JUDGMENT OF THE COURT (First Chamber)

3 April 2008 *

In Case C-306/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Oberlandesgericht Köln (Germany), made by decision of 26 May 2006, received at the Court on 14 July 2006, in the proceedings

01051 Telecom GmbH

v

Deutsche Telekom AG,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, M. Ilešič and E. Levits, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2007,

after considering the observations submitted on behalf of:

— 01051 Telecom GmbH, by P. Schmitz, Rechtsanwalt,

— Deutsche Telekom AG, by M. Reuter, Rechtsanwalt,

— the German Government, by M. Lumma and A. Günther, acting as Agents,

— the Czech Government, by T. Boček, acting as Agent,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Commission of the European Communities, by B. Schima, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 18 October 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to 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 (OJ 2000 L 200, p. 35).

2 The reference has been made in the course of proceedings between 01051 Telecom GmbH ('01051 Telecom') and Deutsche Telekom AG ('Deutsche Telekom') concerning payment of default interest claimed following alleged late payment of invoices.

Legal context

Community law

3 Directive 2000/35 seeks to harmonise certain aspects of Member States' legislation on combating late payment in commercial transactions.

4 Recitals 7, 9, 10 and 16 in the preamble to that directive are worded as follows:

'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 [EC] 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. Distortions of competition would ensue if substantially different rules applied to domestic and transborder operations.

…

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, including compensation of creditors for the costs incurred, is necessary to reverse this trend and to ensure that the consequences of late payments are such as to discourage late payment.'

5 Article 3(1)(a) to (c) of Directive 2000/35 provides:

'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.'

National law

6 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.'

7 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.’

8 Paragraph 286 of the BGB, after amendment with a view to the implementation of Directive 2000/35, 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'.

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

9 01051 Telecom and Deutsche Telekom supply telecommunications services to the public and to network operators. In addition, Deutsche Telekom offers invoicing services to other operators such as 01051 Telecom.

10 Since 1998, the two operators have been linked by an interconnection contract under which they 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 version of 26 June 2002 of that contract, relied on by both parties before the national court, contains the following clauses:

'17.4 When payment is due

Payments between the contracting parties become due on receipt of the invoice.

The amount of the invoice shall be paid into the bank account identified in the invoice.

17.5 Late payment

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.

If a contracting party is late in making a payment, the following compensation shall be paid:

— interest at the rate of 8% above the base interest rate applicable for the period of the delay in accordance with paragraph 247 of the [BGB];

…'

11 In 2001, 01051 Telecom and Deutsche Telekom concluded an invoicing and debt recovery contract which included, in section 8, the following clause:

'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.'

12 In its action brought at first instance before the Landgericht Bonn (Bonn Regional Court), 01051 Telecom argued that clause 8 of the invoicing and debt recovery contract should also be applied in the context of the interconnection contract. Accordingly, it claimed from Deutsche Telekom, where there remained a residual amount after Deutsche Telekom had claimed any set off, interest for late payment for a period it calculated as running from the 30th day after receipt of the relevant invoice and continuing until that amount was credited to the account of 01051 Telecom.

13 The Landgericht Bonn granted part of the claim for payment, holding that the obligation on Deutsche Telekom consisted in having the amount payable credited to the bank account of 01051 Telecom, and not merely in giving the transfer order. That finding follows of necessity from Article 3(1)(c)(ii) of Directive 2000/35, under which the creditor is entitled, in the event of late payment, to interest to the extent that he has 'not received' the amount due on time. Contrary to the interpretation that prevailed in Germany until then, it is therefore not late execution of the order for payment but the fact that the sum due is received late by the creditor that constitutes late payment.

14 Deutsche Telekom appealed against the judgment of the Landgericht Bonn to the Oberlandesgericht Köln (Cologne Higher Regional Court), disputing the interpretation given by the court at first instance. In its reference for a preliminary ruling, the national court states that, in principle, according to the majority judicial view in Germany, in the case of payment by bank transfer, performance is regarded as effected in time if, firstly, the transfer order is given to the debtor's financial institution before the time-limit for payment expires; secondly, there are sufficient funds in the debtor's account or it has a line of credit in a sufficient amount; and, finally, the financial institution accepts the transfer order within that time-limit.

15 However, the national court recognises that one interpretation of Article 3(1)(c)(ii) of Directive 2000/35 could lead to a different solution. In particular, the use in the German, English and French language versions of that directive of the words 'erhalten', 'received' and 'reçu' respectively could indicate that, in order to avoid late payment within the meaning thereof, the amount due must be credited to the account of the creditor before expiry of the period for payment.

16 It was in those circumstances that the Oberlandesgericht Köln decided to stay proceedings and to refer the following question to the Court of Justice 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 …?'

The question referred for a preliminary ruling

17 By its question, the national court asks essentially at what point a payment by bank transfer may be regarded as having been made on time in a commercial transaction, thus excluding the possibility that the debt may give rise to the charging of interest for late payment within the meaning of Article 3(1)(c)(ii) of Directive 2000/35.

18 01051 Telecom, the Czech Government, and the Commission of the European Communities submit that it is apparent from the *travaux préparatoires* for and the wording and objective of Directive 2000/35 that payment is late when the creditor has not received the amount due within the periods allowed, that is to say, in the case of a bank transfer, when that sum has not been credited to the account of the creditor by the due date for payment. The date on which the sum due is credited to the creditor's account is therefore decisive as regards determining whether the creditor is entitled to interest for late payment.

