OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 18 October 2007 [1]

1. By this reference for a preliminary ruling, the Oberlandesgericht Köln (Germany) refers to the Court a question concerning the interpretation of Article 3(1)(c)(ii) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. [2]

2. Essentially, the Court is asked whether the above provision, according to which, in a number of language versions and, in particular, in the German version, the creditor is entitled to claim interest for late payment where 'he has not received the amount due on time, unless the debtor is not responsible for the delay', implies, where payment is made by bank transfer, that the sum payable should be credited to the creditor's account on time, or whether it is sufficient, to avoid or put an end to interest for late payment, for the transfer order to be executed within the period for payment.

3. Let us be clear from the outset that, although this question may be surprising in the light of some language versions [3] in which there is not always a reference to receipt of the amount due on time, that does not call into question the main issue in this case, which remains that relating to the distribution of risk between the creditor and the debtor where the latter is not directly responsible for the late payment.

I — The dispute in the main proceedings, legal background and the question referred for a preliminary ruling

4. The dispute in the main proceedings is between 01051 Telecom GmbH ('the claimant') and Deutsche Telekom AG ('Deutsche Telekom') concerning the payment of interest for late payment. Both these undertakings supply telecommunications services to the public and to network operators. In

1 — Original language: French.

2 — OJ 2000 L 200, p. 35.

3 — See, inter alia, the Portuguese version in which Article 3(1)(c)(ii) of Directive 2000/35 reads merely 'O atraso seja imputável ao devedor'.

addition, Deutsche Telekom offers invoicing services to other operators such as the claimant.

5. Since 1998, the two operators have been linked by an interconnection contract, according to which the parties invoice each other for services supplied in the context of that contract and on that basis calculate the sums due. The contract has been subject to a number of amendments. The most recent version, dated 26 June 2002, provides, with regard to late payment, in Article 17.5:

'Payment shall be deemed to be late, so far as this is not already established by written demand, 30 days after it has become due and the invoice has been received.'

6. In addition, during 2001 the parties concluded an invoicing and debt recovery agreement providing, in paragraph 8, that:

'At the middle and at the end of a calendar month the contracting partner may issue an invoice for the net remuneration, including value added tax, recognised by Deutsche Telekom as capable of being invoiced for services supplied by it to Deutsche Telekom … The amount of the invoice must be credited to the account identified in the invoice or set off at the latest 30 days after receipt of the invoice.'

7. The claimant argues that the abovementioned provision of the invoicing and debt recovery contract should be applied in the context of the interconnection contract, so that the prevention or end of late payment and the obligation to pay interest for late payment depends, inter alia, on receipt or entry on the account of the amount invoiced. Thus it took the view that it was entitled to claim interest for late payment from Deutsche Telekom for the sum outstanding after set-off inasmuch as, on the 30th day following receipt of the invoice, the total amount payable had not been credited to its account.

8. The defendant, on the contrary, argues that the alleged agreement has not been implemented. It submits that it has already paid the sums due under the interconnection contract by sending, in time, to its bank, orders for transfer which the bank received.

9. The courts at first instance and on appeal both excluded the transposition of the invoicing and debt recovery contract to the

interconnection contract. In those circumstances and in the absence of any stipulation in the interconnection contract as to the time from which interest for late payment starts to run where payment is made by transfer it is national law which applies.

10. Paragraph 269 of the German Civil Code (Bürgerliches Gesetzbuch — BGB) provides:

'(1) Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

(2) If the obligation arose in the commercial undertaking of the obligor, the place of the commercial undertaking takes the place of the residence if the obligor maintained his commercial undertaking at another place.

(3) From the circumstance that the obligor has assumed the costs of shipping it may not be concluded that the place to which shipment is to be made is to be the place of performance.'

11. Paragraph 270 of the BGB states as follows:

'(1) In case of doubt the obligor must transfer money at his own risk and his own expense to the obligee at the residence of the latter.

(2) If the obligation came about in the commercial undertaking of the obligee, then, if the obligee has his business establishment in another place, the place of the commercial undertaking takes the place of the residence.

(3) If, as the result of a change in the obligee's residence or business establishment occurring after the obligation arises, the costs or risk of transmission increase, the obligee must in the former case bear the extra costs and in the latter case the risk.

