Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

28 January 2020*

(Failure of a Member State to fulfil obligations — Directive 2011/7/EU — Combating late payment in commercial transactions — Commercial transactions where the debtor is a public authority — Obligation of Member States to ensure that the period for payment imposed on public authorities does not exceed 30 or 60 days — Obligation to achieve a specified result)

In Case C-122/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 14 February 2018,

**European Commission**, represented by G. Gattinara and C. Zadra, acting as Agents,

applicant,

v

**Italian Republic**, represented by G. Palmieri, acting as Agent, and by S. Fiorentino and F. De Luca, avvocati dello Stato,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Safjan and S. Rodin, Presidents of Chambers, L. Bay Larsen, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

## Judgment

1 By its application, the European Commission requests that the Court declare that, by not having ensured and by continuing not to ensure that its public authorities avoid exceeding the periods of 30 or 60 calendar days applicable to the payment of their commercial debts, the Italian Republic has failed to fulfil its obligations under 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) and, in particular, its obligations set out in Article 4 of that directive.

## Legal context

### *EU law*

2 Recitals 3, 9, 12, 14, 23 and 25 of Directive 2011/7 state the following:

‘(3) Many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. …

…

(9) This Directive should regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities, given that public authorities handle a considerable volume of payments to undertakings. It should therefore also regulate all commercial transactions between main contractors and their suppliers and subcontractors.

…

(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 and on the compensation of creditors for the costs incurred, and, inter alia, that the exclusion of the right to compensation for recovery costs should be presumed to be grossly unfair.

…

(14) In the interest of consistency of Union legislation, the definition of “contracting authorities” in 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 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 services contracts [OJ 2004 L 134, p. 114] should apply for the purposes of this Directive.

…

(23) As a general rule, public authorities benefit from more secure, predictable and continuous revenue streams than undertakings. In addition, many public authorities can obtain financing at more attractive conditions than undertakings. At the same time, public authorities depend less than undertakings on building stable commercial relationships for the achievement of their aims. Long payment periods and late payment by public authorities for goods and services lead to unjustified costs for undertakings. It is therefore appropriate to introduce specific rules as regards commercial transactions for the supply of goods or services by undertakings to public authorities, which should provide in particular for payment periods normally not exceeding 30 calendar days, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and in any event not exceeding 60 calendar days.

…

(25) A particular cause for concern in connection with late payment is the situation of health services in a large number of Member States. Healthcare systems, as a fundamental part of Europe's social infrastructure, are often obliged to reconcile individual needs with the available finances … Member States should therefore be able to grant public entities providing healthcare a certain amount of flexibility in meeting their commitments. For that purpose, Member States should be allowed, under certain conditions, to extend the statutory payment period up to a maximum of 60 calendar days. Member States should, nonetheless, make every effort to ensure that payments in the healthcare sector are made within the statutory payment periods.'

3 Article 1(1) and (2) of Directive 2011/7 provides:

'1. 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 (SMEs)].

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

4 Article 2 of that directive states:

'For the purpose of this Directive:

…

(2) "public authority" means any contracting authority, as defined in point (a) of Article 2(1) of Directive [2004/17] and in Article 1(9) of Directive [2004/18], regardless of the subject or value of the contract;

…

(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) or Article 4(1) are satisfied;

…

…'

5 Article 3(1) and (3) of Directive 2011/7 provides:

‘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;

(b) where the date or period for payment is not fixed in the contract, that the creditor is entitled to interest for late payment upon the expiry of any of the following time limits:
   (i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment;
   (ii) where the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of receipt of the goods or services;
   (iii) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;
   (iv) where 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 calendar days after that date.’

6 Article 4 of that directive, entitled ‘Transactions between undertakings and public authorities’, provides, in paragraphs 1, 3, 4 and 6 thereof:

‘1. Member States shall ensure that, in commercial transactions where the debtor is a public authority, the creditor is entitled upon expiry of the period defined in paragraphs 3, 4 or 6 to statutory 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. Member States shall ensure that in commercial transactions where the debtor is a public authority:

(a) the period for payment does not exceed any of the following time limits:
   (i) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment;
   (ii) where the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of receipt of the goods or services;
   (iii) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;

(iv) where 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 calendar days after that date;

(b) the date of receipt of the invoice is not subject to a contractual agreement between debtor and creditor.

