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LATE PAYMENT DIRECTIVE: RECENT AND PENDING CASES AT THE COURT OF JUSTICE

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ABSTRACT

This article analyses recent and pending cases at the Court of Justice concerning the interpretation of the provisions of the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. So far the Court of Justice had issued only one judgment in which it had interpreted the provisions of the Directive 2011/7/EU, the judgment in the case Federconsorzi in which the referring court was concerned with the issues of the scope of application of Directive 2011/7/EU rationae materiae and rationae temporis. There are three more pending cases at the Court of Justice in which the referring courts asked for interpretation of the various provisions of Directive 2011/7/EU. This article reviews the judgment of the Court of Justice in Federconsorzi, and also discusses and offers answers to the questions raised by the referring courts in the still pending cases.

KEYWORDS: late payment, commercial transactions, Directive 2011/7/EU

1. INTRODUCTION

In an effort to develop a culture of prompt payment in the European Union, in 2011 the European Parliament and Council have adopted Directive 2011/7/EU on combating late payment in commercial transactions,[1] which is a recast of the previous Directive 2000/35/EC.[2] Building on the three pillars of the Direc-

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[1] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, pp. 1 – 10; hereinafter: Directive 2011/7/EU.

[2] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, pp. 35 – 38; hereinafter: Directive 2000/35/EC.

tive 2000/35/EC,[3] Directive 2011/7/EU has introduced several novelties aimed at strengthening the payment discipline in commercial transactions.[4]

Review clause included in the Article 11 of Directive 2011/7/EU tasked the European Commission with submitting a report to the European Parliament and the Council on the implementation of Directive 2011/7/EU by 16 March 2016. The report submitted in August 2016[5] has shown that the improvements in average payment periods remained modest, as the Directive is still at an early stage of its lifecycle.[6]

The report has also shown that several terms used in Directive 2011/7/EU, such as "expressly agreed in the contract" and "grossly unfair to the creditor", caused confusion throughout the Member States.[7] These terms had not been yet interpreted by the Court of Justice.

[3] The three pillars of Directive 2000/35/EC are provisions concerning: late payment interest (Article 3), retention of title (Article 4) and recovery procedures for unchallenged claims (Article 5). See: Perales Viscasillas, M. P., Late Payment Directive 2000/35 and the CISG, Pace International Law Review, Vol. 19, (1) 2007, pp. 125 – 142; Schulte-Braucks, R.; Ongena, S., The Late Payment Directive – a step towards an emerging European Private Law?, European Review of Private Law, Vol. 11, (4) 2003, pp. 519 – 544. In particular on provisions of Directive 2000/35/EC concerning the retention of title see: McCormack, G., Retention of Title and the EC Late Payment Directive, Journal of Corporate Law Studies, Vol. 1, (2) 2001, pp. 501 – 518; Milo, J. M., Combating Late Payment in Business Transactions: How a New European Directive Has Failed to Set a Substantial Minimum Standard Regarding National Provisions on Retention of Title, European Review of Private Law, Vol. 10, (3) 2003, pp. 379 – 393.

[4] Article 4 of Directive 2011/7/EU harmonised the period for payment by public authorities to undertakings, providing that public authorities have to pay for goods and services, in principle, within 30 days. Article 6 introduced the right to compensation of creditor's own recovery costs as a new legal consequence of late payment. See in detail: Bilotta, C., Ending the Commercial Siesta: The Shortcomings of European Union Directive 2011/7/EU on Combating Late Payments in Commercial Transactions, Brooklyn Journal of International Law, Vol. 38, (2) 2013, pp. 699 – 727.

[5] European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, COM(2016) 534 final, Brussels, 26.8.2016.

[6] In some Member States the Directive 2011/7/EU had a negative outcome, as stakeholders argue that the prescribed statutory periods for payment have given larger companies more leverage to demand longer payment periods (European Commission, Commission Staff Working Document - Evaluation of the Late Payment Directive/ REFIT Evaluation - Accompanying the document: Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions, SWD/2016/0278 final, Brussels, 26.8.2016, p. 17).

[7] Ibid., p. 27.

However, recently the Court of Justice had the opportunity to interpret provisions of Directive 2011/7/EU for the first time, in the judgment which is analysed in the next chapter of this article. There are three more cases pending at the Court of Justice in which the referring courts have asked the Court of Justice for a clarification of the provisions of the Directive 2011/7/EU. The questions raised in these cases are discussed in the third and fourth chapter of this article.