(4) The provisions on the place of performance are unaffected.'

12. As interpreted in national case-law and legal literature, it appears from those articles

that in the case of payment by transfer, as in the present case, performance is considered to be on time where (i) the transfer order is received by the debtor's financial establishment before expiry of the period for payment, (ii) the debtor's account is covered or enjoys a line of credit in a sufficient amount and (iii) the debtor's financial establishment accepts the transfer order. In other words, it is not necessary for the sum physically to be credited to the creditor's account for the payment to be made.

13. Finally, as amended in order to implement Directive 2000/35, Paragraph 286 of the BGB provides:

'(1) If the obligor, following a warning notice from the obligee that is made after performance is due, fails to perform, he is in default as a result of the warning notice. Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice.

(2) There is no need for a warning notice if

1. a period of time according to the calendar has been specified,

2. performance must be preceded by an event and a reasonable period of time for performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar,

3. the obligor seriously and definitively refuses performance,

4. for special reasons, weighing the interests of both parties, the immediate commencement of default is justified.

(3) The obligor of a claim for payment is in default at the latest if he does not perform within 30 days after the due date and receipt of an invoice or equivalent statement of payment; this applies to an obligor who is a consumer only if these consequences are specifically referred to in the invoice or statement of payment. If the time at which the invoice or payment statement is received by the obligor is uncertain, an obligor who is not a consumer is in default at the latest 30 days after the due date and receipt of the consideration.

(4) The obligor is not in default for as long as performance is not made as the result of a circumstance for which he is not responsible'.

14. Article 3 of Directive 2000/35 on late payment, thus transposed, provides, inter alia, that:

'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;

(b) if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder:

(i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or

(ii) if the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 days after the date of receipt of the goods or services; or

(iii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services; or

(iv) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 days after this latter date;

(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;

…'

15. The Landgericht Bonn upheld in part the action of 01051 Telecom, taking the view that Article 3(1)(c)(ii) of Directive 2000/35, pursuant to which the creditor is entitled, in the event of late payment, to interest when he has not *received* the amounts invoiced on time, suggested that late receipt of the sum due should be taken as the triggering factor for interest for late payment, even if the order for payment had been executed in good time.

16. On appeal, the Oberlandesgericht Köln, after noting that Directive 2000/35 could be relied on in order to fill lacunae in the interconnection contract on this point, took the view that Article 3(1)(c)(ii) of the Directive could also correspond to the majority view in German law that, in the event of payment by transfer, it is the late execution of the transfer order and not the late receipt of the sum which is important. The abovementioned article, in specifying that interest for late payment is not due where the debtor 'is not responsible for the delay', indicates, according to the referring court, that a payment, even late, may be regarded as 'received' on time by the creditor where the debtor has done what is necessary for the sum due to be transferred in good time.

17. The referring court nevertheless recognises that the interpretation of the provision in question is not unequivocal. In particular, the use in the German, French and English versions of the terms 'erhalten', 'reçu' and 'received' respectively could indicate that, in order to avoid late payment within the meaning of Directive 2000/35, the amount must *reach* the creditor before expiry of the applicable period for payment.

18. It is in those circumstances that the Oberlandesgericht Köln decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is a national rule that payment by bank transfer preventing the occurrence of late payment by a debtor or putting an end to late payment on his part does not depend on the time when the amount is credited to the creditor's account but on the time when the debtor gives a transfer order that is covered by sufficient funds or a sufficient credit limit and is accepted by the bank compatible with

Article 3(1)(c)(ii) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions?'

II — Legal analysis

19. Before analysing the substance, it is appropriate to examine whether the question referred for a preliminary ruling is admissible.

A — *Admissibility*

20. Although the relevance of the question referred for a preliminary ruling does not appear to be the subject of debate in the parties' observations, this merits some amplification.

21. Since this is a dispute between individuals, account must be taken of the fact that, in accordance with the Court's established case-law, a directive cannot, of itself, create rights and obligations in the context of their relations. [4] In its judgment in *QDQ Média*, [5] the Court had occasion to recall that principle in reply to a question referred for a preliminary ruling which also related to the interpretation of Directive 2000/35.

