Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

15 December 2016*

(Reference for a preliminary ruling — Directive 2000/35/EC — Combating late payment — Jurisdiction of the Court — Transaction concluded before the accession of the Republic of Slovenia to the European Union — Scope — Concept of 'commercial transaction' — Concept of 'undertaking' — Maximum amount of interest for late payment)

In Case C-256/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 19 March 2015, received at the Court on 1 June 2015, in the proceedings

Drago Nemec

v

Republika Slovenija,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, M. Berger, A. Borg Barthet and E. Levits, Judges,

Advocate General: M. Bobek,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2016,

after considering the observations submitted on behalf of:

— the Slovenian Government, by N. Pintar Gosenca and A. Vran, acting as Agents,

— the Latvian Government, by A. Bogdanova and I. Kalniņš, acting as Agents,

— the European Commission, by M. Šimerdová and M. Žebre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

* Language of the case: Slovenian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35).

2 The request has been made in proceedings between Drago Nemec and Republika Slovenija (Republic of Slovenia) concerning a claim for compensation for loss allegedly suffered by Mr Nemec as a result of the supposed incompatibility of national legislation with Directive 2000/35.

Legal context

EU law

The 2003 Act of Accession

3 Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33, 'the 2003 Act of Accession') provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

4 Article 54 of the 2003 Act of Accession provides:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 249 of the EC Treaty and of Article 161 of the Euratom Treaty, unless another time-limit is provided for in the Annexes referred to in Article 24 or in any other provisions of this Act or its Annexes.'

Directive 2000/35

5 Recitals 7, 9, 10, 13 and 16 of Directive 2000/35 state:

'(7) Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses.

…

(9) The differences between payment rules and practices in the Member States constitute an obstacle to the proper functioning of the internal market.

(10) This has the effect of considerably limiting commercial transactions between Member States. This is in contradiction with Article 14 of the Treaty as entrepreneurs should be able to trade throughout the internal market under conditions which ensure that transborder operations do not entail greater risks than domestic sales. …

…

(13) This Directive should be limited to payments made as remuneration for commercial transactions and does not regulate transactions with consumers, interest in connection with other payments, e.g. payments under the laws on cheques and bills of exchange, payments made as compensation for damages including payments from insurance companies.

…

(16) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low interest rates on late payments and/or slow procedures for redress. A decisive shift … is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment.'

6 Article 1 of Directive 2000/35, which defines the scope of the directive, provides:

'This Directive shall apply to all payments made as remuneration for commercial transactions.'

7 Article 2(1) of the directive provides:

'For the purposes of this Directive:

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,

…

"undertaking" means any organisation acting in the course of its independent economic or professional activity, even where it is carried on by a single person'.

8 Article 3 of the directive, 'Interest in case of late payment', provides in paragraph 1:

'Member States shall ensure that:

(a) interest in accordance with point (d) shall become payable from the day following the date or the end of the period for payment fixed in the contract;

…

(c) the creditor shall be entitled to interest for late payment to the extent that:

(i) he has fulfilled his contractual and legal obligations; and

(ii) he has not received the amount due on time, unless the debtor is not responsible for the delay;

(d) the level of interest for late payment ("the statutory rate"), which the debtor is obliged to pay, shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus at least seven percentage points … unless otherwise specified in the contract. For a Member State which is not participating in the third stage of economic and monetary union, the reference rate referred to above shall be the equivalent rate set by its national central bank. …

…'

9 Article 6 of the directive reads as follows:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 August 2002. …

…

3. In transposing this Directive, Member States may exclude:

…

(b) contracts that have been concluded prior to 8 August 2002 …

…'

Slovenian law

Provisions on payment of interest for late payment

10 Under Article 277(1) of the Zakon o obligacijskih razmerjih (Law on obligations), the debtor is obliged to pay the creditor interest for late payment, in addition to the principal amount, if he has not paid the amount due in respect of the debt when it was due.

11 That law was replaced as from 1 January 2002 by the Obligacijski zakonik (Code of obligations, 'the OZ'). That code essentially repeated the provision mentioned in the preceding paragraph, and, in Article 376, introduced a new rule under which interest for late payment ceases to run when the amount of interest accrued but not paid equals the amount of the principal ('the *ne ultra alterum tantum* rule').