4. Member States may extend the time limits referred to in point (a) of paragraph 3 up to a maximum of 60 calendar days for:

(a) any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject, as a public undertaking, to the transparency requirements laid down in Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [(OJ 2006 L 318, p. 17)];

(b) public entities providing healthcare which are duly recognised for that purpose.

…

6. Member States shall ensure that the period for payment fixed in the contract does not exceed the time limits provided for in paragraph 3, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and that it in any event does not exceed 60 calendar days.'

### *Italian law*

7 Directive 2011/7 was transposed into the Italian legal system by Decreto legislativo n. 192 — Modifiche al decreto legislativo 9 ottobre 2002, n. 231, per l'integrale recepimento della direttiva 2011/7/UE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali, a norma dell'articolo 10, comma 1, della legge 11 novembre 2011, n. 180 (Legislative Decree No 192, amending Legislative Decree of 9 October 2002, No 231, for the purpose of transposing in full Directive 2011/7/EU on combating late payment in commercial transactions, in accordance with Article 10(1) of the Law of 11 November 2011, No 180), of 9 November 2012 (GURI No 267, of 15 November 2012). Legislative Decree No 231 of 9 October 2002 had, for its part, transposed into the Italian legal system 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).

8 Among the measures adopted by the Italian Republic to guaranteee the punctuality of the payments of public authorities is Decreto-legge n. 35 — Disposizioni urgenti per il pagamento dei debiti scaduti della pubblica amministrazione, per il riequilibrio finanziario degli enti territoriali, nonché in materia di versamento di tributi degli enti locali (Decree-Law No 35, laying down urgent provisions for the payment of the outstanding debts of the public administration, for the financial rebalancing of local and regional authorities and for the payment of taxes by local authorities) of 8 April 2013 (GURI No 82 of 8 April 2013), converted into law, with amendments, by Law No 64 of 6 June 2013 (GURI No 132 of 7 June 2013), and Decreto-legge n. 66 — Misure urgenti per la competitività e la giustizia sociale (Decree-Law No 66, laying down urgent measures for competitiveness and social justice) of 24 April 2014 (GURI No 95 of 24 April 2014), converted into law, with amendments, by Law No 89 of 23 June 2014 (GURI No 143 of 23 June 2014). Those decree-laws provide, inter alia, for the allocation of additional financial resources for the payment of debts established as certain, of a fixed amount and due, held by undertakings against public authorities.

9 Fiscal measures have been adopted in order to improve the position of undertakings holding claims against public authorities, including Article 12(7a) of Decreto-legge n. 145 — Interventi urgenti di avvio del piano « Destinazione Italia », per il contenimento delle tariffe elettriche e del gas, per la riduzione dei premi RC-auto, per l'internazionalizzazione, lo sviluppo e la digitalizzazione delle imprese, nonché misure per la realizzazione di opere pubbliche ed EXPO 2015 (Decree-Law No 145, laying down urgent measures for the launch of the 'Destination Italy' plan, for the limitation of electricity and gas tariffs, for the reduction of motor vehicle third party liability insurance, for the internationalisation, development and digitalisation of companies as well as for the performance of public works and EXPO 2015), of 23 December 2013 (GURI No 300 of 23 December 2013), converted into law, with amendments, by Law No 9 of 21 February 2014 (GURI No 43 of 21 February 2014). By virtue of that provision, undertakings can offset their tax liabilities against debts established as certain, of a fixed amount and due, held by companies against public authorities.

## Pre-litigation procedure

10 Following a series of complaints from Italian economic operators and associations of economic operators, the Commission sent the Italian Republic, on 19 June 2014, a letter of formal notice, alleging that it had failed to fulfil its obligations inter alia under Article 4 of Directive 2011/7.

11 By letter dated 18 August 2014, that Member State replied to the letter of formal notice, informing the Commission of the specific measures taken to combat late payment in commercial transactions between public and private entities. Those measures consisted in the early transposition of Directive 2011/7, actions to eliminate the stock of overdue public debt and the creation of a new regulatory and administrative system intended to encourage compliance with the payment periods prescribed in that directive and to avoid an increase in the stock of overdue and unpaid debts of public authorities. In the same letter, the Italian Republic stated that, notwithstanding the adoption of those measures, the existence of late payments could not be ruled out.

