della Giustizia (Ministry of Justice)) cannot be classified as a commercial transaction.

**Subject matter and legal basis of the request**

Interpretation of EU law under Article 267 TFEU, in particular Article 4(3) TEU, Article 47 of the Charter, and Article 1, Article 2(1) and (2), Article 4(3), and Article 10(1) of Directive 2011/7.

## Questions referred for a preliminary ruling

[(1)] Should Directive 2000/35/EC [of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions], as amended by Directive 2011/7/EU [of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions], and, in particular, Article 1, Article 2(1) and (2), and Article 4(3) of Directive 2011/7, be interpreted as precluding a piece of national legislation or a national practice that:

(a) excludes the classification of services, provided against remuneration by charterers of the equipment used for wiretapping at the request of public prosecutors' offices, as commercial transactions within the meaning of Directive 2011/7, making them subject to the substantive and procedural regime covering extraordinary legal costs?

(b) consequently excludes the abovementioned services between charterers and public prosecutors' offices from the rules governing interest which are laid down by that directive?

(2) Should Directive 2000/35, as amended by Directive 2011/7, and, in particular, Article 10(1) of the latter directive, be interpreted as precluding a piece of national legislation or a national practice that lays down an indeterminate time limit ('without delay') for the settlement of fees due to a service provider, with the result that those creditor rights cannot be asserted in an effectively enforceable and fully satisfactory manner?

## Main provisions of European Union law relied on

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions: recitals 5, 7 and 9

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions: Article 1, Article 2(1) and (2), Article 4(3) and Article 10(1), as well as recitals 3 and 4

Charter of Fundamental Rights of the European Union: Article 47

## Main provisions of national law relied on

Decreto legislativo del 9 ottobre 2002, n. 231 – Attuazione della direttiva 2000/35/CE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali (Legislative Decree No 231 of 9 October 2002 – Implementation of Directive 2000/35/EC on combating late payment in commercial transactions; 'Legislative Decree No 231/2002') (GURI No 249 of 23 October 2002), as

amended by decreto legislativo del 9 novembre 2012, n. 192 – Modifiche al decreto legislativo 9 ottobre 2002, n. 231, per l'integrale recepimento della direttiva 2011/7/UE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali (Legislative Decree No 192 of 9 November 2012 – Amendments to Legislative Decree No 231 of 9 October 2002, for the full transposition of Directive 2011/7/EU on combating late payment in commercial transactions), in accordance with Article 10(1) of legge 11 novembre 2011, n. 180 (Law No 180 of 11 November 2011) (GURI No 267 of 15 November 2012): Articles 1 to 5

Decreto del Presidente della Repubblica del 30 maggio 2002, n. 115 – Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia (Presidential Decree No 115 of 30 May 2002 – Consolidated text of legislative and regulatory provisions regarding legal costs) (Ordinary Supplement to GURI No 139 of 15 June 2002) ('the Consolidated text regarding legal costs');

Article **168**: '1. The determination of amounts due to court officers ... shall be on the basis of reasoned payment orders issued by the prosecuting magistrate. 2. Such orders shall be notified to the beneficiary and the parties, including the public prosecutor, and shall be provisionally enforceable ...'

Article **168-bis**: '1. The determination of the costs relating to the services referred to in Article 96 of decreto legislativo 1° agosto 2003, n. 259 (Legislative Decree No 259 of 1 August 2003), and of the costs instrumental to the use of such services, shall be made without delay by means of a payment order from the public prosecutor who requested or executed the authorisation to order wiretapping operations. ... 3. Objections to payment orders shall be admissible under Article 170' and

Article **170**: '1. The beneficiary and the parties to the proceedings, including the public prosecutor, may lodge an objection to the payment order issued in favour of the court officer, ... Objections shall be governed by Article 15 of decreto legislativo 1° settembre 2011, n. 150 (Legislative Decree No 150 of 1 September 2011)'.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 By means of a payment order of 4 May 2012, the Tribunale di Venezia (District Court, Venice, Italy), the court of first instance, ordered the Ministry of Justice to pay GMG srl sums including default interest, under Articles 4 and 5 of Legislative Decree No 231/2002, as remuneration for the rental of electronic equipment for telephone and environmental wiretapping provided by that company to numerous public prosecutors' offices.
- 2 The Ministry of Justice lodged an objection with that court, which issued a judgment revoking the payment order and recognised GMG as having a claim not including default interest. It held, in fact, that the services involved in the

wiretapping and environmental monitoring were not commercial transactions (remunerated using the criteria laid down in Legislative Decree No 231/2002), but rather were among the activities of court officers (remunerated using the criteria laid down in Article 168 et seq. of the Consolidated text regarding legal costs).

