Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

6 February 2025*

(Reference for a preliminary ruling – Combating late payment in commercial transactions – Directive 2011/7/EU – Commercial transactions between undertakings – Article 3(5) – Obligation on Member States to ensure that the period for payment set in the contract concluded between undertakings does not exceed 60 calendar days – Possibility, for contracting parties, to set a longer period for payment – Condition for the express agreement in the contract of such a period – Condition that a contractual term is not grossly unfair to the creditor – Cumulative conditions – Contracts in which the terms are determined unilaterally by one of the parties – Contractual term by which the debtor unilaterally sets the period for payment of 120 days – Unlawfulness)

In Case C-677/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy Katowice – Wschód w Katowicach (District Court, Katowice-East, Katowice, Poland), made by decision of 26 September 2022, received at the Court on 2 November 2022, in the proceedings

Przedsiębiorstwo Produkcyjno – Handlowo – Usługowe A.

v

P. S.A.,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Second Chamber, acting as President of the Third Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Jääskinen, M. Gavalec and N. Piçarra (Rapporteur), Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– P. S.A., by J. Janczewski and A. Paniczek,

* Language of the case: Polish.

– the Polish Government, by B. Majczyna, acting as Agent,

– the German Government, by J. Möller, J. Heitz and M. Hellmann, acting as Agents,

– the European Commission, by G. Gattinara and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(5) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48, p. 1).

2 The request has been made in proceedings between Przedsiębiorstwo Produkcyjno – Handlowo – Usługowe A. ('A.') and P. S.A. concerning the legality of a contractual term by which P. unilaterally fixed a period for payment of 120 calendar days applicable to invoices relating to the contracts concluded with A.

Legal context

European Union law

Directive 2011/7

3 Recitals 12, 13 and 28 of Directive 2011/7 state:

'(12) Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. 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 …

(13) Accordingly, provision should be made for business-to-business contractual payment periods to be limited, as a general rule, to 60 calendar days. However, there may be circumstances in which undertakings require more extensive payment periods, for example when undertakings wish to grant trade credit to their customers. It should therefore remain possible for the parties to expressly agree on payment periods longer than 60 calendar days, provided, however, that such extension is not grossly unfair to the creditor.

…

(28) This Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor. As a result, where a term in a contract or a practice relating to the date or period for payment … is not justified on the grounds of the terms granted to the debtor, or it mainly serves the purpose of procuring the debtor additional liquidity at the expense of the creditor, it may be regarded as constituting such an abuse. … This Directive should not affect national provisions relating to the way contracts are concluded …'

4 Article 1 of that directive, entitled 'Subject matter and scope', provides, in paragraph 1 thereof:

'The aim of this Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of [small and medium-sized enterprises].'

5 Under Article 2 of that directive, entitled 'Definitions':

'For the purposes of this Directive, the following definitions shall apply:

(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;

(2) "public authority" means any contracting authority, as defined in point (a) of Article 2(1) of Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and in Article 1(9) of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)], regardless of the subject or value of the contract;

(3) "undertaking" means any organisation, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person;

(4) "late payment" means payment not made within the contractual or statutory period of payment and where the conditions laid down in Article 3(1) … are satisfied;

(5) "interest for late payment" means statutory interest for late payment or interest at a rate agreed upon between undertakings, subject to Article 7;

(6) "statutory interest for late payment" means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points;

…'

6 Article 3 of Directive 2011/7, entitled ‘Transactions between undertakings’, provides, in paragraphs 1, 3 and 5:

‘1. Member States shall ensure that, in commercial transactions between undertakings, the creditor is entitled to interest for late payment without the necessity of a reminder, where the following conditions are satisfied:

(a) the creditor has fulfilled its contractual and legal obligations; and

(b) the creditor has not received the amount due on time, unless the debtor is not responsible for the delay.

…

3. Where the conditions set out in paragraph 1 are satisfied, Member States shall ensure the following:

(a) that the creditor is entitled to interest for late payment from the day following the date or the end of the period for payment fixed in the contract;

…

5. Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor within the meaning of Article 7.’

7 Article 7 of Directive 2011/7, entitled ‘Unfair contractual terms and practices’, states, in paragraph 1 thereof:

‘Member States shall provide that a contractual term or a practice relating to the date or period for payment … is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor.