2. MODIFICATION OF NATIONAL LAW TO THE DISADVANTAGE OF A CREDITOR OF THE STATE: *FEDERCONSORZI*

The judgment in the case *Federconsorzi*[8] is the first and so far the latest judgment of the Court of Justice concerning the interpretation of the provisions of Directive 2011/7/EU. The request for a preliminary ruling of the Court of Justice was submitted by the Italian Supreme Court of Cassation[9] in proceedings between the Ministry of Agriculture, Food and Forestry,[10] on the one hand, and the Federation of Italian Agricultural Cooperatives[11] and the Judicial liquidation of assets transferred to the creditors of the Federconsorzi[12], on the other hand, concerning the debt owed by the Ministry to the Federconsorzi.

The facts of the case in the main proceedings before the referring court, simplified, are as follows. In 1948 the Italian government had established a system for the centralised management of the supply of cereals and other agricultural products under which the existing farming organisations were entrusted with ensuring the supply of those agricultural products. Expenses incurred for the compulsory storage management and the marketing of domestic agricultural products were to be reimbursed by the State to the farming organisations created in the form of cooperative societies. An organisation was created at the national level, the Federconsorzi, with the task to report annually on the management of those cooperative societies. The claims of the agricultural cooperatives for the reimbursement of the costs incurred until 1967 were assigned to the Federconsorzi. In 1999 the Law No. 410[13] was adopted by which Federcon-

[8] Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU: C: 2015:125.

[9] *Corte Suprema di Cassazione*; hereinafter: the referring court.

[10] *Ministero delle Politiche agricole, alimentari e forestali*; hereinafter: the Ministry.

[11] *Federazione Italiana Consorzi Agrari Soc. coop. arl – Federconsorzi*; hereinafter: Federconsorzi.

[12] *Liquidazione giudiziale dei beni ceduti ai creditori della Federazione Italiana Consorzi Agrari Soc. coop. arl – Federconsorzi.*

[13] *Legge 28 Ottobre 1999, n. 410, “Nuovo ordinamento dei consorzi agrari”*, Gazzetta Ufficiale n. 265/99; hereinafter: Law No. 410.

sorzi was dissolved and placed under a collective insolvency procedure known as *concordato preventivo*, in the context of which the claims of the agricultural cooperatives were subsequently assigned to the creditors of the Federconsorzi.

The Law No. 410 also provided that the claims arising from compulsory storage management and the marketing of domestic agricultural products carried out by the agricultural cooperatives on behalf and in the interests of the State, as they result from accounts approved by final and enforceable orders of the Minister of Agriculture and Forestry, shall be satisfied together with interest due from the date of the closure of the relevant accounts indicated in those orders up to 31 December 1997.[14] The Law No. 410 was amended in 2000 by Law No. 388[15] which provided that these claims shall bear interest "calculated up to 31 December 1995 on the basis of the official discount rate, plus 4.4 points, with annual capitalisation, and for the years 1996 and 1997, only at the statutory interest rate".[16] Adopted in 2012, the Decree-Law No. 16[17] provided in Article 12 (6) that claims arising from compulsory storage management and the marketing of domestic agricultural products carried out by the agricultural cooperatives on behalf and in the interests of the State, other than those satisfied in accordance with the Law No. 410 as amended by the Law No. 388, "shall bear interest calculated up to 31 December 1995 on the basis of the official discount rate, plus 4.4 points, with annual capitalisation, and for the subsequent period only at the statutory interest rate".[18]

Directive 2000/35/EC was transposed in the Italian law by the Legislative Decree No. 231.[19] In accordance with the provision of the Article 3 (1) (d) of the Directive 2000/35/EC, the Legislative Decree No. 231 provided in the Article 5 (1) that the interest rate for late payment in commercial transactions, unless otherwise agreed by the parties, shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, plus seven percentage points.

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[14] Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU: C:2015:125, paragraph 12.

[15] *Legge 23 dicembre 2000, n. 388, "Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001)"*, Gazzetta Ufficiale n. 302/00, Supplemento Ordinario n. 219; hereinafter: Law No. 388.

[16] Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU: C:2015:125, paragraph 13.