Provisions on craft activities

12 According to the order for reference, the exercise of self-employed economic activity by a natural person was, at the time of the material facts in the main proceedings in June 1993, governed by the Obrtni zakon (Law on craft activities) in the version then in force. Under that law, which was subsequently amended, in order to exercise an economic activity as a self-employed craftsman, a natural person had to hold a licence issued by the competent authority, specifying the field of activity concerned.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Mr Nemec has since 8 November 1989 held a craftsman's licence to carry on the activity of turning mechanical parts and welding. In June 1993 he concluded a contract with the Gasilsko Društvo (Association of volunteer firemen) of Murska Sobota ('the association') under which he leased to the association a tanker to transport water in periods of drought.

14 In 1996 Mr Nemec brought proceedings against the association for payment of the sum of EUR 17669.51 on the basis of that contract.

15 By judgment of 17 February 2010, the Višje sodišče v Mariboru (Court of Appeal, Maribor, Slovenia) ordered the association to pay EUR 15061.44 together with statutory interest for late payment for the period from 25 March 1996 to 31 December 2001. On the other hand, the court dismissed the claim for payment of interest for late payment from 1 January 2002, the date on which the *ne ultra alterum tantum* rule entered into force. The amount of interest payable up to 31 December 2001 already exceeded the principal amount.

16 On 18 May 2010 the association paid the sum due under that judgment.

17 Since he considered that the *ne ultra alterum tantum* rule was incompatible with Directive 2000/35 and the Višje sodišče v Mariboru (Court of Appeal, Maribor) had therefore been wrong to dismiss his claim for interest for late payment for the period from 1 January 2002 to 18 May 2010, Mr Nemec brought an action against the Republic of Slovenia for compensation for the damage suffered as result of that supposed incompatibility. After the court at first instance dismissed that action by judgment of 18 May 2011, upheld on appeal by judgment of 24 January 2012, on the ground that Directive 2000/35 was not applicable to the facts of the main proceedings, Mr Nemec appealed on a point of law to the referring court, the Vrhovno sodišče (Supreme Court, Slovenia).

18 That court expresses doubts as to whether the contract at issue in the main proceedings falls within the scope *ratione materiae* of Directive 2000/35. In particular, the court raises the question whether Mr Nemec concluded that contract as an 'undertaking' within the meaning of Article 2(1) of the directive, that is, an organisation acting in the course of an independent economic or professional activity, so that the contract was a 'commercial transaction' within the meaning of that provision and thus fell within the scope of the directive. While the contract at issue in the main proceedings relates to an economic activity and gave rise to the issuing of an invoice, it is not, however, covered by the activities of turning mechanical parts and welding which Mr Nemec is licensed to engage in as a self-employed craftsman.

19 If that is the case, the referring court also raises the question of the compatibility with Directive 2000/35 of the *ne ultra alterum tantum* rule laid down in Article 376 of the OZ.

20 In those circumstances, the Vrhovno sodišče (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the third subparagraph of Article 2(1) of Directive 2000/35 to be interpreted as meaning that, in a system in which, for the purposes of engaging in an economic activity, a natural person is granted authorisation stating the activity for which authorisation is granted, there is no undertaking, nor, therefore, any commercial transaction within the meaning of the above-mentioned provision of the directive, when the legal transaction giving rise to late payment relates to an activity not covered by the authorisation?

If the reply to the above question is in the negative:

2. Is the third subparagraph of Article 2(1) of Directive 2000/35 to be interpreted as meaning that a natural person is deemed to be an undertaking and the legal transaction giving rise to late payment constitutes a commercial transaction within the meaning of that provision, when the legal transaction does not fall within the activity registered by the said natural person but stems from an activity which, by its nature, may be an economic activity, and an invoice has been issued for that transaction; and

3. Does the rule that interest for late payment ceases to run when the amount of accrued and unpaid interest equals the principal amount owed (the *ne ultra alterum tantum* rule) run counter to the provisions of Directive 2000/35?'

Jurisdiction of the Court

21 The Slovenian Government and the European Commission submitted at the hearing before the Court that the Court does not have jurisdiction to answer the questions put by the referring court. They argue that the dispute in the main proceedings concerns a situation which preceded the accession of the Republic of Slovenia to the European Union on 1 May 2004, and produced all its effects before that date.