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

…

(c) whether the debtor has any objective reason to deviate … from the payment period as referred to in Article 3(5) …

…’

Directive 2014/25/EU

8 Under Article 3(1) and (4) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243):

‘1. For the purpose of this Directive “contracting authorities” means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

…

4. “Bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or which have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.’

Polish law

9 Under Article 7 of the ustawa o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych (Law on counteracting excessive delays in commercial transactions) of 8 March 2013 (Dz. U. of 2013, item 403), in the version in force before 1 January 2020 (‘the Law of 8 March 2013’):

‘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 statutory interest for late payment in commercial transactions, unless the parties have agreed on higher interest, for the period from the due date for payment to the actual date of payment, if all the following conditions are met:

(1) the creditor has performed its obligations;

(2) the creditor has not received payment within the period laid down in the contract.

2. The period for payment fixed in the contract may not exceed 60 days from the date of submission to the debtor of the invoice or memorandum confirming delivery of the goods or provision of the service, unless otherwise expressly agreed by the parties in the contract and provided that such stipulation is not grossly unfair to the creditor.

3. Where the period for payment fixed in the contract is longer than 60 days from the date of submission to the debtor of the invoice or memorandum confirming delivery of the goods or provision of the service and where the condition referred to in paragraph 2 is not met, a creditor

that has performed its obligations shall be entitled, on expiry of the period of 60 days, to the interest referred to in paragraph 1.'

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

10 P., a company incorporated under Polish law active in the field of coal extraction and sale, concluded with A., a company incorporated under Polish law active in the production of mining equipment, a number of contracts for the supply of parts of machinery for mining ('the contracts at issue').

11 Some of those contracts were concluded following a sale by auction organised on a website managed by P., on which the contract conditions were published. Other contracts were concluded following a tender procedure (public or non-public). In both cases, the terms of the contract between the parties, including the 120-day payment period, starting on the date of the submission of the invoice to P., were determined unilaterally by the latter.

12 In performance of the contracts at issue, P. paid 354 invoices, within 120 to 122 days from the date of their receipt. Subsequently, A. sent P. a summary accounting note of the amounts which it considered to be due by way of late payment interest and compensation in the form of a fixed sum for recovery costs.

13 On 31 December 2021, A. brought an action before the Sąd Rejonowy Katowice – Wschód w Katowicach (District Court, Katowice-East, Katowice, Poland), the referring court, seeking payment by P. of 13 702.99 zlotys (PLN) (approximately EUR 3 100), together with statutory interest for late payment between the lodging of the application and the date of payment, and a fixed sum of PLN 4 473.04 (approximately EUR 975) by way of compensation for recovery costs. For the period from the sixty-first day from the date of submission of the invoices at issue until the date of actual payment of those invoices, A. calculated the late payment interest in accordance with Article 7(2) of the Law of 8 March 2013, which transposes Article 3(5) of Directive 2011/7 into Polish law.

14 A. submits, in support of its claim for interest based on Article 7 of the Law of 8 March 2013, that the payment period of 120 days was unilaterally set by P. in the model contract annexed to the specifications published on its website. That period was not at any time negotiated between the parties, but was the result of P.'s dominant position in the contractual relationship. Similarly, the participation in a tender procedure was subject to the conditions unilaterally set by P., including that regarding the 120-day period for payment. Due to A.'s economic situation, it was forced to conclude the contracts at issue, without ever being able to reach an agreement with P. so as to reduce the period to 60 calendar days. In those circumstances, such a contractual term cannot be regarded as having been expressly agreed by the parties to the contract, within the meaning of Article 3(5) of Directive 2011/7.

15 On 26 January 2022, the Registrar of the Sąd Rejonowy Katowice – Wschód w Katowicach (District Court, Katowice-East, Katowice) issued an order for payment against P., granting A.'s application in its entirety.

16 P. lodged an objection against that order, challenging the part of the interest calculated in accordance with Article 7 of the Law of 8 March 2013, in so far as the invoices had been paid within the 120-day period for payment from the date of their submission, as set out in the

contracts at issue. According to P., that period was accepted by A., which, after becoming aware of the specifications and winning the tenders, concluded a number of contracts in which it confirmed that period. That same period cannot be detrimental to the creditor, since it was certain that it would sell its services, earn income and maintain liquidity.