[17] *Decreto-legge del 2 marzo 2012, n. 16, „Disposizioni urgenti in materia di semplificazioni tributarie, di efficientamento e potenziamento delle procedure di accertamento"*, Gazetta Ufficiale n. 52/12; hereinafter: Decree-Law No. 16.

[18] Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU:C:2015:125, paragraph 14.

[19] *Decreto Legislativo 9 ottobre 2002, n. 231, "Attuazione della direttiva 2000/35/CE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali"*, Gazzetta Ufficiale, n. 249/02; hereinafter: Legislative Decree No. 231.

The dispute between the Ministry and the Federconsorzi in the proceedings in front of the national courts concerned the amount of the debt owed to the Federconsorzi by the Ministry. Regarding the calculation of the due interest, the Ministry called for the application of the provision of Article 12 (6) of the Decree-Law No. 16, whereas the court-appointed liquidator of the Federconsorzi claimed that this provision was incompatible with the Directive 2000/35/EC and the Directive 2011/7/EU.

The referring court decided to stay the proceedings and to refer five questions to the Court of Justice for a preliminary ruling. By its first question the referring court asked, in essence, whether a statute-based agreement between the State administrative authorities and the agricultural cooperatives for the supply and distribution of agricultural products is covered by the definition of a commercial transaction, as defined in Article 2 (1) of Directive 2000/35/EC and Article 2 (1) of Directive 2011/7/EU.[20] By its second to fifth question, the referring court asked "whether the third paragraph of Article 288 TFEU and Articles 3(3) and 6 of Directive 2000/35 and Articles 7 and 12 of Directive 2011/7 must be interpreted as precluding a Member State, which made use of the option under Article 6(3)(b) of Directive 2000/35, from adopting, during the period prescribed for transposition of Directive 2011/7, legislative provisions, such as those at issue in the main proceedings, which are capable of modifying, to the detriment of a creditor of the State, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002".[21]

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[20] The first question of the referring court was: „(1) Is the statute-based agreement between the State administrative authorities and the agricultural cooperatives (an agreement under which arose a claim that was subsequently assigned by the cooperatives to the Federconsorzi and, in turn, to the latter's creditors in the context of insolvency proceedings) for the supply and distribution of agricultural products, as established by Legislative Decree No 169 of 23 January 1948 and Law No 1294 of 22 December 1957, covered by the definition of a commercial transaction, as defined in Article 2 of Directive 2000/35 and Article 2 of Directive 2011/7?" (Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU: C:2015:125, paragraph 25).

[21] Ibid., paragraph 30.

These questions of the referring court, in full, were: „(2) If the answer to Question 1 is in the affirmative, do the transposition requirements of Directive 2000/35 (Article 6(2)) and Directive 2011/7 (Article 12(3)), under which it is possible to maintain in force provisions which are more favourable, mean that it is not possible to alter for the worse, or indeed to exclude, the late-payment interest rate applicable to agreements that were already in existence when the directives entered into force?

(3) If the answer to Question 2 is in the affirmative, must the obligation not to alter for the worse the late-payment interest rate applicable to agreements that were already in existence be construed as imposing — as regards a legislative measure governing interest, which provides, up to a certain point (in the present case, from 31 January 1982 to 31 December 1995),

Court of Justice held that the second to fifth questions should be examined together and in the first place. In examination of those questions the Court of Justice tested the applicability of the principles established in the landmark case *Inter-Environnement Wallonie* concerning the duty of Member States during the period prescribed for transposition of the directive to refrain from adopting measures liable seriously to compromise the result prescribed.[22] The decisive factor for the decision was the question of the temporal application of Directive 2000/35/EC and of the Directive 2011/7/EU.

Article 6 (3) (b) of the Directive 2000/35/EC expressly provided the option for a Member State of excluding contracts concluded before 8 August 2002 when transposing the Directive 2000/35/EC, whereas the Article 12 (4) of the Directive 2011/7/EU authorised the Member States to exclude contracts concluded prior to 16 March 2013 when transposing the Directive 2011/7/EU. Italy had exercised these options when transposing both of the directives into its national legislation.[23] The questionable Decree-Law No. 16 was adopted

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for the application of a non-statutory rate and capitalisation, even on an annual basis and not six-monthly, as claimed by the creditor, and, after that point, only for the payment of statutory interest — a set of rules which, in view of the particular circumstances of the present dispute …, is not necessarily unfavourable to the creditor?