19 However, Deutsche Telekom and the German, Austrian and Finnish Governments submit, principally, that Directive 2000/35 lays down only minimal requirements with regard to combating late payment in commercial transactions and, in the context of that objective, allows the legislation of the Member States some considerable leeway. In particular, Article 3 of that directive leaves it to the Member States to determine the point at which a payment by bank transfer is to be regarded as having been made in time by laying down solely, in the absence of any contractual agreement, the conditions on which and the period after which interest for late payment may be claimed.

20 In that context, an interpretation requiring the debtor to make the credit transfer through a financial institution by the due date achieves an adequate balance between the interests of the creditor and those of the debtor, having regard in particular to the fact that the time necessary for the credit transfer to be executed depends on the handling of the transaction by the banks and not on any action by the debtor. In those circumstances, it is unreasonable to make the debtor liable for any delays due to the time taken to handle banking transactions if he has acted in good faith by making the credit transfer in time, that is to say before the due date for payment.

21 In order to answer the question referred by the national court, it must first be recalled that although, as Deutsche Telekom and the German, Austrian and Finnish Governments point out, the Directive does not harmonise fully all the rules relating

to late payments in commercial transactions, it does govern certain specific rules in that regard. They include, inter alia, as the Court has already held, rules on interest for late payment (see, to that effect, Case C-302/05 *Commission* v *Italy* [2006] ECR I-10597, paragraph 23).

22 In that regard, after laying down in Article 3(1)(b)(i) a period for payment of 30 days to be applicable in the absence of any contractual agreement, Directive 2000/35 provides, in Article 3(1)(c)(ii), that the creditor is to be entitled to interest for late payment to the extent that 'he has not received the amount due on time, unless the debtor is not responsible for the delay'.

23 It is therefore explicit in the wording of that provision that a debtor's payment is regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date. In the case of payment by bank transfer, only the crediting of the amount due to the creditor's account will enable him to have that sum at his disposal.

24 That interpretation is confirmed by the various language versions of Directive 2000/35 which refer, unequivocally, to receipt of the amount due within the period for payment. Such is the case, inter alia, of the wording 'erhalten', 'received', 'reçu' and 'ricevuto' in the German, English, French and Italian language versions respectively of Directive 2000/35.

25 Moreover, it is clear from the *travaux préparatoires* for that directive that the choice of the word 'received' was not random, but the result of a deliberate decision by the Community legislature. As the Commission points out, during the discussions in the

Council of the European Union which preceded the adoption of that directive, that word was finally preferred to a number of other, less precise, expressions with regard to determination of the point from which a payment is to be regarded as having been made within the period for payment in a commercial transaction.

26 Furthermore, an interpretation which makes the crediting of the amount due to the account of the creditor the decisive criterion of payment, inasmuch as it is based on the point when the sum due is definitely at the creditor's disposal, complies with the main objective pursued by Directive 2000/35, as is apparent, inter alia, from recitals 7 and 16 in the preamble thereto, that is to say the protection of those holding financial debts.

27 It is worth adding also that such a reading of Article 3(1)(c)(ii) of the Directive appears to be confirmed by the interpretation adopted by the Court in respect of other areas of Community law. Thus, as 01051 Telecom points out, it is apparent from the case-law of the Court that the crediting to the account of the own resources of the European Communities constitutes the decisive criterion for establishing whether a Member State which is required to place a sum of money at the disposal of the Commission has failed to fulfil its obligations and whether, consequently, it is required to pay interest for late payment (see, to that effect, Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraphs 42, 43 and 46).

28 Accordingly, the decisive point for the assessment of whether, in a commercial transaction, payment by bank transfer may be regarded as having been made in time, thus excluding the possibility of the debt giving rise to the charging of interest for late payment within the meaning of that provision, is the date on which the sum due is credited to the account of the creditor.

29 That conclusion cannot be called into question by the argument, raised in particular by the Finnish Government, that such an interpretation of Article 3(1)(c)(ii) of Directive 2000/35 would lead to the debtor's being unreasonably required to bear the risk relating to delays in the handling of banking transactions.

30 In that regard, it is sufficient to observe that that provision lays down specifically, in its last phrase, that the debtor must not be held liable for delays for which he is not responsible. In other words, Directive 2000/35 itself excludes interest for late payment in cases where the late payment is not the result of the debtor's conduct, as he has diligently taken into account the periods normally necessary for execution of a bank transfer.

31 Moreover, as the Czech Government observes, it is usual in commercial transactions for regulatory or contractual provisions to lay down the periods required for the execution of bank transfers, so that a debtor is in a position to take such periods into account and thus avoid incurring interest for late payment.

32 In view of all the foregoing considerations, the answer to the question referred to the Court must be that Article 3(1)(c)(ii) of Directive 2000/35 is to be interpreted as meaning that it requires, in order that a payment by bank transfer may avoid or put an end to the application of interest for late payment, that the sum due be credited to the account of the creditor within the period for payment.

Costs

33 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 (First Chamber) hereby rules:

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 is to be interpreted as meaning that it requires, in order that a payment by bank transfer may avoid or put an end to the application of interest for late payment, that the sum due be credited to the account of the creditor within the period for payment.

[Signatures]