22. Nevertheless, by virtue of the principle of interpretation in conformity with the requirements of Community law and the obligation of genuine cooperation as set out in Article 10 EC, the Court has consistently pointed out that a national court called upon to interpret national law is bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. [6]

23. Such an obligation cannot be called into question in the main proceedings by the fact that the period for transposition of Directive 2000/35 had not yet expired at the material time.

4 — See, inter alia, Case 152/84 *Marshall* [1986] ECR 723; Case C-106/89 *Marleasing* [1990] ECR I-4135; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835.

5 — Case C-235/03 *QDQ Média* [2005] ECR I-1937.

6 — Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26; *Marleasing*, paragraph 8; *Pfeiffer and Others*, paragraph 113; and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 108.

24. Since its judgment in *Inter-Environnement Wallonie*,[7] the Court considers, on the basis of the second paragraph of Article 10 EC and Article 249 EC, that, during the period laid down for its implementation, the Member States to which a directive is addressed must refrain from adopting measures liable seriously to compromise the achievement of the result prescribed. That is all the more so where the question referred to the Court does not concern the possible exclusion of a national provision but its interpretation where it is already treated with caution in the relevant legal order. Moreover, the Court has stated that:

'from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive'.[8]

25. Finally, in the dispute in the main proceedings, the national legislature had chosen to implement the provisions of Directive 2000/35 early, by adopting Paragraph 286 of the BGB. In those circumstances, the Court considers:

'Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC'.[9]

26. In those circumstances, in interpreting the implementing provisions in accordance with the Directive, the court must take account of the intention of the national legislature which sought rapid implementation.[10] Since Paragraphs 269, 270 and 286 of the BGB may be interpreted in different ways, resolution of the dispute depends to a great extent on the interpretation given by the Court to Article 3(1)(c)(ii) of the Directive on late payment, such that the relevance of the question put to the Court must be regarded as established.

7 — Case C-129/96 [1997] ECR I-7411, paragraph 50, since confirmed by, inter alia, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58.

8 — *Adeneler and Others*, paragraph 123.

9 — *Pfeiffer and Others*, paragraph 113.

10 — *Pfeiffer and Others* and *Adeneler and Others*.

B — *Interpretation of Article 3(1)(c)(ii)*

27. The Court is asked essentially to determine on the basis of which operation a payment made by bank transfer may be regarded as correctly executed in the context of a commercial transaction and, accordingly, as not giving rise to the charging of interest for late payment within the meaning of Directive 2000/35.

28. The claimant and the Commission of the European Communities argue for a rigorous interpretation of Article 3(1)(c)(ii) of Directive 2000/35, taking the view that the provision requires the debtor to ensure that the creditor has the amount due at his disposal on the due date. In other words, only when the funds are actually credited to the creditor's account will entitlement to payment of interest for late payment be brought to an end or avoided.

29. It is true that a literal interpretation of the article, in most language versions, appears to confirm that position by stating that the creditor is entitled to interest for late payment if he 'has not *received* the amount due on time'. The choice of that verb by the Community legislature leads to the view that the sum due must be credited to the creditor's account on the due date if interest for late payment is no longer to be payable.

30. In support of that argument, it will also be noted that that requirement tallies perfectly with the objective of ensuring that creditors have effective protection against late payment, as is clear from recitals 7, 16, 19 and 20 in the preamble to Directive 2000/35, late payment constituting 'an obstacle to the proper functioning of the internal market'. [11] The textual and teleological interpretations thus, at first sight, concur in favour of the requirement of effective payment of the amount due in the sense that the beneficiary should have at his disposal the amount credited to his account.

31. However, that interpretation imposes a responsibility on the debtor which does not appear to be his. It requires him to anticipate exactly the time necessary for the transaction to be handled by the various financial institutions involved. Although the view may be taken that the originator of the transfer must accept responsibility for delays in payment attributable to his financial institution, that

11 — See, inter alia, recitals 9 and 10 in the preamble to Directive 2000/35 as set out in Commission Recommendation 95/198/EC of 12 May 1995 on payment periods in commercial transactions (OJ 1995 L 127, p. 19).

is not the case as regards those caused by the creditor's institution or by the creditor himself. Furthermore, such an interpretation is contrary to that adopted by Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, [12] according to which responsibility for late payment caused by the financial institution of the beneficiary must be accepted by the creditor and not by the debtor. [13]

32. Nevertheless, the solution could be found in the second part of the article submitted for interpretation by the Court, according to which a creditor who has not received the amount due on time is entitled to interest for late payment, 'unless the debtor is not responsible for the delay'. At the hearing, the Commission thus argued for the view that Article 3(1)(c)(ii) could be interpreted as laying down the principle, in the case of payment by transfer, that entry on the account of the creditor of the sum invoiced on time would avoid or end late payment, except in circumstances, which remain to be determined, of late payment for which the debtor was not responsible. However, such a reading supposes a split between the two parts of Article 3(1)(c)(ii), between the principle and the exception, which leaves open the circumstances in which the debtor will not be held responsible for the delay.