12 On 12 November 2014, the Commission requested the Italian Republic to send it bimonthly reports on the actual duration of the public authorities' payment periods. The Italian Republic acceded to that request, sending the Commission seven bimonthly reports between 1 December 2014 and 6 August 2016.

13 By letter of 21 September 2016, the Commission stated that the bimonthly reports sent up to that date did not take into account all the invoices indicating the Italian public authorities as recipient, but only those actually paid by those authorities during the reference periods. Consequently, that institution requested the Italian Republic to provide it with updated data concerning all the invoices.

14 In response to the letter of 21 September 2016, that Member State provided the Commission, on 5 December 2016, with data obtained using the trade receivables monitoring platform, from which it was apparent that the average payment time for the first half of 2016 was 50 days.

15 On 16 February 2017, the Commission, taking the view that the situation resulting from the body of reports submitted by the Italian Republic was not in conformity with Article 4 of Directive 2011/7, issued a reasoned opinion within the meaning of Article 258 TFEU and requested that Member State to comply with it within two months.

16 In its reply of 19 April 2017 to the reasoned opinion, the Italian Republic stated that the average payment time by public authorities was 51 days for the whole of 2016, that is to say, 44 days for State administrative bodies, 67 days for the national health service, 36 days for regions and autonomous provinces, 43 days for local entities, 30 days for national public entities and 38 days for other public authorities.

17 Being of the view that the Italian Republic had still not remedied the infringements of Article 4(3) and (4) of Directive 2011/7, the Commission brought the present action.

18 The Italian Republic, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, requested the Court to sit in a Grand Chamber.

## The action

### *Arguments of the parties*

19 The Commission argues that the data provided by the Italian Republic itself demonstrate that the Italian public authorities exceeded the payment deadlines of 30 or 60 days laid down by Article 4(3) and (4) of Directive 2011/7. Such an exceedance — the existence of which is not specifically disputed by that Member State — concerns all public authorities and covers a several-year period.

20 In that regard, the Commission emphasises that the data demonstrating the reality of the alleged failure to fulfil obligations were continuously recorded and updated in the period between September 2014 and December 2016.

21 In addition, the Commission notes that certain studies carried out by other entities and associations contradict the bimonthly reports submitted by the Italian Republic according to which there has been a gradual reduction in average payment times. Those studies reveal the existence of average payment times ranging from 99 days (study by the Confartigianato, an association representing certain craftsmen and SMEs) 145 days (study by the Assobiomedica, an association representing undertakings providing medical devices to Italian healthcare facilities) or 156 days (study by the ANCE, an association of undertakings in the construction sector). In borderline cases, payment time even reaches 687 days (study by the daily newspaper *Il Sole 24 Ore*).

22 In the Commission's view, such a continuous and systematic exceedance by the Italian public authorities of the payment periods prescribed in Article 4(3) and (4) of Directive 2011/7 constitutes in itself an infringement of that directive attributable to the Italian Republic. Since the entry into force of that directive, Member States, by virtue of Article 4(3) and (4) thereof, have been required not only to prescribe, in their legislation transposing that directive and in contracts governing commercial transactions in which the debtor is one of their public authorities, maximum periods for payment in conformity with those provisions, but also to ensure that those periods are actually complied with by those public authorities.

23 In that context, the Commission notes, in the first place, that the concept of 'period for payment', within the meaning of Article 4(3)(a) of Directive 2011/7, refers to the period within which public authorities are required effectively to pay their commercial debts, that period being triggered by the occurrence of specific factual circumstances, such as receipt of the invoice, receipt of goods or provision of services. The Commission adds that, in defining the concept of 'late payment', Article 2(4) of that directive refers to a specific element, namely, 'payment not made' within the contractual or statutory period of payment. Such an interpretation of the concept of 'period for payment' is, moreover, the only one allowing the objective of Directive 2011/7 — combating late payment within the internal market effectively — to be pursued efficiently.

24 In the second place, the Commission considers that, since the infringement of Article 4(3) and (4) of Directive 2011/7 by public authorities is such as to engage the liability of the Member State concerned, the question of whether those authorities are exercising public powers or whether they are

acting *de jure privatorum* is irrelevant in this context. Moreover, the concept of 'contracting authority' used in Article 2(2) of that directive to define the concept of 'public authority' is not dependent on the existence of public powers.

