

Case C-279/23

Request for a preliminary ruling

Date lodged:

28 April 2023

Referring court:

Sąd Rejonowy Katowice – Zachód w Katowicach (Poland)

Date of the decision to refer:

7 March 2023

Applicant:

Skarb Państwa – Dyrektor Okręgowego Urzędu Miar w K.

Defendant:

Z. sp.j.

ANONYMISED VERSION

...

ORDER

7 March 2023

The Sąd Rejonowy Katowice – Zachód w Katowicach, II Wydział Cywilny (District Court, Katowice-West, Katowice, Second Civil Chamber) ...

...

following consideration on 7 March 2023 in Katowice

...

of the action brought by the applicant Skarb Państwa (Public Treasury), represented by the Dyrektor Okręgowego Urzędu Miar w K. (Director of the Regional Office of Measures in K.)

against Z., a general partnership established in C.,

concerning payment

makes the following order:

1. the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Does Article 6(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions preclude national legislation under which a national court may dismiss an action for compensation for the recovery costs referred to in that provision on the ground that the debtor's delay in payment was not significant or on the ground that the amount which the debtor was late in paying was small?

2. ... proceedings are stayed pending receipt of an answer to the question referred for a preliminary ruling.

GROUND

I. Referring court

- 1 ... [grounds setting out the referring court's jurisdiction to refer a question for a preliminary ruling]
- 2 The referring court is therefore a court which is entitled to refer a question for a preliminary ruling, pursuant to the second sentence of Article 267 of the Treaty on the Functioning of the European Union.

II. National legislation applicable in the case

- 3 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions ... ('Directive 2011/7/EU') was implemented in the Polish legal order by the Ustawa z dnia 8 marca 2013 r. o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych ... (Law of 8 March 2013 on counteracting excessive delays in commercial transactions ('Law on counteracting excessive delays in commercial transactions').
- 4 The Law on counteracting excessive delays in commercial transactions provides:
- 5 Article 2

The provisions of this Law shall apply to commercial transactions to which the exclusive parties are:

- (1) traders within the meaning of the Law of 6 March 2018 on undertakings ...;
- (2) economic operators as referred to in Article 6(1) of the Law of 6 March 2018 on undertakings;
- (3) entities as referred to in Articles 4, 5(1) and 6 of the Law of 11 September 2019 on public procurement ...;
- (4) members of a profession;
- (5) branches and representations of foreign traders;
- (7) traders from the Member States of the European Union, the Member States of the European Free Trade Association (EFTA), parties to the Agreement on the European Economic Area, or the Swiss Confederation.

6 Article 4

For the purposes of this Law:

- (1) ‘commercial transaction’ means a contract having as its object a supply of goods or provision of a service for consideration, where parties as referred to in Article 2 enter into it in connection with the activity which they carry out;
- (1a) ‘financial consideration’ means remuneration for the supply of goods or provision of a service in a commercial transaction;
- (2) ‘public entity’ means entities as referred to in Article 4 of the Law of 11 September 2019 on public procurement;

7 Article 6

1. If the parties to a commercial transaction did not stipulate a time limit for payment in the contract, the creditor shall, without demand, be entitled to statutory interest for late payment in commercial transactions after the expiry of 30 days calculated from the date of the performance of the service to the date of payment. In the case referred to in Article 9(1), the expiry of 30 days shall be calculated from the date on which the examination is completed.

8 Article 7

1. In commercial transactions, with the exception of transactions in which the debtor is a public entity, the creditor shall, without demand, be entitled to 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 obtained payment within the period laid down in the contract.

9 Article 8

1. In commercial 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 for the period from the due date for the payment until the actual payment date, if both the following conditions are met:

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

10 Article 10

1. 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, without demand, be entitled to obtain from the debtor 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.

1a. The equivalent in national currency of the amount of compensation referred to in paragraph 1 shall be determined using the average euro exchange rate published by the National Bank of Poland on the last business day of the month preceding the month in which the payment became due.

2. In addition to the amount referred to in paragraph 1, the creditor shall also be entitled to a refund, in a reasonable amount, of the recovery costs incurred in excess of that amount.

11 The Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) ... provides:

12 Article 5

A right may not be exercised in a manner which would be contrary to its social and economic purpose or to the principles of communal coexistence. Any such act or omission on the part of the person entitled shall not be treated as an exercise of the right and shall not be protected.