17 In order to resolve the dispute in the main proceedings, the referring court considers it necessary to determine whether the period for payment exceeding 60 calendar days from the date of submission of the invoice to the debtor, laid down in the contracts at issue, was set in compliance with the first condition set out in Article 3(5) of Directive 2011/7, according to which any period for payment longer than 60 calendar days must be 'expressly agreed in the contract'.

18 That court notes, first, that the contractual terms at issue, including that relating to the 120-day payment period, were determined unilaterally by P. Second, the referring court observes that the only means of challenging those terms, limited to the contracts at issue which were concluded following a public tender procedure, is an appeal before the President of the Krajowa Izba Odwolawcza (National Appeals Chamber, Poland), an appeal which was not brought by A.

19 The referring court is inclined to the view that the first condition laid down in Article 3(5) of Directive 2011/7 is not satisfied where a term setting a period for payment longer than 60 calendar days appears in a contract, the terms of which are determined unilaterally by one of the contracting parties. According to that court, although the terms of a contract may, as a general rule, be determined by one of the parties, which drafts the terms in advance or uses a contractual model, with the other party limited to accept those terms, like a pre-formulated standard contract, Article 3(5) precludes, however, a period for payment of 120 days from being fixed in that manner. Since such a period is exceptional, the creditor should at least know the reasons why the debtor intends to set a 120-day payment period and have the opportunity to put forward its own arguments that that period should not exceed 60 calendar days.

20 The referring court considers, moreover, that the fact that it is possible to challenge, before a national authority, a term setting a payment period longer than 60 calendar days in a contract concluded following a public tender procedure is not sufficient to regard the first condition laid down in Article 3(5) of Directive 2011/7 as satisfied, in so far as such a challenge would lead to 'a decision of an authority that is outside the contract itself', concerning the applicable period for payment.

21 Lastly, that court considers that such an interpretation of that first condition is substantiated by the second condition laid down in Article 3(5), under which the express contractual agreement of a period for payment exceeding 60 calendar days, by way of deviation from the general rule that the maximum payment period is 60 calendar days, must not be 'grossly unfair to the creditor within the meaning of Article 7 [of that directive]'. According to the referring court, in order to be able to carry out such an assessment with regard to the contracts at issue, the economic situation which must be taken into account is that of the creditor at the time of the conclusion of those contracts.

22 In those circumstances, the Sąd Rejonowy Katowice – Wschód w Katowicach (District Court, Katowice-East, Katowice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 3(5) of Directive [2011/7] be interpreted as meaning that a period for payment longer than 60 [calendar] days may be expressly stipulated by undertakings only in contracts in which the contractual terms are not determined unilaterally by one of the contracting parties?'

Procedure before the Court

23 In the light of the written observations submitted by the parties and interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union concerning, inter alia, the possible classification of P. as a 'public authority' within the meaning of Article 2(2) of Directive 2011/7, the Court sent a request for information to the referring court, requesting it to confirm that that company constitutes an 'undertaking' within the meaning Article 2(3) of that directive, and to specify the criteria which led the referring court to that classification, for the purpose of determining whether the case in the main proceedings does indeed fall within the scope of Article 3(5) of Directive 2011/7, which refers to transactions between undertakings, and not that of Article 4(4) of that directive, which refers to transactions between undertakings and public authorities.

24 In its reply, received at the Court on 4 October 2023, the referring court confirmed that P. is an 'undertaking' within the meaning of Article 2(3) of Directive 2011/7.

Consideration of the question referred

Admissibility

25 The German Government submits that the request for a preliminary ruling is inadmissible, since the referring court has not demonstrated to the requisite legal standard that the decision which it must give in the main proceedings depends on the answer to the question referred for a preliminary ruling. According to that government, the referring court makes its decision dependent not only on whether the 120-day payment period laid down in the contracts at issue was expressly agreed, within the meaning of Article 3(5) of Directive 2011/7, but also whether such a period is grossly unfair to the creditor, within the meaning of that provision, without, however, ruling in that regard and without referring to that point of law in its question.