(4) In so far as Directive 2000/35 and Directive 2011/7 provide, in Articles 3(3) and 7 respectively, in relation to the prohibition of the abuse of freedom of contract to the disadvantage of the creditor, that unfair contractual terms and practices are invalid, do the transposition requirements of those directives (Articles 6 and 12, respectively) have the effect of precluding the State from adopting measures which, as regards agreements to which the State is a party and which were in existence at the time the directives entered into force, exclude late-payment interest?

(5) If the answer to Question 4 is in the affirmative, does the prohibition on intervening in agreements that are already in existence and to which the State is a party by adopting measures which preclude late-payment interest impose — as regards a legislative measure governing interest, which provides, up to a certain point (in the present case, from 31 January 1982 to 31 December 1995), for the application of a non-statutory rate and capitalisation, even on an annual basis and not six-monthly, as claimed by the creditor, and, after that point, only for the payment of statutory interest — a set of rules which, in view of the particular circumstances of the present dispute, is not necessarily unfavourable to the creditor?" (ibid., paragraph 25).

[22] Judgment of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45: „Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed."

[23] Article 11 (1) of the Legislative Decree No. 231 provided that the provisions of the decree do not apply to contracts concluded before 8 August 2002. Directive 2011/7/EU was transposed into Italian law by Legislative Decree No. 192 (*Decreto Legislativo 9 novembre 2012, n. 192, „Modifiche al decreto legislativo 9 ottobre 2002, n. 231, per l'integrale recepimento*

after the entry into force of Directive 2011/7/EU but before the expiration of the period prescribed for its transposition. Since the agreement between the Italian administrative authorities and the agricultural cooperatives was concluded before 8 August 2002, the Legislative Decree No. 231 nor the Directive 2000/35/EC could not be applied to the factual situation in the proceedings. Explaining the legal effects of exercising of the option given to Member States by Article 6 (3) (b) of Directive 2000/35/EC, the Court of Justice stated that „that option has the effect of rendering all the provisions of that directive inapplicable *ratione tempori*s to those contracts“.[24] Considering that Article 12 (4) of Directive 2011/7/EU allows Member States to exclude contracts concluded before 16 March 2013, the Court of Justice held that a legislative act adopted during the period prescribed for transposition of Directive 2011/7/EU which is to be applied to contracts concluded before that date "may not in any event be regarded as being capable of seriously compromising the attainment of the objective pursued by that directive".[25]

The lower interest rate as regulated in the Decree-Law No. 16 is undoubtedly less favourable to the creditor than the solution set forth in the Article 3 (1) (d) of Directive 2000/35/EC, as well as in the Articles 2 (6, 7) and 4 (1, 2) of Directive 2011/7/EU. However, the agreement to which provision of Article 12 (6) of the Decree-Law No. 16 is to be applied falls outside the temporal scope of application of Directive 2000/35/EC. Due to the option of excluding contracts concluded before the expiration of the period for transposition of Directive 2011/7/EU, Italy had not violated the duty to refrain from adopting measures liable seriously to compromise the result prescribed by Directive 2011/7/EU. Therefore, the Court of Justice ruled in *Federconsorzi*: "The third paragraph of Article 288 TFEU and Articles 3(3) and 6 of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions and Articles 7 and 12 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 not precluding a Member State which has made use of the option under Article 6(3)(b) of Directive 2000/35 from adopting, during the period prescribed for transposition of Directive 2011/7, legislative provisions, such as those at issue

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", Gazzetta Ufficiale, n. 267/12; hereinafter: Legislative Decree No. 192). Article 3 (1) of the Legislative Decree No. 192 provides that its provisions are to be applied to commercial transactions concluded after 1 January 2013.

[24] Judgment of 26 February 2015, *Federconsorzi*, C-104/14, EU: C:2015:125, paragraph 31.

