

THE CHALLENGE OF CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE REGULATION OF COMMERCIAL TRANSACTIONS

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Abstract: Relevant for the study is Directive 2011/7/EU on combating late payment in commercial transactions¹. On one hand, the regulations are liberal as they provide free access to the EU internal market and equal treatment of all participants there. On the other hand, they provide high protection of creditors' rights. The Directive does not harmonize fully all the rules relating to late payments in commercial transactions and Member States may adopt different ones. Nevertheless, the new rules must be settled in favor of creditors. However, in accordance with the principle of equality and uniform application of EU law, the concepts of the Directive are autonomous and should be interpreted uniformly in all Member States. This challenges national doctrine and practice and changes long-standing traditions and concepts.

Key words: case law, commercial transactions, European Law, Commercial Law, European Union (EU)

¹ Official Journal of the European Union, Series L 48, Volume 54/23.02.2011, 1 – 10.

ПРЕДИЗВИКАТЕЛСТВОТО НА СЪДЕБНАТА ПРАКТИКА НА СЪДА НА ЕВРОПЕЙСКИЯ СЪЮЗ ПРИ УРЕЖДАНЕТО НА ТЪРГОВСКИТЕ СДЕЛКИ

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Резюме: От значение за изследването е Директива 2011/7 на ЕС за борба със забавените плащания при търговските сделки. От една страна, разпоредбите са либерални, тъй като осигуряват свободен достъп до вътрешния пазар на ЕС и равно третиране на всички участници в него. От друга страна, те осигуряват висока степен на защита на правата на кредиторите. Директивата не хармонизира напълно всички правила, свързани със забавените плащания при търговските сделки – държавите членки могат да приемат различни такива. Въпреки това новите правила трябва да бъдат уредени в полза на кредиторите. Съгласно принципа на равенство и еднаквото прилагане на правото на ЕС обаче понятията в Директивата са автономни и следва да се тълкуват еднакво във всички държави членки. Това поставя под въпрос националната доктрина и практика и променя дългогодишни традиции и концепции.

Ключови думи: съдебна практика, търговски сделки, европейско право, търговско право, Европейски съюз (ЕС)

I. Introduction

The subject matter of this report is the influence of the case law of the Court of Justice of the European Union on national law and jurisprudence regarding the understanding of the concept of a commercial transaction within the meaning of Directive 2011/7/EU on combating late payment in commercial transactions (the Directive). Traditionally, in national legal systems, a transaction is considered as a legal fact that gives rise to a legal relationship with a content defined by the parties or by law. The qualification of this legal fact as a commercial transaction is relevant to the legal norms applicable to this relationship. The qualification is carried out by examining the legal relationship based on deliberate criteria that national legislation has

developed for the purpose. The Republic of Bulgaria is a member state of the European Union, which requires compliance with the criteria developed in European legislation. European rules aim to ensure the proper functioning of the internal market, thereby fostering competitiveness of undertakings and in particular of small and medium-sized enterprises (Art. 1, paragraph 1 from the Directive). These objectives can be achieved by adopting rules that deter debtors from using commercial practices that have a negative impact on these businesses. Payments made later than agreed on, although the goods are delivered or the services are performed; contractual clauses that exclude the charging of interest for late payments; contractual clauses that allow payment within an unreasonably long period of time constitute such unfair commercial practices. As a small or medium-sized enterprise, the creditor accepts these contractual clauses negotiated with large enterprises or multinational companies, under pressure in order not to stop having access to the internal market. These commercial practices affect the competitiveness and the profitability of the business that small and medium-sized enterprises manage (recital 3 of the Directive).

The commercial practices in question can expose the creditor to the risk of loss of financial liquidity or "liquidity risk." In the economic literature, financial liquidity in narrow sense means "the ability to settle obligations immediately when due"². Legally, immediately means on time, as agreed, or upon request for payment, if not agreed. Talking about financial liquidity, it means the ability to settle monetary payments. Financial risk arises when this ability is lost. Risk is nothing more than "the danger of suffering a loss"³ of a material nature that can be monetized.

Exactly this risk has been addressed by the European legislator. It is covered by the concept of "liquidity risk" in its narrow sense, as stated in recitals 3, 7 and 28 of the Directive, which implements specific sanctions to prevent it. Prevention is effectuated by prohibiting

² **Drehmann, M., K. Nikolaou.** Funding liquidity risk. Definition and measurement. – In: Working Paper Series. European Central Bank, No 1024, March 2009, Germany, 4 – 36.