22 It must be noted in this respect that the contract at issue in the main proceedings was indeed concluded in June 1993, and that the present case thus originates in a situation which arose before the accession of the Republic of Slovenia to the European Union.

23 However, that situation continued to produce effects after accession. The non-payment of the principal debt which gave rise to the interest for late payment claimed by Mr Nemec continued until 18 May 2010, the date on which the association made that payment, and the action brought by Mr Nemec seeks precisely to obtain compensation for the loss he claims to have suffered because of the dismissal by the Višje sodišče v Mariboru (Court of Appeal, Maribor) of his claim to payment of that interest for the period from 1 January 2002 to 18 May 2010.

24 By virtue of Articles 2 and 54 of the 2003 Act of Accession, the provisions of the original Treaties and the acts adopted by the institutions before accession are to be binding on the new Member States from accession, and are to apply in those States under the conditions laid down in those Treaties and that act.

25 Moreover, in accordance with settled case-law of the Court, unless there is a derogation, a new rule applies immediately to the future effects of a situation which arose under the old rule. Applying that principle, the Court has held that, where the act concerning the conditions of accession of a Member State contains no specific provision on the application of a provision of EU law, that provision must be considered to be immediately applicable and binding as regards that Member State as from the date of its accession to the EU, so that it applies to the future effects of situations arising before accession (see, to that effect, judgments of 12 November 2009, *Elektrownia Pątnów II*, C-441/08, EU:C:2009:698, paragraph 32; 22 December 2010, *Commission* v *Poland*, C-385/08, not published, EU:C:2010:801, paragraph 29; and 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 57).

26 With respect more particularly to Directive 2000/35, the 2003 Act of Accession contains no specific provision on the application of that directive to the Republic of Slovenia. Consequently, the directive became immediately applicable and binding as regards the Republic of Slovenia from the date of its

accession to the European Union, and has since that date been capable of applying to the future effects of situations which arose or occurred before accession, such as those at issue in the main proceedings.

27 It follows that, since EU law applies to the main proceedings, the Court has jurisdiction to answer the questions put by the referring court.

Consideration of the questions referred

Questions 1 and 2

28 By its first two questions, which should be considered together, the referring court essentially asks whether Article 2(1) of Directive 2000/35 must be interpreted as meaning that a natural person holding a licence to carry on an activity as a self-employed craftsman must be regarded as an 'undertaking' within the meaning of that provision, so that a transaction concluded by him with a third party is a 'commercial transaction' within the meaning of that provision, where that transaction, although not part of the activities covered by the licence, relates to an economic activity.

29 In order to answer those questions, it should be noted, as a preliminary point, that while, in accordance with Article 6(3)(b) of Directive 2000/35, the Member States were authorised, when transposing the directive, to exclude contracts concluded before 8 August 2002 from its scope, it appears from the order for reference that the Republic of Slovenia did not make use of that option, and this was confirmed by the Slovenian Government at the hearing.

30 As to the questions referred, it should be recalled that, in accordance with Article 1 of Directive 2000/35, the directive applies to all payments made as remuneration for commercial transactions. The first subparagraph of Article 2(1) of the directive defines 'commercial transactions' as transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration, while recital 13 of the directive specifies that, inter alia, transactions with consumers are excluded, on the other hand. Under the third subparagraph of Article 2(1) of the directive, an 'undertaking' within the meaning of the directive is any organisation acting in the course of its independent economic or professional activity, even where it is carried on by a single person.

31 Recitals 7, 10 and 16 of Directive 2000/35 state, moreover, that the aim of the directive is to improve the proper functioning of the internal market by protecting entrepreneurs, in particular small and medium-sized businesses, against late payment.

32 The directive is thus not intended to apply to all transactions leading to the delivery of goods or the provision of services for remuneration, in particular all one-off transactions concluded every day by private individuals.

33 It follows that it is not enough for a person to conclude a transaction relating to an economic activity, such as leasing a chattel to another person, for him to be an 'undertaking' and the transaction to be classified as 'commercial' within the meaning of Article 2(1) of the directive. The person must also act as an organisation within the framework of an independent economic or professional activity.