[25] Ibid., paragraph 32.

in the main proceedings, which are capable of modifying, to the detriment of a creditor of the State, the interest on a debt arising out of the performance of a contract concluded before 8 August 2002."[26]

In view of the given answer, the Court of Justice held there was no need to answer the first question asked by the referring court.[27] The question whether the relationships between undertakings and public authorities such as those in the main proceedings fall within the material scope of the Directive 2011/7/EU was left open. Considering the stand of the Italian authorities that there was no commercial transaction between the parties but only a relationship governed by public law,[28] clarification of the Court of Justice of the concept of "commercial transactions" would have been most welcomed.[29]

Directive 2011/7/EU defines "commercial transactions" in Article 2 (1) as "transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration". Identical definition of the term "commercial transactions" was provided in the Article 2 (1) of Directive 2000/35/EC. The definition consists of elements based on a subjective criterion (i) and on objective criterions (ii, iii): (i) parties to the transaction must be undertakings or an undertaking and a public authority, (ii) there must be delivery of goods or provision of services, and (iii) there must be remuneration for those goods or services.[30] The concept of "commercial transactions" should be interpreted autonomously. It covers not only commercial contracts, but also all exchange-related relationships with a contract-like function, even if they have a public law character.[31] Therefore, a statute-based agreement, such as the one in the main proceedings in *Federconsorzi*, is covered by the definition of a commercial transaction, as defined in Article 2 (1) of Directive 2000/35/EC and Article 2 (1) of Directive 2011/7/EU.

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[26] Ibid., paragraph 37.

[27] Ibid., paragraph 36.

[28] Ibid., paragraph 21.

[29] Similar stance was taken by: Müller, R., EuGH: Zinsänderung während der Umsetzungsfrist der RL 2011/7/EU, LMK: Kommentierte BGH-Rechtsprechung, Lindenmaier-Möhring, 2015, p. 368608.

[30] See: Advocate General's Opinion of 28 July 2016, *Nemec*, C-256/15, EU:C:2016:619, paragraph 77.

[31] Schöne, M., Leistungs- und Zahlungsverzögerung im deutschen und englischen Privatrecht – Ein Rechtsvergleich mit Ausblicken auf eine europäische Privatrechtsvereinheitlichung, Tenea Verlag, Bristol – Berlin, 2005, p. 15.

3. WAIVER OF THE CREDITOR'S RIGHTS: *IOS FINANCE EFC* AND *DRAGADOS*

Two still pending cases at the Court of Justice deal with the identical legal issues connected with the recently implemented supplier payment mechanism in Spain: The Extraordinary Mechanism for the Payment to Suppliers of the Local and Regional Public Authorities.[32] The Extraordinary Mechanism, implemented in several stages, is aimed at solving the problem of outstanding debt owed by the local and regional authorities to their suppliers. It consists of identification of owed debts and subsequent transfer of funds from the central government to the local and regional authorities in order to enable these to pay the debts to their suppliers. The transferred amounts are limited only to the principal and a supplier who subscribes to the Extraordinary Mechanism has to waive his right to interest, court costs and other expenses in order to recover the principal straightaway. Suppliers who are not pleased with prompt payment of only the principal have the option of not subscribing to the Extraordinary Mechanism which means that they have to wait for the payment of the principal and interest without any guarantee regarding the time of payment in full.[33]

However, several suppliers who accepted the payment of principal through the Extraordinary Mechanism have started proceedings in front of Spanish courts claiming the unpaid interest and arguing they have a right to interest due to the direct effect of the Directive 2011/7/EU.[34] In two such proceedings the national court decided to stay the proceedings and to refer a question to the Court of Justice for a preliminary ruling.

In the proceedings between IOS Finance EFC SA, a Spanish factoring company who acquired a number of claims of the suppliers, and Servicio Murciano de Salud, a regional health authority, the Court for Contentious Administrative Proceedings No. 6 of Murcia referred to the Court of Justice the following questions:

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32 *Mecanismo Extraordinario de Pago a Proveedores de las Administraciones Públicas de las Entidades Locales y de las Comunidades Autónomas*; hereinafter: the Extraordinary Mechanism.

33 On the Extraordinary Mechanism, see: Vilà Costa, B., Las directivas de morosidad 2000/35/CE y 2011/7/UE y el pago a proveedores de la administración, ante el Tribunal de justicia de la UE: Por una interpretación coherent con el acquis, Àrea de Dret Internacional Privat, 28/6/2016, available at: http://blogs.uab.cat/adipr, last accessed on: 22/11/2016.