III. Facts of the case

- 13 The parties to the dispute before the referring court are:
- 14 Applicant: the Skarb Państwa (Public Treasury), represented by the Dyrektor Okręgowego Urzędu Miary w K. (Director of the Regional Office of Measures in K.). The applicant is an entity within the meaning of Article 2(3) of the Law on counteracting excessive delays in commercial transactions. The referring court clarifies that in the present case the applicant is the ‘Skarb Państwa’, which is represented by the ‘Dyrektor Okręgowego Urzędu Miary w K.’. ... [reference to the applicant’s legal personality and capacity to be party to legal proceedings].
- 15 The Okręgowy Urząd Miary w K. provides, as part of its activities, services relating to the calibration of measuring instruments.
- 16 Defendant: Z., a general partnership (spółka jawna) established in C. The defendant is a general partnership and a trader within the meaning of Article 2(1) of the Law on counteracting excessive delays in commercial transactions. In connection with the economic activities which it carries out it avails regularly of the services provided by the applicant.
- 17 The applicant claims that the defendant should be ordered to pay to it the equivalent in Polish złoty (PLN) of EUR 80, plus the interest provided for under Polish law. It stated that it was claiming the equivalent of two compensation payments for recovery costs as referred to in Article 7(1)(1) of the Law on counteracting excessive delays in commercial transactions, of EUR 40 each. The claim arises from the fact that the defendant was twice late in paying it remuneration for services provided. The defendant was late in paying PLN 246 (approximately EUR 55) by 20 days and in paying PLN 369 (approximately EUR 80) by five days.
- 18 The defendant contended that the action should be dismissed, pointing out that the debtor’s delay in payment was not significant and that the amount which the debtor was late in paying was small. It argued that, in the past, the defendant had been late on at least 39 occasions in paying remuneration for services provided by the applicant ... [reference to the applicant’s organisational structure]. As a result of those late payments, the applicant had brought an action against the defendant several times for compensation for recovery costs, and each time the courts had dismissed the actions on the ground that the debtor’s delay in payment was not significant or on the ground that the amount which the defendant had been late in paying was small.
- 19 Despite at least 39 late payments, the applicant had never succeeded in obtaining compensation from the defendant for recovery costs.

IV. The relationship between the provisions of EU law and of national law applicable in the main proceedings

- 20 Directive 2011/7/EU provides that Member States are obliged to ensure that the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 ('compensation'), where interest for late payment becomes payable in commercial transactions:
- (a) in which the creditor and the debtor are traders;
 - (b) in which the creditor is a trader and the debtor is a public authority.
- 21 Polish law provides that a creditor is entitled to obtain from the debtor compensation for recovery costs of between EUR 40 and EUR 100, where interest for late payment becomes payable in transactions:
- (a) in which the creditor and the debtor are traders;
 - (b) where the creditor is a trader and the debtor is a public authority;
 - (c) where the creditor is a public authority and the debtor is a trader.
- 22 Polish law thus extends the entitlement to compensation to the situation described in subparagraph (c). The facts of the present case correspond precisely to the situation under subparagraph (c). This does not mean, however, that Directive 2011/7/EU does not apply and that the case has no connection with EU law. The referring court notes that the intention of the Polish legislature was that compensation should be obtained on exactly the same terms, regardless of whether situation (a), (b) or (c) occurs. This means that, in order to assess whether the referring court may dismiss an action for payment of compensation on the ground that the debtor's delay in payment was not significant or on the ground that the amount which the debtor was late in paying was small in situation (c), it is necessary to determine whether the referring court may dismiss such an action in situation (a) or (b). That, in turn, requires an interpretation of EU law, as situations (a) and (b) are expressly provided for in Directive 2011/7/EU.
- 23 It should be noted that the Court of Justice of the European Union has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning European Union law in situations where the facts of the cases being considered by the national courts were outside the direct scope of that law but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law. According to the settled case-law of the Court of Justice, in those circumstances it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (for example, the judgments: *Allianz Hungaria Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20; *FNV*

Kunsten Informatie en Media, C-413/13, EU:C:2014:2411, paragraph 18; and *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 12).

V. Reasons why the referring court had doubts as to the interpretation of EU law

- 24 The approach consistently taken by the Polish courts in their case-law is to dismiss actions for compensation on the ground that the debtor's delay in payment was not significant or on the ground that the amount which the debtor was late in paying was small. The basis for dismissal of the action in each case is Article 5 of the Civil Code, the content of which is quoted above. The Polish courts hold that demanding payment of compensation in such situations is '*sprzeczne z zasadami współżycia społecznego*' (contrary to the principles of communal coexistence) (a Polish legal term with a similar meaning to the terms: 'immoral', 'reprehensible', 'contrary to accepted principles of morality').
- 25 The abovementioned case-law was initiated by a single sentence contained in the grounds for the resolution of the Sąd Najwyższy (Supreme Court) of 11 December 2015 ... In those grounds, the Sąd Najwyższy held that the courts should examine in each case whether or not the creditor, in demanding payment of the compensation, is acting in a manner contrary to the principles of communal coexistence.
- 26 Although the approach taken in that regard by the courts in their case-law sometimes differs, an analysis of the case-law carried out by the referring court shows that Polish courts generally accept that the amount which a debtor is late in paying is not significant if it does not exceed the equivalent in Polish złoty of EUR 100 to 300. At the same time, Polish courts accept that the delay should be considered minor if it does not exceed two to six weeks. In that regard, it is not necessary for both conditions concerning conduct 'contrary to the principles of communal coexistence' to be met. Even if the amount which the debtor was late in paying was substantial, but the delay was minor, Polish courts usually dismiss actions for compensation. Similarly, if the delay was significant but the amount involved was small, Polish courts also usually dismiss such actions.
- 27 The approach taken by the Polish courts in their case-law, as described by the referring court, is perfectly illustrated by the history of the disputes between the parties concerned, which are the applicant and the defendant in the present case, as set out above. The defendant was late in paying remuneration to the applicant on at least 39 occasions, but in spite of this the Polish courts have never ordered the defendant to pay compensation to the applicant.
- 28 In considering the present case, the referring court had doubts as to whether national legislation which allows an action for payment of compensation to be dismissed on the grounds set out above is compatible with Directive 2011/7/EU.
- 29 The referring court's doubt arises for the following six reasons:

- 30 First, Directive 2011/7/EU does not provide for any exception to the rule that a creditor should be compensated if the debtor is late in paying. Such exceptions are provided for only in national law. At the same time, those exceptions do not protect any fundamental values which could not be reconciled with the obligation to pay compensation. On the contrary, the main reason why those exceptions are provided for is the custom in Poland (and probably also in certain other Member States) of making small payments late, particularly in business transactions. Consequently, the Polish courts have concluded that a creditor who disregards that custom of accepting minor delays and demands compensation is acting in a manner contrary to the principles of communal coexistence. However, protection of the custom of accepting minor delays is not, in the view of the referring court, an essential value which could justify the introduction in national law of an exception to the clear, precise and unconditional rule laid down in Directive 2011/7/EU.
- 31 Second, the exceptions to the rule that the creditor is entitled to compensation provided for in Polish law are contrary to the objective of Directive 2011/7/EU, as set out in recital 12 thereof. That recital states that ‘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.’ The exceptions provided for in Polish law and the objectives underlying the introduction thereof are contrary to the [directive’s] objective of creating a ‘culture of prompt payment’. The exceptions to the obligation to pay compensation have the effect not so much of creating a ‘culture of prompt payment’ as of perpetuating a culture of acceptance of late payment. Those exceptions therefore have the effect of undermining the practical effectiveness (*effet utile*) of EU law and, as such, are contrary to it.
- 32 Third, the exceptions to the obligation to pay compensation make illusory the rule laid down in the above-cited recital 12 of Directive 2011/7/EU that ‘the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair’. Traders in Poland do not have to incorporate into contracts clauses excluding the right to compensation for recovery costs in situations where the debtor’s delay in payment was not significant or where the amount the debtor was late in paying was small since the exclusion of the right to such compensation has been introduced in the case-law of the Polish courts.
- 33 Fourth, in the view of the referring court, the obligation to pay compensation is most relevant precisely in cases where the debtor’s delay in payment was not significant or the amount which the debtor was late in paying was small. It is sometimes argued in the case-law of the Polish courts that where the debt is a small amount, for example the equivalent of EUR 100 to 300, the need for the debtor to pay the equivalent of EUR 40 on account of late payment is an excessive

sanction. In the view of the referring court, it is primarily with such cases in mind that the European legislature laid down the obligation to pay compensation. In cases where the debtor's delay is substantial or the amount of debt is large, the debtor is obliged to pay high rates of interest, often amounting to thousands or even hundreds of thousands of euros. In those situations, the obligation to pay a compensation of EUR 40 does not have any mobilising effect on the debtor at all. The opposite is true in situations where the debtor's delay in payment was not significant or where the amount that the debtor was late in paying was small.

- 34 Fifth, the objective of Directive 2011/7/EU is to combat late payment throughout the internal market (recital 36 of Directive 2011/7/EU). In order to achieve that objective, the European legislature laid down uniform rules on creditors acquiring rights to obtain compensation. However, the rules on acquiring rights to compensation will not be uniform, and therefore in accordance with the intention of the directive's authors, if individual Member States introduce their own exceptions to the obligation to pay compensation which do not arise from the directive.
- 35 Sixth, the principle of procedural autonomy is irrelevant for the purposes of considering whether a rule of national law allowing an action for compensation to be dismissed on the grounds referred to in the question is compatible with EU law. Article 5 of the Kodeks Cywilny (Polish Civil Code), which forms the basis for dismissing such an action, is a rule of substantive, not procedural, law. Courts dismissing an action for compensation do so not on formal grounds, but because, in their view, the action has no substantive legal basis, that is to say, because the applicant has no claim at all to raise.

VI. Positions of the parties on the question referred

- 36 ... [references to procedure]

VII. Staying of proceedings

- 37 ... [references to procedure]