³ **Koleva, R., S. Kasabova.** Statistical Methods of Business Risk Analysis. – Economics 21, Year VI, Book 1, 2016, Interuniversity Journal, Svishtov, 93 – 104 (<https://www2.uni-svishtov.bg/economics21/title.asp?title=582>).

commercial practices that force the creditor to accept contractual clauses with excessively long payment terms. The ultimate goal is prevention of late payments in commercial transactions, so that the creditor is not deprived of finances to perform his monetary obligations to other contractual parties for an unreasonable long period of time.

II. Scope of the Directive 2011/7/EU on combating late payments in commercial transactions

The scope of the Directive is limited to payments made as remuneration for commercial transactions. The main point of view of the doctrine is that every transaction is considered as a legal fact in its type as an action, from which the obligations arise. Such a meaning seems to be proclaimed in Art. 2 (1) of the Directive. This legal fact as an action is considered by the European legislator a commercial transaction if two criteria are simultaneously met. The first one is subjective. It includes requirements to the contracting parties, as they must act in their specific capacity as “undertakings”, but one of them as an exception may be a public authority. The second one is objective. It requires that the contract reached includes consideration for delivery of goods or the provision of services and counter-consideration for remuneration.

1. Subjective criterion for qualification of commercial transaction in supranational law

The provision of Art. 2 (1) of the Directive clearly defines the concept of “commercial transaction”⁴. The subjective criterion requires the transaction to be carried out either between private undertakings or between private undertakings and public authorities. This condition requires a legal relationship between two undertakings, subjects of private law, or between private undertaking and public authority. It must be pointed out that “private undertakings” within the meaning of the Directive is different from the “trader” within the meaning of national law. According to Art. 2 (3) of the Directive the “undertaking” is defined as “any organization, acting in the course of its independent

⁴ Article 2 (1): “Commercial transactions” means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration.

economic or professional activity, even where that activity is carried out by a single person”. This requirement means that whatever legal status may have that person in national law, he must exercise the activity in a stable manner, so that the transaction must form part of that activity (C-256/15⁵).

Therefore, whether a person is an “undertaking” cannot depend on national law. It does not matter whether the competent national authorities issue a license to exercise that activity. Circumstances such as acting under trading or professional name, issuing of an invoice due to the transaction et cetera, must be taken into account in determining whether that person is an undertaking within the meaning of the Directive (C-199/19⁶; C-256/15⁷).

As can be seen, the Directive defines “private undertakings” differently and that person cannot necessarily be a “trader” under national law.

2. Objective criterion for qualification of commercial transaction in supranational law

According to the objective criterion the transaction must result in a delivery of goods or in the provision of services for remuneration. It seems there is no doubt what the content of the contract is. One party must render a positive obligation to *dare* (to give something) or to *facere* (to do something) in return to counter-consideration by the other party to pay the agreed equivalent of the goods or services received.

However, the Directive contains no definition of the concepts “delivery of goods” and “provision of services”, and nor is any reference made to the law of the Member States for the purposes of defining those terms. The term “provision of services” must be interpreted in the context of Article 57 of the Treaty of Functioning of

⁵ Judgment (OJ), 15.12.2016, ECLI:EU:C:2016:954, C-256/15, Drago Nemec/Republika Slovenija. It must be pointed out that the question referred for a preliminary ruling in this procedure is an interpretation of a Directive 2000/35/EC on combating late payments in commercial transactions, which provisions are implemented in the new Directive 2011/7/EU for clarity and rationalization (recital 1 of Directive 2011/7/EU).

⁶ Judgment (OJ), 14.08.2020, ECLI:C:2020:548, C-199/19, RL sp. z. o. o./J.M.

⁷ ECLI:EU:C:2016:954, C-256/15, Drago Nemec v. Republika Slovenija.

the European Union (TFEU)⁸, because the Directive was adopted pursuant to Article 114 TFEU. Under Art. 57 TFEU, “services” are those which are provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement of goods, capital and persons. In particular, services include: a) activities of an industrial character; b) activities of a commercial character; c) activities of craftsmen; d) activities of the liberal professions.

For instance, within the meaning of the Directive in the context of Art. 57 TFEU the rental of immovable property for payment of remuneration would be defined as a service, although under national law this contract is not a service contract.

As the Court of Justice stated, in those circumstances, such concepts must be given an autonomous and uniform interpretation throughout the European Union, in the light of the need for the uniform application of EU law in conjunction with the principle of equality. These concepts thus constitute autonomous concepts of EU law. Their scope cannot be determined by reference either to concepts known to the legislation of the Member States or to classifications made at national level. It must be established by simultaneously taking into account the wording, context and objectives of the provision in which those concepts are used and the notions of “delivery of goods” or “provision of services” are not specifically defined.