34 Ibid.

Majority of the Spanish courts rejected such claims on the grounds that subscribing to the Extraordinary Mechanism was voluntary; see analysis of the Spanish case-law in: Mayor Gómez, D. R., El plan de pago a proveedores y el derecho de la Unión Europea: Ante el imminente pronunciamiento del Tribunal de Justicia de la Unión Europea, Gabilex, (6) 2016, pp. 8 – 13.

"Regard being had to Articles 4(1), 6 and 7(2) and (3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions:

1) Must Article 7(2) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to interest for late payment?
2) Must Article 7(3) of the directive be interpreted as meaning that a Member State may not make recovery of the principal debt conditional on the waiver of the right to compensation for recovery costs?
3) Should the answer to those two questions be in the affirmative, where the debtor is a contracting authority, can it rely on the freedom of contract of the parties in order to avoid its obligation to pay interest for late payment and compensation for recovery costs?"[35]

The same questions were referred to the Court of Justice in the similar proceedings between Dragados SA and Cabildo Insular de Tenerife, by the Court for Contentious Administrative Proceedings No. 1 of Santa Cruz de Tenerife.[36]

In the pending case *IOS Finance EFC*, Advocate General Sharpston delivered her opinion on 12 May 2016.[37] In view of the Advocate General Sharpston, Directive 2011/7/EU "should be interpreted as meaning that it does not preclude legislation under national law which (a) gives a creditor the right to subscribe to a scheme providing for 'accelerated' payment of the principal sum due under a contract to be made where the creditor has performed his obligations under the contract, subject to the condition that he waives entitlement to payment of interest for late payment and to compensation for recovery costs, whilst (b) allowing the creditor to refuse to subscribe to such a scheme with the result that his entitlement to both interest and compensation will remain, albeit that it is likely that he will have to wait considerably longer to receive payment."[38] In her analysis, Advocate General Sharpston emphasised the element of choice given to the creditor through relevant Spanish legislation. Since the creditor can refuse to subscribe to Extraordinary Mechanism and decide to wait for payment in full, his waiver of the right to interest and the right to compensa-

[35] Case C-555/14: Request for a preliminary ruling from the Juzgado Contencioso-Administrativo N ° 6 de Murcia (Spain), lodged on 3 December 2014 - *IOS Finance EFC SA v Servicio Murciano de Salud*, OJ C 56, 16.2.2015, p. 10.

[36] Case C-324/16: Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 1 de Santa Cruz de Tenerife (Spain), lodged on 8 June 2016 - *Dragados, S.A. v Cabildo Insular de Tenerife*, OJ C 305, 22.8.2016, p. 16.

[37] Advocate General's Opinion of 12 May 2016, *IOS Finance EFC*, C-555/14, EU: C:2016:341.

[38] Ibid., paragraph 66.

tion for recovery costs when subscribing to such payment scheme, in the view of Advocate General Sharpston, could not be viewed as "grossly unfair" to the creditor, "provided always that the right to await payment in full was real and not illusory".[39]

The key issue on which the Court of Justice should focus when deciding the pending cases *IOS Finance EFC* and *Dragados* is whether Directive 2011/7/EU had left the waiver of the right to interest and the right to compensation for recovery costs completely out of the scope of the free will of the contractual parties. A view opposed to the one of Advocate General Sharpston has been argued in the literature,[40] according to which the Article 7 (2) of the Directive 2011/7/EU is clear and precise when setting forth that "a contractual term or a practice which excludes interest for late payment shall be considered as grossly unfair", with a consequence that any national law establishing a practice that contains the waiver of the right to interest is contrary to Directive 2011/7/EU. This opposing view considers the Extraordinary Mechanism to be contrary to Directive 2011/7/EU as it imperatively lays down that accepting the payment of the principal implies waiving the recovery of the interest, the compensation for recovery costs and other amounts accrued in favour of the creditor.

It should be borne in mind that in the case of late payment the creditor has a right to interest and a right to compensation for recovery costs – but not an obligation to claim the interest and to claim the compensation for recovery costs from the debtor.[41] When exercising his rights in the case of late payment, the creditor is free to decide not to claim interest from the debtor, for any reason whatsoever. The Extraordinary Mechanism provided for in Spanish law does not exclude the creditor's rights absolutely as it does not deprive the creditor of his free choice not to subscribe to such arrangement but to wait for payment of the whole debt - including the interest accruing in the period between his decision not to subscribe to the Extraordinary Mechanism and the date of the actual payment.