25 In the third place, the Commission submits that its proposed interpretation of Article 4(3) and (4) of Directive 2011/7 is not called into question by the judgment of 16 February 2017, *IOS Finance EFC* (C-555/14, EU:C:2017:121), cited by the Italian Republic in its response to the reasoned opinion.

26 So far as concerns the data it provided to the Commission, the Italian Republic claims, in the first place, that those data, relating to the years 2015 to 2017 and updated in March 2018, show a continuous and systematic improvement in the average payment times by the public authorities. That improvement led to a reduction in the average number of late days in the period from 2015 to 2017 (from 23 days to 8 days). If that trend were to be confirmed, it would be possible to comply, in the case of invoices issued in 2018, with the periods for payment laid down in Article 4(3) and (4) of Directive 2011/7.

27 In the second place, the Italian Republic submits that the analytical procedures adopted by the Commission with regard to the data provided in its bimonthly reports are inappropriate.

28 In that regard, it stresses, first, that the Commission's choice to use the indicator corresponding to the 'average payment time' rather than the indicator relating to the 'average delay' affects the reliability of the analysis it carried out. Indeed, given that that first indicator has the 'standard' 30-day period as point of reference in the analysis of the magnitude of late payments by public authorities, the Commission disregarded the fact that the 60-day period for payment provided for in Article 4(4) of Directive 2011/7 applies not only to transactions carried out by those public entities providing healthcare, but also to those carried out by any public authority which carries out economic activities of an industrial and commercial nature and which is subject to Directive 2006/111. Second, the Commission made a misleading temporal comparison of the data by not taking into account the dynamic of making payments. That institution's analysis therefore crystallised when the last bimonthly report was sent, without payments made subsequently being taken into account.

29 In the third place, the Italian Republic contests the results of the studies mentioned in paragraph 21 of the present judgment, which, due to their unreliability and the partial nature of the data collected, are irrelevant.

30 So far as concerns the scope of Article 4(3) and (4) of Directive 2011/7, the Italian Republic submits, in the first place, that a literal and systematic interpretation of those provisions indicates that, although that directive requires Member States to guarantee, in their national legislation transposing that directive and in contracts governing commercial transactions in which the debtor is one of their public authorities, maximum periods for payment in conformity with those provisions and to provide for the right of creditors, in the event of non-compliance with those periods, to late payment interest and compensation for recovery costs, those same provisions do not, however, require Member States to guarantee effective compliance with those periods by their public authorities in all circumstances. Directive 2011/7 aims to standardise not the deadlines by which public authorities must actually pay the amounts due as remuneration for their commercial transactions, but only the deadlines by which they must fulfil their obligations without incurring automatic penalties for late payment.

31 In addition to the fact that Article 4(6) of Directive 2011/7 merely requires compliance with the period for payment 'fixed in the contract', it does not follow from Article 4(3) and (4) of that directive that public authorities are required to pay their debts within the period prescribed therein. As for the expression 'period for payment', it does not refer, in the relevant provisions of the said directive, to the period within which public authorities must actually pay such debts.

32 In the second place, the Italian Republic submits that Article 4(3) of Directive 2011/7 merely fixes the starting points for periods for payment in commercial transactions. Thus, the reference in that provision to the factual circumstances which are receipt of the invoice, receipt of goods, provision of services or acceptance or verification of goods does not mean that a Member State is required to ensure *in concreto* compliance with those deadlines.

33 In the third place, the absence of precise deadline within which the obligation imposed by Article 4(3) and (4) of Directive 2011/7 must be fulfilled highlights that, as regards complying with periods for payment, that directive puts the Member State concerned not under obligations to achieve a specified result, but at most under obligations as to the means employed, the infringement of which can be established only if that Member State's situation differs considerably from that envisaged by that directive. In the present case, however, the data provided to the Commission demonstrate, on the one hand, a considerable and continuous reduction in late payments of the commercial debts of the public authorities and, on the other hand, regarding more specifically the public authorities operating within the national health service, a modest delay, exceeding by only a few days the period for payment prescribed in Article 4(4) of the same directive.