26 In the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute in the main proceedings has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court. Consequently, where the question referred concerns the interpretation or the validity of a rule of EU law, it is presumed to be relevant and the Court is, in principle, bound to give a ruling. The Court may refuse to rule on such a question only where it is quite obvious that the interpretation or assessment of the validity of an EU rule which is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to

give a useful answer to the question submitted to it (see, to that effect, judgments of 22 November 2022, *Staatssecretaris van Justitie en Veiligheid (Removal – Medicinal cannabis)*, C-69/21, EU:C:2022:913, paragraph 41, and of 11 January 2024, *Inditex*, C-361/22, EU:C:2024:17, paragraphs 28 and 29).

27 In the present case, the referring court seeks an interpretation of Article 3(5) of Directive 2011/7 in order to determine whether a term in contracts which it classifies as comparable to pre-formulated standard contracts, by which the debtor unilaterally set at 120 days the period for payment of the invoices due under those contracts, instead of the 60 calendar days laid down in that provision, may be classified as 'otherwise expressly agreed in the contract', within the meaning of that provision, and to rule on A.'s application for the late payment interest for the amounts due under those contracts.

28 The request for a preliminary ruling is therefore admissible.

Substance

29 By its question, the referring court asks, in essence, whether Article 3(5) of Directive 2011/7 must be interpreted as meaning that the expression 'otherwise expressly agreed in the contract', in that provision, precludes a contractual term from setting a period for payment longer than 60 calendar days unilaterally determined by the debtor.

30 Under Article 3(5) of Directive 2011/7, Member States are to ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor, within the meaning of Article 7 of that directive.

31 Article 3(5) thus allows deviation from the maximum payment period of 60 calendar days which it lays down, subject to two cumulative conditions. Such a period must, first, be 'expressly agreed in the contract'. Second, the period thus agreed upon cannot be 'grossly unfair to the creditor within the meaning of Article 7' of Directive 2011/7.

32 In so far as Article 3(5) allows for deviation from the maximum payment period of 60 calendar days set out in the contract, it must be interpreted strictly (see, by analogy, judgment of 13 June 2024, *D. (Engine design defect)*, C-411/23, EU:C:2024:498, paragraph 26 and the case-law cited).

33 As regards the first cumulative condition, to which the referring court's question relates, since Article 3(5) of Directive 2011/7 makes no express reference to the law of the Member States for the purpose of determining the meaning and scope of the expression 'otherwise expressly agreed in the contract', it follows from the requirements for the uniform application of EU law and from the principle of equality that that meaning and that scope must normally be given an autonomous and uniform interpretation throughout the European Union, which takes into account not only the wording but also the context of the provision in which that expression appears as well as the objectives of that provision and the act of EU law of which it forms part (see, to that effect, judgments of 9 July 2020, *RL (Directive combating late payment)*, C-199/19, EU:C:2020:548, paragraph 27, and of 1 December 2022, *X (Deliveries of medical products)*, C-419/21, EU:C:2022:948, paragraph 21).

34 Although the wording of Article 3(5) of Directive 2011/7 does not, in itself, make it possible to determine whether a term setting a period for payment longer than 60 calendar days in a contract, the content of which has been unilaterally and entirely determined by the debtor, may be classified as 'otherwise expressly agreed in the contract', within the meaning of that provision, the requirement of an express agreement implies, however, that, having regard to all the contractual documents and terms contained in that contract, it may be established that the parties to the contract expressed their concurrence of wills to be bound specifically by the term setting a maximum period for payment which deviates from that of the 60 calendar days laid down in that provision.

35 Article 3(5) of Directive 2011/7 thus requires the expression of a concurrence of wills on the part of those parties at the time of the conclusion of the contract which goes beyond the mere express reference of such a period in a contractual term, irrespective of whether the contract in which that term appears constitutes, in whole or in part, a pre-formulated standard contract or a contract of a similar nature.

36 Such a requirement may be satisfied not only where such a term has been individually negotiated by the parties, but also, in particular in the context of a pre-formulated standard contract, where the term concerned has been highlighted by one of those parties in the contractual documents in such a way as to distinguish it clearly from the other terms of the contract, thus making clear its nature as a deviation and thus enabling the other party to adhere to it in full knowledge of the facts.