33. It seems to me that such an interpretation must be excluded for two main reasons. Firstly and despite clear progress on delays and transparency in banking transactions, [14] it remains impossible, at the present time, for the debtor accurately to determine the date on which the creditor's financial institution will transfer the funds to the creditor's account. Accordingly, to elevate into a principle a requirement that, in any event, can be based only on an estimation undermines the principle of legal certainty. What is more, according to the criteria adopted to determine whether the debtor is not responsible, the approach indicated is liable to be a source of legal uncertainty both for the debtor and for the creditor. Although the debtor

12 — OJ 1997 L 43, p. 25.

13 — See, inter alia, Article 6(2) and (3) and Article 7(3) of Directive 97/5.

14 — In this regard, reference may be made to the Report from the Commission to the European Parliament and to the Council on the application of Directive 97/5 (COM/2002/663 final). This report thus states that nearly 90% of credit transfers arrived within the time indicated by the executing institution. A further 8% arrived within 3 days after the time indicated (paragraph 3.7.2.1). Furthermore, it is established that transfers took on average x2.97 days. 95.4% of transfers arrived within 6 working days, which is the default time specified in Directive 97/5 (paragraph 3.8.2). See also the Proposal for a Directive on payment services (COM (2005) 603 final), especially Articles 26, 28 and 60 of that directive, which impose a precise obligation on the service provider to inform the beneficiaries with regard, inter alia, to the 'execution time for the payment service to be provided' (Article 26(1)(a)(ii)). The draft also seeks to require the payer's payment service provider to credit the payee's payment account at the latest at the end of the first working day following the point in time of acceptance (Article 60).

may find it impossible to determine the point from which he is free of his obligation, the creditor too could be forced to accept a risk which he cannot control, where delays in payment were caused by the debtor's financial institution.

34. Secondly, the interpretation envisaged means that the circumstances in which the debtor would not be responsible for late payment are left to the discretion of the Member States. Although exceptions are to be interpreted strictly, that could reintroduce disparities between the Member States which would be directly contrary to the objective of harmonisation pursued by Directive 2000/35 and, more generally, to the smooth functioning of the common market. As stated in recital 10 in the preamble to that directive: 'distortions of competition would ensue if substantially different rules applied to domestic and transborder operations'. That would be the case if exoneration from responsibility had to be decided in the context of national laws under which the rules on the subject differed.

35. Moreover, although the Directive regularly refers back to national law and confines itself to laying down minimal requirements for the combating of late payment, there is no such reference in Article 3(1)(c)(ii). It follows both from the requirements of uniform application of Community law and the principle of equality that the definition of responsibility with regard to late payment thus represents an autonomous Community law definition which is to be interpreted in a uniform manner. [15]

36. Lastly, in any event, I would point out that the Directive was adopted on the basis of Article 95 EC. Consequently, the main objective which it pursues is indeed the approximation of the laws of the Member States. To that end, it seeks to eliminate obstacles to the smooth running of the internal market arising in particular as a result of divergences between the national legal orders. An interpretation of Article 3(1)(c)(ii) which left to the Member States the task of determining what is meant by 'receipt of the amount due on time' as cases where the debtor cannot be held responsible for late payment would amount, as has already been emphasised, to reintroducing disparities between the national rules which the Community legislature wished precisely to avoid.