34 As the Advocate General essentially observes in point 82 of his Opinion, that requirement means that that person, whatever his form and legal status may be in national law, must exercise that activity in a structured and stable manner, so that the activity cannot be limited to an isolated one-off supply, and that the transaction in question must form part of that activity.

35 On the other hand, contrary to the Commission's submissions, it does not follow from Article 2(1) of Directive 2000/35 that the activity in question must necessarily be the principal economic or professional activity of the person concerned, or be linked to that activity.

36 Also, contrary to the submissions of the Slovenian Government and the Commission, whether a person counts as an 'undertaking' within the meaning of that provision cannot depend on the issue by the competent national authorities of a licence to exercise the activity in question.

37 In a national system in which the exercise by a natural person of an economic or professional activity as a self-employed craftsman or entrepreneur is subject to the issue of a licence, a natural person holding such a licence cannot be excluded from the definition of 'undertaking' and the transactions he concludes excluded from that of 'commercial transactions' solely because those transactions relate to an independent economic or professional activity other than that mentioned in the licence or form part of an independent economic or professional activity that is more extensive than that one.

38 Any other interpretation would amount to making the scope of those concepts depend on national law, more particularly on the system established by each Member State for the exercise of an independent economic or professional activity. However, it follows from the requirements both of the uniform application of EU law and of the principle of equality that, in the absence of a reference to national law in Article 2(1) of Directive 2000/35, the terms 'undertaking' and 'commercial transactions' must be given an autonomous and uniform interpretation (see, by analogy, judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 25 and the case-law cited).

39 Furthermore, as the Advocate General observes in point 90 of his Opinion, any interpretation which had the effect of making the scope of the concept of 'undertaking', and hence the scope *ratione personae* and *ratione materiae* of Directive 2000/35, depend on the issue by the competent national authorities of a Member State of a licence to exercise the activity concerned would clash with that directive's aim, apparent from recital 10 of the directive, of facilitating commercial transactions between Member States. Undertakings or public authorities from other Member States would, in order to determine whether the transaction concluded fell within the scope of Directive 2000/35, have to check systematically whether the transaction related to the activities for which that licence had been issued, which would be liable to restrict or hinder cross-border transactions.

40 It follows that, while the fact that the person concerned has concluded a transaction within the bounds of the activity for which he has been granted a licence may be taken into account among other factors for ascertaining whether he has acted as an 'undertaking' within the meaning of Article 2(1) of Directive 2000/35, that fact cannot be decisive.

41 All the circumstances must thus be taken into consideration in determining whether a person is acting in that capacity — that is, as stated in paragraph 34 above, within the framework of an independent economic or professional activity that is structured and stable — and whether, consequently, the transactions he concludes are commercial transactions within the meaning of that provision.

42 Those circumstances include in particular the fact that the person in question acts under his trading or professional name and the transaction concluded gives rise to the issue of an invoice.

43 It is the light of the above considerations that the referring court must determine whether in the present case Mr Nemec concluded the contract at issue in the main proceedings in the capacity of an 'undertaking' within the meaning of Article 2(1) of Directive 2000/35.

44 Having regard to all the foregoing considerations, the answer to Questions 1 and 2 is that Article 2(1) of Directive 2000/35 must be interpreted as meaning that a natural person holding a licence to carry on an activity as a self-employed craftsman must be regarded as an 'undertaking' within the meaning of that provision, and a transaction concluded by him as a 'commercial transaction' within the

meaning of that provision, where that transaction, although not part of the activities covered by the licence, forms part of the exercise of an independent economic or professional activity that is structured and stable, which is for the referring court to ascertain in the light of all the circumstances of the case.

Question 3

45 By its third question, the referring court essentially asks whether Directive 2000/35 must be interpreted as precluding national legislation, such as Article 376 of the OZ, under which interest for late payment accrued but not paid ceases to run when the amount of the interest equals the principal amount.

46 In order to answer that question, it should be recalled that, in accordance with settled case-law of the Court, Directive 2000/35 does not harmonise fully all the rules relating to late payments in commercial transactions (judgments of 26 October 2006, *Commission* v *Italy*, C-302/05, EU:C:2006:683, paragraph 23; 3 April 2008, *01051 Telecom*, C-306/06, EU:C:2008:187, paragraph 21; and 11 September 2008, *Caffaro*, C-265/07, EU:C:2008:496, paragraph 15).