[39] Ibid., paragraph 42.

[40] The views expressed by the Advocate General Sharpston are criticised in: Vilà Costa, op. cit.

[41] Recital (16) of the Directive 2011/7/EU explicitly states: „This Directive should not oblige a creditor to claim interest for late payment."

4. LEASE CONTRACTS AS COMMERCIAL TRANSACTIONS: *ZARSKI*

In another pending case at the Court of Justice, *Zarski*,[42] The District Court in Warsaw in essence asked the Court of Justice whether letting of premises constitutes a commercial transaction within the meaning of provisions of Directive 2011/7/EU and whether a contract for letting premises or a single rental payment constitutes a commercial transaction within the meaning of provisions of Directive 2011/7/EU.[43] The referring court is also in doubt regarding the temporal scope of application of Directive 2011/7/EU to such contracts concluded before 16 March 2013 in cases where late individual payments of rent occur after that date.[44]

The question of whether contracts for temporary use of goods are covered by the definition of "commercial transactions" had already been raised in literature. Several authors had argued that it is doubtful whether lease contracts could be considered as "commercial transactions" as defined by Article 2 (1) of Directive 2011/7/EU and Article 2 (1) of Directive 2000/35/EC,[45] as granting the right to a temporary use of goods *stricto sensu* does not constitute supply of goods nor provision of services. It is observed that in some Member States

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[42] Case C-330/16: Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Poland), lodged on 10 June 2016 - *Piotr Zarski v Andrzej Stadnicki*, OJ C 335, 12.9.2016, p. 33.

[43] By its first and second question, the referring court asked:
„Does the letting of premises constitute a service within the meaning of Articles 2(1) and 3 (and recitals 2, 3, 7, 11, 18 and 23) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions?
If the answer to Question 1 is in the affirmative, where a letting contract of indefinite duration is concluded, does the contract or the single, separate 'transaction', which is what each individual rental payment in return for access to the premises and utilities is, constitute a commercial transaction within the meaning of Articles 1(1), 2(1), 3, 6 and 8 (and recitals 1, 3, 4, 8, 9, 26 and 35) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions?"

[44] By its third question, the referring court asked:
„If in the answer to Question 2 it is established that each individual payment of rent in return for access to the premises and utilities does constitute a commercial transaction, must Articles 1(1), 2(1) and 12(4) (and recital 3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions be interpreted as meaning that the Member States can exclude application of the directive to letting contracts concluded before 16 March 2013 in cases where late individual payments of rent occur after that date?"

[45] E.g.: Schmidt-Kessel, M., Stellungnahme zum Vorschlag für eine Richtlinie zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr (Neufassung) gegenüber dem Rechtsausschuß des deutschen Bundestages, 18/4/2010, available at: http://www.schmidt-kessel.uni-bayreuth.de/pdf_ordner/Stellungnahme_Bundestag.pdf, last accessed on 22/11/2016.

the definition of “commercial transactions” provided in the national law does not cover lease contracts.[46]

Article 2 (1) of Directive 2011/7/EU defines “commercial transactions” as transactions “which lead to the delivery of goods or provision of services for remuneration”, but does not specify in which types of commercial contracts are covered by the notion of “commercial transactions”. It should be inferred that the Directive 2011/7/EU covers all commercial contracts, irrespective of the type of a contract.

The answer to the question of whether lease contracts are commercial transactions within the meaning of Article 2 (1) of Directive 2011/7/EU depends mainly on the interpretation of the expression “provision of services” contained in the definition of commercial transactions. This expression should not be understood in a strict legal sense comparable to the notion of the service contract, but should be interpreted in a broader sense in line with the Court of Justice case law on the notion of “services” provided in Article 57 TFEU (previous Article 50 TEC).[47] In several such cases the Court of Justice held that leasing constitutes a service within the meaning of TFEU.[48] It should also be noted that, in a pending case concerning the interpretation of the notion of “commercial transactions” provided in Article 2 (1) of the Directive 2000/35/