34 In the fourth place, the Italian Republic claims that it cannot be held liable for the public authorities' exceedance of periods for payment. In its view, where a body of a Member State acts on an equal footing with a private operator, that body is liable only before national courts for any infringement of EU law, in the same way as a private operator is. In those circumstances, so as to ensure observance of EU law, Member States can intervene only indirectly, by correctly transposing the provisions with which these public authorities must comply and by imposing sanctions in the event of non-compliance with those provisions. In prescribing periods for payment not exceeding those prescribed in Directive 2011/7 and interest for late payment and compensation for recovery costs incurred, however, the Italian Republic has met the obligations imposed by that directive.

35 In any event, even supposing that Directive 2011/7 required it to ensure that public authorities actually complied with periods for payment in their commercial transactions, the Italian Republic claims that it would be liable only for serious, continuous and systematic infringements of that directive such as to demonstrate breach of the principle of loyal cooperation enshrined in Article 4(3) TEU.

36 So far as concerns, last, the judgment of 16 February 2017, *IOS Finance EFC* (C-555/14, EU:C:2017:121), the Italian Republic submits that the Court approved in that judgment a regulatory mechanism allowing the systematic late payment of public authorities' debts to creditors who have not waived interest for late payment and compensation for recovery costs. If it were accepted, as the Commission maintains, however, that actual delays in payment by public authorities constitute an infringement of Directive 2011/7 attributable to the Member State concerned, then the Court necessarily found such a regulatory mechanism not to be in conformity with EU law, in so far as it allowed the systematic late payment of the commercial debts of public authorities. The Italian Republic concludes, first, that the right effectively guaranteed to creditors by Directive 2011/7 concerns only the late payment interest it imposes and, second, that the objective of that directive, which is combating late payment, 'is pursued only indirectly'.

### *Findings of the Court*

37 By its action, the Commission requests that the Court declare that, by not ensuring that its public authorities comply with the periods of 30 or 60 calendar days applicable to the payments they must make as remuneration for their commercial transactions with undertakings, the Italian Republic has failed to fulfil its obligations under Article 4(3) and (4) of Directive 2011/7.

38 Under Article 4(3)(a) of that directive, Member States are to ensure, in commercial transactions where the debtor is a public authority, that the period for payment term does not exceed 30 calendar days from the factual circumstances enumerated therein. As for Article 4(4) of that directive, it gives Member States the option of extending that period up to a maximum of 60 calendar days for those public authorities and entities covered by it.

39 As regards, in the first place, the interpretation of those provisions, it should be recalled that, in accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part (judgment of 7 November 2019, *UNESA and Others*, C-105/18 to C-113/18, EU:C:2019:935, paragraph 31 and the case-law cited).

40 Concerning, first, the wording of Article 4(3) of Directive 2011/7, it follows from that wording, particularly the phrase 'Member States shall ensure that in commercial transactions where the debtor is a public authority … the period for payment does not exceed any of the following time limits', that the obligation imposed on Member States by that provision pertains to the effective compliance by their public authorities with the periods for payment it prescribes.

41 It should be noted, in that regard, that that provision is drafted in terms that are just as mandatory as those used in Article 4(1) of that directive, relating to the payment of statutory interest for late payment. It follows that those provisions impose on Member States not alternative obligations, but complementary ones.

42 Second, that literal interpretation is supported by the context of Article 4(3) and (4) of Directive 2011/7.

43 It should therefore be noted that the wording of Article 3 of that directive, which relates to transactions between undertakings, differs significantly from that of Article 4 of the directive, which relates to transactions between undertakings and public authorities. Admittedly, those articles both provide that Member States are to ensure that the creditor is entitled to obtain interest in the event of late payment. However, as regards compliance with periods for payment, where Article 4(3) of that directive lays down the specific obligation recalled in paragraph 40 of this judgment, Article 3(3) thereof merely provides for the creditor's right to interest in the event that those periods are exceeded.

44 That analysis is confirmed by comparing Directive 2011/7 with its predecessor, Directive 2000/35. Whereas the more recent directive expressly states in Article 4 thereof, which relates to transactions between undertakings and public authorities, that Member States are to ensure that the period for payment does not exceed 30 days or, in certain cases, a maximum of 60 days, the previous directive contained no such provision and was limited to setting, in Article 3 thereof, an obligation relating to the payment of default interest — now expressed in Article 3 of Directive 2011/7 — without treating differently the situation where the debtor is a public authority.