37. None the less, it cannot meet the objectives of the Directive either to take the view that mere execution of the transfer order, accepted by the debtor's financial institution,

15 — See, inter alia, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 26; Case C-246/05 *Armin Häupl* [2007] ECR I-4673, paragraph 43.

frees the debtor from his obligation. Such an interpretation would deprive the Directive of its effectiveness. The Directive pursues the objective of prohibiting 'abuse of freedom of contract to the disadvantage of the creditor'. [16] Such abuse is characterised inter alia by the fact of 'procuring the debtor additional liquidity at the expense of the creditor'. [17] To consider that only a late transfer order rather than the late receipt of the sum due entails the charging of interest for late payment amounts to authorising the debtor not to issue the transfer order until the last day of the period for payment, assuming that his financial institution accepts the order within the period. Such opportunistic conduct brings to mind the abuse of freedom of contract referred to by the Directive in allowing the debtor to enjoy liquidity at the expense of the creditor during the day or days preceding a transfer order submitted on the last day of the period for payment, when the amount should have been 'received' on that date according to the Directive. [18] Thus the German Government's argument that to treat the transfer order as the equivalent of payment is not contrary to the Directive's objectives appears to be incorrect. The objective pursued by the text is not to favour the debtor by allowing him to enjoy liquidity until the final day of the period for payment, but to guarantee the creditor receipt of the sum due within the period for payment.

38. Furthermore, such a reading of Article 3(1)(c)(ii) of Directive 2000/35 places the creditor in an uncertain legal position with regard to the date on which interest for late payment may be claimed. Although such interest is due automatically when the transfer order is late, the creditor also needs to know the date on which the order was passed to the payer's financial institution. To obtain that information, the creditor would therefore have to take the steps necessary to obtain a copy of the contract by which the transfer order was accepted in order to check the exact date of payment. Irrespective of the fact that the necessity for such a step rather changes the automatic nature of the requirement to pay interest for late payment, it seems difficult to deny that it constitutes an additional administrative burden on the creditor — or on the debtor if it is agreed that he will provide that information — whereas Directive 2000/35 expressly seeks to avoid such additional administrative and financial burdens. [19]

39. I would therefore invite the Court to adopt an intermediate solution that would ensure a fair distribution of the risk between the creditor and the debtor.

40. Given the relative consistency with which the expression 'has received the amount' is used in most language versions

16 — Recital 19 in the preamble to Directive 2000/35.

17 — Idem.

18 — See also to that effect: Mengozzi, P., *I ritardi di pagamento nelle transazioni commerciali:L'interpretazione delle norme nazionali di attuazione delle direttive comunitarie*, Padova, CEDAM, 2007, p. 15.

19 — Recital 7 in the preamble to Directive 2000/35.

of Directive 2000/35, together with its purpose, it seems difficult not to construe such a requirement as implying that the sum must have left the debtor's account to reach the creditor. However, if the Court accepts, in accordance with the directive on cross-border transfers and usage in private international law, that the debtor cannot be held responsible for the contractual relationship between the creditor and his financial institution, it appears justifiable to take the view that that obligation is met when the sum has reached the beneficiary's financial institution, without necessarily having already been credited to his account.

41. The second part of Article 3(1)(c)(ii) of the Directive supports that interpretation, in stating that non-receipt of the amount due on time cannot give rise to entitlement to interest for late payment where the debtor is not responsible for exceeding the period for payment. Although he can ascertain precisely and accurately in the contractual framework he has established with his financial institution the date on which the funds will have been received by the beneficiary's institution, it is, however, impossible for him to anticipate the time taken to transfer the funds from the creditor's financial institution to the creditor's account.

42. Such an interpretation of the first part of Article 3(1)(c)(ii) of Directive 2000/35 in the light of the second part of that provision would mean that relative legal certainty in the relations between the creditor and the debtor would be ensured; the debtor would have an assurance, on the basis of the contract which he concludes with his own financial institution, as to the date on which he has met his obligation and the creditor would have the same guarantee with regard to his own financial institution as to receipt of the amount due on his account, without their relationships with their respective financial institutions affecting the principal relationship established between the two parties. The proposed interpretation appears to me to guarantee an equitable distribution of the risks by virtue of a criterion which takes account of the contracting party best placed to foresee and control the risk in question.

III — Conclusion

43. Having regard to the foregoing considerations, I propose that the Court should answer the question referred by the Oberlandesgericht Köln for a preliminary ruling as follows:

'Article 3(1)(c)(ii) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions implies that, for a payment made by bank transfer to exclude or put an end to interest for late payment, the sum due must have reached the creditor's financial institution on time.'