[46] For Italian law see: Tagliavoro, F., La lotta contro i ritardi di pagamento nelle transazioni commerciali, Doctoral thesis, Universitä degli studi di Palermo, Palermo, 2011, p. 66.; Tommasini, M. C., Interessi moratori e ritardo nei pagamenti delle transazioni commerciali, Comparazione e diritto civile, December 2014, p. 8, available at: http://www.comparazionedirittocivile.it/prova/files/tommasini_interessi.pdf, last accessed on 22/11/2016.
Also, although Croatia had directly translated the definition of „commercial transactions“ into its national law (Article 3 (16) of *Zakon o financijskom poslovanju i predstečajnoj nagodbi*, Narodne novine no. 108/12, 144/12, 81/13, 112/13, 71/15 and 78/15), Ministry of Finance which is tasked with the supervision of the application of the national law on combating late payment issued an opinion according to which lease contracts are not considered as commercial transactions under the national law (Opinion of the Tax Administration, Ministry of Finance of the Republic of Croatia, off. no. 423-08/13-01/70, 28.10.2013., available at: http://www.porezna-uprava.hr/HR_publikacije/ Lists/mislenje33/Display.aspx?id=18802, last accessed on 22/11/2016).

[47] The same is proposed by: Oelsner, T., Die Neufassung der Zahlungsverzugsrichtlinie, Europäische Zeitschrift für Wirtschaftsrecht, Vol. 22, (24) 2011, p. 941; Perales Viscasillas, M. P., La Ley 3/2004 y la Directiva 2000/35: pasado, presente y futuro e impacto en el Derecho Mercantil, Redur, (5) 2007, p. 7; Zaccaria, A., (EC) Directive 2000/35 on Combating Late Payments in Commercial Transactions, The European Legal Forum, (6) 2001, p. 389.

[48] For example, renting of a mooring was considered to be service in: Judgment of 29 April 1999, *Ciola*, C-224/97, EU:C:1999:212, paragraph 12. Leasing of a motor vehicle constitutes a service according to: Judgment of 21 March 2002, Cura Anlagen, C-451/99, EU:C:2002:195, paragraph 18.

EC, Advocate General Bobek was of the opinion that the lease of the water tanker lorry constitutes "provision of services" within the meaning of the Article 2 (1) of the Directive 2000/35/EC.[49]

In the light of these considerations, it is suggested that the Court of Justice should answer in the affirmative the first question referred by the District Court in Warsaw in *Zarski*: the letting of premises constitutes a service within the meaning of Articles 2 (1) of Directive 2011/7/EU.

Regarding the second question of the referring court, it should be noted that the scope of application *rationae materiae* of the Directive 2011/7/EU is defined in Article 1 (2) as "all payments made as remuneration for commercial transactions". Where a letting contract of indefinite duration is concluded, the letting contract should be considered as commercial transaction. Individual rental payments do not constitute separate single commercial transactions, but the provisions of the Directive 2011/7/EU are to be applied to every individual rental payments as they are payments made as remuneration for use of the premises.

Since Poland has also exercised the option to exclude contracts concluded prior to 16 March 2013 when transposing the Directive 2011/7/EU,[50] the answer to the third question of the referring court should be in line with the judgment of the Court of Justice in *Federconsorzi*.

5. CONCLUSION

It can be inferred from the questions raised in the four analysed cases that the referring courts are mostly concerned with the scope of application of the Directive 2011/7/EU. Some of the key concepts of the Directive 2011/7/EU, such as the notion of commercial transactions, appear to be not clear to the national courts, although the same concepts existed in the previous Directive 2000/35/EC. Clarification of the notion of commercial transactions by the Court of Justice would be most welcomed, especially since the opportunity to interpret this notion autonomously was missed in the previous case law.

The paper suggested possible answers to the questions raised by the referring courts in the pending cases, taking into account that Directive 2011/7/EU aims at minimum harmonisation of only some aspects of late payment in commercial transactions. In all of the pending cases, in particular in *IOS Finance EFC*, there is a possibility for Court of Justice to interpret provisions

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49 Advocate General's Opinion of 28 July 2016, Nemec, C-256/15, EU:C:2016:619, paragraph 78.

50 See Article 15 (1) of *Ustawa z dnia 8 marca 2013 r. o terminach zaplaty w transakcjach handlowych*, Dziennik Ustaw no. 403/2013.

of Directive 2011/7/EU in more extensive manner and to provide the efficient protection of creditors from the effects of late payment through a teleological interpretation of those provisions. Will the Court of Justice take the road not yet taken, it remains to be seen.

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