47 In particular, the directive does not harmonise all aspects relating to interest for late payment. In Article 3 it regulates some only of those aspects, namely the entitlement to interest in the event of late payment, the date from which the interest is due, the rate of interest, the creditor's right to seek compensation for the recovery costs incurred through late payment, and the consequences of the use of contractual terms that are grossly unfair to the creditor.

48 Directive 2000/35 does not, on the other hand, include rules relating to the period during which interest for late payment runs or to the maximum amount of interest.

49 The Member States therefore remain free to regulate that question, provided, however, that they do not disregard the objectives pursued by Directive 2000/35 or deprive the directive of practical effect (see, by analogy, judgment of 14 September 2016, *Pérez López*, C-16/15, EU:C:2016:679, paragraph 59 and the case-law cited).

50 It must be pointed out in this connection that that directive aims principally, as stated in recitals 7 and 16, to discourage late payment, in particular by ensuring that late payment is not financially attractive to debtors, and to protect creditors against late payment.

51 The Slovenian Government, supported by the Latvian Government, submits that the *ne ultra alterum tantum* rule laid down in Article 376 of the OZ does not run counter to those objectives. On the contrary, the rule preserves the function of interest for late payment, which is precisely to encourage the debtor to pay what is due, not to enable the creditor to enrich himself. The rule, while protecting the creditor, ensures that the amount of interest for late payment that has accrued is not such as to burden the debtor with an unreasonable debt and thereby to create a situation that is unfair and disproportionate between the creditor and the debtor and may lead to the debtor becoming insolvent.

52 In this respect, it must indeed be stated that such a rule is liable, by capping the amount of interest for late payment at the amount of the principal, to limit the deterrent effect of the payment of such interest.

53 However, first, such a ceiling does not as such amount to calling in question the objective of protection of creditors pursued by Directive 2000/35, nor of depriving that directive of practical effect.

54 The *ne ultra alterum tantum* rule does not bring about a limitation of the amount of interest for late payment that is such as to render nugatory the creditor's entitlement, provided for in Article 3(1)(a) to (c) of the directive, to such interest in the case of late payment or to deprive the interest of any deterrent function as regards the debtor. Furthermore, the rule has no effect on the rate of interest applicable, which must correspond to that laid down in Article 3(1)(d) of the directive.

55 Secondly, as the Advocate General observes in essence in points 66 and 67 of his Opinion, it must be noted that the national legislature could, on the basis of the margin of discretion it enjoys, take the view that a balance should be struck between the objective of protecting creditors and the need to avoid an unreasonable debt burdening the debtor. Within the bounds of that discretion, the legislature could consider that a rule such as the *ne ultra alterum tantum* rule was an appropriate instrument to that end.

56 Moreover, such a rule must be examined not in isolation but in its context. For that purpose, account must also be taken of the other provisions of national law that are applicable to late payment.

57 On this point, the Slovenian Government points in particular to Article 380 of the OZ, which ensures that a creditor who, because of late payment, has incurred loss in an amount greater than that of the interest received is awarded compensation to cover the difference.

58 The national legislature could consider, within the bounds of the discretion it enjoys, that such a provision, combined with all the rules laid down by Directive 2000/35, was such as to ensure the protection of creditors against late payment.

59 Having regard to all the foregoing considerations, the answer to Question 3 is that Directive 2000/35 must be interpreted as not precluding national legislation, such as Article 376 of the OZ, under which interest for late payment accrued but not paid ceases to run when the amount of the interest equals the principal amount.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 2(1) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions must be interpreted as meaning that a natural person holding a licence to carry on an activity as a self-employed craftsman must be regarded as an 'undertaking' within the meaning of that provision, and a transaction concluded by him as a 'commercial transaction' within the meaning of that provision, where that transaction, although not part of the activities covered by the licence, forms part of the exercise of an independent economic or professional activity that is structured and stable, which is for the referring court to ascertain in the light of all the circumstances of the case.**

2. **Directive 2000/35 must be interpreted as not precluding national legislation, such as Article 376 of the Obligacijski zakonik (Code of obligations), under which interest for late payment accrued but not paid ceases to run when the amount of the interest equals the principal amount.**

[Signatures]