45 Third, the literal and contextual interpretation of Article 4(3) and (4) of Directive 2011/7 is supported by the objectives pursued by that directive. According to Article 1(1) thereof, the aim of the 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 SMEs.

46 In that respect, reading recitals 3, 9 and 23 of Directive 2011/7 together shows that public authorities, which make a considerable number of payments to undertakings, benefit from more secure, predictable and continuous revenue streams than undertakings, can obtain financing on more attractive conditions than undertakings and depend less on stable commercial relationships for the achievement of their aims than undertakings. In the case of those undertakings, however, late payments by the authorities

in question lead to unjustified costs for them, aggravating their liquidity constraints and complicating their financial management. Those late payments are also detrimental to their competitiveness and profitability, as those undertakings have to obtain external financing because of them.

47 Those considerations, pertaining to the large number of commercial transactions in which public authorities are the debtors of undertakings and to the costs and difficulties created for undertakings by those authorities' late payments, show that the EU legislature intended to impose increased obligations on Member States as regards transactions between undertakings and public authorities and imply that Article 4(3) and (4) of Directive 2011/7 is to be interpreted as requiring Member States to ensure that those authorities make, within the periods prescribed by those provisions, payments as remuneration for commercial transactions with undertakings.

48 It follows from the foregoing that the interpretation of the Italian Republic, according to which Article 4(3) and (4) of Directive 2011/7 imposes on Member States only the obligation to ensure that the statutory and contractual payment periods applicable to commercial transactions involving public authorities are in conformity with those provisions and to provide, in the event of non-compliance with those periods, for the right of a creditor who has fulfilled his contractual and statutory obligations to obtain statutory interest for late payment, but does not impose the obligation to ensure that those public authorities effectively comply with those periods, cannot be accepted.

49 That conclusion is in no way affected by the judgment of 16 February 2017, *IOS Finance EFC* (C-555/14, EU:C:2017:121), on which the Italian Republic relies.

50 It is important, first of all, to recall that that judgment, which concerns an 'extraordinary [national] financing mechanism for payment of suppliers', for a limited period, intended to deal with the delays which had been built up because of the economic crisis, concerns the interpretation not of Article 4(3) and (4) of Directive 2011/7, but, in essence, of Article 7(2) and (3) thereof, relating to unfair contractual terms and practices with respect to interest for late payment.

51 Next, in considering, in paragraphs 31 and 36 of that judgment, that the waiver, by the creditor of a public authority, of interest for late payment and of compensation for recovery costs must, in order to be in conformity with Directive 2011/7, not only have been freely agreed to, but, in addition, be made in exchange for 'immediate' payment of the principal amount of the debt, the Court has, as the Commission has pointed out, stressed the paramount importance which Member States must attach, in the context of that directive, to the effective and prompt payment of such amounts.

52 Contrary to what the Italian Republic claims, it cannot be inferred from that same judgment that the Court approved the systematic late payment of the commercial debts of public authorities to creditors who had not waived interest for late payment and compensation for recovery costs.

53 In the light of the foregoing considerations, it must be held that Article 4(3) and (4) of Directive 2011/7 must be interpreted as requiring Member States to ensure that their public authorities effectively comply with the periods for payment prescribed therein.

54 It is appropriate to ascertain, in the second place, in the light of the argument of the Italian Republic mentioned in paragraph 34 of the present judgment, whether the exceedance, by the public authorities, of such periods for payment is liable to constitute a failure to fulfil the obligations of the Member States concerned within the meaning of Article 258 TFEU.

55 In that regard, it is important to recall that a Member State's failure to fulfil obligations may, in principle, be established under Article 258 TFEU whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (judgments of 5 May 1970, *Commission* v *Belgium*, 77/69, EU:C:1970:34,

paragraph 15; of 12 March 2009, *Commission* v *Portugal*, C-458/07, not published, EU:C:2009:147, paragraph 20; and of 4 October 2018, *Commission* v *France (Advance payment)*, C-416/17, EU:C:2018:811, paragraph 107).

56 In the case at hand, the Italian Republic does not dispute that the failures to fulfil obligations alleged by the Commission pertain to its public authorities, within the meaning of Article 2(2) of Directive 2011/7. That provision refers, for the purposes of defining the concept of 'public authority', to the definition of the concept of 'contracting authority', inter alia, by, Article 1(9) of Directive 2004/18, that reference responding to a need for consistency of EU legislation, as recital 14 of Directive 2011/7 indicates.