37 That interpretation of Article 3(5) of Directive 2011/7 is consistent both with the general objectives of that directive and with the objective underlying, in particular, that provision.

38 As is apparent from Article 1(1) of Directive 2011/7, read in the light of recital 12 thereof, the purpose of that directive is to combat late payments in commercial transactions and to establish a culture of prompt payment, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of small and medium-sized undertakings (see, to that effect, judgment of 9 July 2020, *RL (Directive combating late payment)*, C-199/19, EU:C:2020:548, paragraph 35).

39 In addition, it follows from recital 13 of that directive that Article 3(5) thereof is an expression of those objectives in that that provision is intended effectively to protect the creditor against late payment by the debtor by establishing a payment period not exceeding 60 calendar days, from which deviation may be made only subject to the two cumulative conditions set out therein, recalled in paragraph 31 of the present judgment.

40 Lastly, it should be borne in mind that, in accordance with Article 3(5) of Directive 2011/7, the setting of a period for payment longer than 60 calendar days as a result of an express agreement between the creditor and the debtor must also comply with the second condition laid down in that provision. Thus, that agreement must not be 'grossly unfair to the creditor within the meaning of Article 7' of that directive. It is apparent from recital 28 of that directive that it prohibits abuse of contractual freedom to the detriment of the creditor. Thus, the Member States are required, in accordance with Article 7(1) of Directive 2011/7, to provide that a grossly unfair term is either not applicable or gives rise to an action for compensation for the damage suffered by the creditor as a result of its application.

41 Under points (a) to (c) of the second subparagraph of Article 7(1) of Directive 2011/7, in order to determine whether a contractual term is grossly unfair to the creditor, all the circumstances of the case must be taken into account, including any gross deviation from good commercial practice, contrary to good faith and fair dealing, the nature of the product or the service, and, in particular, whether the debtor has any objective reason to deviate from the period for payment referred to in Article 3(5) of Directive 2011/7.

42 It follows in particular from the latter requirement that, irrespective of any dominant economic position of the debtor in its relations with the creditor, the effective protection of the latter against the unjustified use, by the debtor, of a contractual term providing for a period for payment longer than 60 calendar days remains fully guaranteed, even though that term follows from an express agreement which satisfies the conditions set out in paragraphs 34 and 35 of the present judgment.

43 In the present case, subject to the verifications which it is for the referring court to carry out, A. claims, first, that it was never in a position to negotiate the term relating to the payment periods of 120 days which appeared in the model contract annexed to the specifications drawn up by P. and, second, that the contracts at issue could be concluded only after A. had accepted the conditions unilaterally set by P.

44 It is for the referring court, first, to ascertain whether, in the light of all the contractual documents and terms contained in that contract, it can be established that A. and P. expressed their concurrence of wills to be bound specifically by the contractual terms providing for a period which deviates from the period for payment of 60 calendar days, laid down in Article 3(5) of Directive 2011/7. Second, it is for the referring court to determine whether, in the light of the factors set out in Article 7 of that directive, recourse to those terms is liable to be grossly unfair to A. and, if so, to draw the appropriate conclusions laid down by national law.

45 In the light of all of the foregoing considerations, the answer to the question referred is that Article 3(5) of Directive 2011/7 must be interpreted as meaning that the expression ‘otherwise expressly agreed in the contract’ precludes a contractual term setting a period for payment longer than 60 calendar days from being determined unilaterally by the debtor, unless it can be established, having regard to all the contractual documents and terms contained in that contract, that the parties to that contract have expressed their concurrence of wills to be bound specifically by the term concerned.

Costs

46 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 (Third Chamber) hereby rules:

Article 3(5) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions

must be interpreted as meaning that the expression ‘otherwise expressly agreed in the contract’ precludes a contractual term setting a period for payment longer than 60 calendar

days from being determined unilaterally by the debtor, unless it can be established, having regard to all the contractual documents and terms contained in that contract, that the parties to that contract have expressed their concurrence of wills to be bound specifically by the term concerned.

[Signatures]