- 3 The judgment at first instance was appealed and was upheld on appeal. GMG has brought an appeal in cassation against the appeal judgment before the referring court.

### **The essential arguments of the parties in the main proceedings**

- 4 **According to the appellant in cassation**, its provision of equipment rental services constitutes a commercial transaction within the meaning of Directive 2011/7, as the provision of services against payment of a price, and must therefore be capable of generating default interest in the event of late payment.
- 5 The fact that the person requesting the service was a public prosecutor does not preclude such a classification. Indeed, in authorising the use of the wiretapping equipment, the public prosecutor formulated a genuine acceptance of the proposal made by the supplying company and, thus, entered into a contractual relationship with that company, subject to the ordinary rules governing obligations and contracts.
- 6 Even if the relationship in question were, conversely, to be classified as a relationship governed by public law and the payment were therefore to be justified by a legal obligation as a legal cost, the charterer should in any event be awarded default interest and should also be able to assert its claim by means other than the avenue specifically laid down in the Consolidated text regarding legal costs, namely an order for taxation of costs. In fact, such an order, in particular, does not cover interest (legal or default interest) and is not subject to any time limit with regard to its issuance.
- 7 **According to the Ministry of Justice**, however, first, the act of authorising the use of private equipment is an exercise of the public powers of the public administration and, second, the public prosecutor does not have the power contractually to bind the public administration. Furthermore, Directive 2011/7, inasmuch as it is applicable to ‘public contracting authorities’, covers only commercial transactions resulting from a public procurement procedure, whereas GMG was selected by private agreement.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 8 Until 2004, there were no explicit provisions for the payment of wiretapping expenses. Article 5(1)(i-bis) of the Consolidated text regarding legal costs, introduced by Legge n. 311/2004 (Law No 311/2004), included among the expenses recoverable by the Treasury, which had paid for them in advance, both

those for tracing activities, which telephone operators are bound by law to undertake, and those that are instrumental in such activities. For both of these types of expenses, Article 168-bis of the Consolidated text regarding legal costs, introduced by decreto legislativo n. 120/2018 (Legislative Decree No 120/2018), provides that they are to be settled by court order in accordance with Article 168 of the Consolidated text regarding legal costs.

- 9 According to the settled case-law of the Corte [suprema] di cassazione (Supreme Court of Cassation, Italy), this choice of legal approach demonstrates the legislature's intention (a) to consider the rental of machinery from private parties, as well as possible services by personnel, as strictly inherent in criminal proceedings, and (b) to include the relevant expenses, as extraordinary expenses, among those relating to justice, and therefore not freely negotiated, both with reference to the determination phase and in relation to the objection phase. According to this approach, those costs can therefore be paid only by the public prosecutor in the proceedings, 'without delay' (Article 168-bis), by means of a reasoned order that becomes definitively enforceable in the absence of an objection under Article 170 of the Consolidated text regarding legal costs and constitutes an order for payment of the costs, in accordance with Article 171 of the Consolidated text regarding legal costs.
- 10 However, this procedural model does not lay down a precise time limit for the completion of the procedures for verifying invoices with a view to settlement, a time limit that should rather be determined with certainty having regard to the date on which the service was rendered and the invoice was issued. It does not compensate for delays by making provision for legal interest or default interest; nor does it guarantee the creditor an enforceable title, with a certificate of res judicata, within ninety days from the date on which the order for taxation of costs is delivered.
- 11 This raises doubts for the division of the Corte [suprema] di cassazione hearing the dispute as to the compatibility of the hitherto established case-law of that court with EU law, because of a possible conflict with the EU legislation, as transposed by national legislation, on combating late payment in commercial transactions, and also because of a conflict with the right to property and the right to an effective remedy and to a fair trial (Articles 17 and 47 of the Charter).

A preliminary interpretation of the relevant legislation is therefore requested.

- 12 The referring court observes that, because of the incorrect application of the rules of the Late Payment Directive, the European Commission has already brought infringement proceedings against Italy under Article 258 TFEU (INFR (2021) 4037).

In view of the particular situation of the appellant in cassation, which is in liquidation, and of the indefinite number of undertakings, especially small and

medium-sized ones, that are in a similar situation, the expedited preliminary ruling procedure is requested.

WORKING DOCUMENT