57 It is important to note that the argument of the Italian Republic that public authorities cannot engage the liability of the Member State to which they belong when acting in a commercial transaction, outside their public powers, would, if accepted, render Directive 2011/7 — in particular Article 4(3) and (4) thereof, which specifically places Member States under the obligation to ensure effective compliance with the periods for payment prescribed therein in commercial transactions where the debtor is a public authority — ineffective.

58 As regards, in the third place, the substantive nature of the failure to fulfil obligations alleged by the Commission under Article 4(3) and (4) of Directive 2011/7, it should be recalled that, in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (judgment of 18 October 2018, *Commission* v *United Kingdom*, C-669/16, EU:C:2018:844, paragraph 40 and the case-law cited), namely, in the case at hand, on 16 April 2017.

59 In that regard, it appears from the last bimonthly report submitted by the Italian Republic to the Commission, dated 5 December 2016, that the average payment time by public authorities for the first half of 2016 was 50 days (47 days when using the weighted average of the data), those data having been calculated using transactions carried out by more than 22 000 public authorities and involving approximately 13 million invoices received by them.

60 In addition, in the response to the reasoned opinion and in its annexes, the Italian Republic stated that, for the whole of 2016, average payment times had risen to 41 days for public authorities not coming within the national health system and to 67 days for those coming within it, those data having been based on the invoices received by all public authorities that year (more than 27 million).

61 As for the argument of the Italian Republic according to which the failure to fulfil obligations should be assessed on the basis of the average lateness of payments rather than the average payment time, it is sufficient to state that it is apparent, in any event, from the response to the reasoned opinion and from its annexes, referred to in the preceding paragraph, that average delays in payment were, in 2016, 10 days for public authorities not coming within the national health system and 8 days for those coming within it.

62 Those data, together with those provided by the Italian Republic since the initiation of the pre-litigation procedure, over an uninterrupted period of time, show that the average period within which the Italian public authorities as a whole made payments as remuneration for their commercial transactions have exceeded the periods for payment prescribed in Article 4(3) and (4) of Directive 2011/7.

63 In that respect, it should be pointed out that the Italian Republic does not dispute the fact that its public authorities, as a whole, have exceeded, on average, those periods, nor does it claim that analysing those data on the basis of other methods would have made it possible to establish compliance with those periods. It nevertheless maintains, first, that a series of measures taken since

2013 have contributed to a gradual reduction in those delays in payment and, second, that a failure to fulfil obligations can be established only where there has been a serious, continuous and systematic breach of the obligations imposed by Article 4 of Directive 2011/7, which has not been the case here.

64 However, such considerations are not such as to rule out the existence, at the end of the period laid down in the reasoned opinion, of a failure of that Member State to fulfil its obligations under Article 4(3) and (4) of Directive 2011/7 (see, by analogy, judgment of 4 March 2010, *Commission* v *Italy*, C-297/08, EU:C:2010:115, paragraphs 77 and 78). Moreover, it follows from the case-law of the Court that an action against a Member State for failure to fulfil its obligations is objective in nature and, consequently, where a Member State fails to fulfil its obligations under EU law, the infringement exists regardless of the frequency or the scale of the circumstances complained of (see, to that effect, judgment of 30 January 2003, *Commission* v *Denmark*, C-226/01, EU:C:2003:60, paragraph 32 and case-law cited).

65 Consequently, the fact — assuming it were established — that the situation involving the public authorities' late payments in commercial transactions covered by Directive 2011/7 was improving could not prevent the Court from holding that the Italian Republic had failed to fulfil its obligations under EU law (see, by analogy, judgment of 24 October 2019, *Commission* v *France (Exceedance of limit values for nitrogen dioxide)*, C-636/18, EU:C:2019:900, paragraph 49).

66 In the light of all the foregoing considerations, it must be held that, by not ensuring that its public authorities effectively comply with the periods for payment prescribed in Article 4(3) and (4) of Directive 2011/7, the Italian Republic has failed to fulfil its obligations under those provisions.

## Costs

67 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by not ensuring that its public authorities effectively comply with the periods for payment prescribed in Article 4(3) and (4) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, the Italian Republic has failed to fulfil its obligations under those provisions.**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]