In accordance with the principle of equality and uniform application of European Law, these concepts should be interpreted in the same way in all Member States. These concepts are autonomous concepts of European Law, and their scope cannot be determined by reference to national law. They must be interpreted considering the wording, context and purpose of the provision (section 27, C-199/19⁹).

3. Exceptions of given concept of commercial transactions in supranational law

According to Art. 1 (2), the Directive shall apply to all payments made as remuneration for commercial transactions. Nevertheless, not every transaction is commercial within the meaning of the Directive, even though the payment agreed is made as remuneration. There are

⁸ OJEU, Series C 326/26.10.2012, 47 – 390.

⁹ ECLI:C:2020:548, C-199/16, RL sp. z. o. o./J.M.

some reasonable exceptions, in respect to them the Directive shall not cover all payments made as remuneration for commercial transactions.

Outside the scope of the Directive remains transactions with consumers (recital 8 of the Directive), even if the creditor is an independent economic organization. In this case, the interests of consumers conflict with the interests of undertakings, therefore they take precedence. Out of scope remains as well as other payments, for instance payments on cheques and bills of exchange, or payments made as compensation for damages including payments from insurance companies. Furthermore, pursuant to Art. 1 (3) of the Directive payments for debts subject to insolvency proceedings, including proceedings aimed at debt restructuring are excluded .

Outside the scope of the Directive transactions by which the creditor is a public authority also remain. In this case, public authority does not need protection, because it has secured predictable and stable access to financing Art. 4 (1) of the Directive (C-327/20¹⁰). According to Court decision the concept of an undertaking adopted in that Directive expressly excludes the possibility that a public authority within the meaning of Article 2 (2) thereof may fall within that concept in its capacity as a creditor of an undertaking (section 39, C-327/10).

III. Core arguments of the Court of Justice of the European Union on the concept of commercial transaction

Considering the concept given in European law, there is no doubt who could be contracting parties and what they have agreed on. It is clearly and unambiguously stated which persons are considered undertakings within the meaning of the Directive and which are State or public bodies. There is also no doubt what the content of the contract is. One party must render a positive obligation to *dare* (to give something) or to *facere* (to do something) in return for counter-consideration by the other party to pay the agreed equivalent of goods or services received.

Despite the clear and unambiguous definition, the Court of Justice of the European Union has reached many decisions that shift the

¹⁰ Judgment (OJ), 13.01.2022, ECLI:EU:C:2022:23, C-327/20, Media Development & Hotel Services.

long-standing traditional legal concept of a legal fact in its type of transaction as an action. Because the Court of Justice of the EU has the autonomous right to interpret European law, its judgments have a significant impact on national doctrine and jurisprudence. Considering these interpretations, the national concepts of what is a contract, what is a commercial transaction and who is a trader undergo changes.

All these rules have a reasonable explanation. But there are some decision-makings that do not fully fit into the national doctrine regarding the concept of a contract.

In respect of long-standing traditions, the contract is a compound legal fact, from which the obligations arise. Regardless of whether the parties have agreed separate periods for delivery of goods and separate remuneration for each delivery, the contract remains a compound legal fact, considered to be a single transaction within the meaning of national law.

Contrary to that vision, the Court of Justice of the EU has ruled that by multiple deliveries under the single contract there are multiple transactions giving rise to separate obligations. Where the parties have agreed, under a single contract, to make successive deliveries, each giving rise to an obligation to pay, each delivery may be classified as a commercial transaction.

The above-mentioned decision erases the difference between a contract as a legal fact and the performance of an obligation arising from the same legal fact. The decision is motivated by the objective of the Directive to fully protect the creditor's rights. As a result, the creditor may obtain multiple compensation for recovery costs as a fixed sum within the meaning of the provision of Art. 6 (1) of the Directive. In other words, failure to perform a single contract gives right to more than one piece of compensation.

As the Court has stated, the concept of "commercial transactions" must be understood broadly and does not necessarily coincide with the concept of "contract" (C-419/21¹¹). A restrictive interpretation of

¹¹ Judgment (Summary), 01.12.2022, ECLI:EU:C:2022:948, C-419/21, *Furnitures de materiel medical*. According to the Court Article 2 (1) of Directive 2011/7/EU must be interpreted as meaning that the concept of "commercial transactions" referred to therein covers each successive delivery of goods or provision of services carried out under a single contract. In respect of that, Article 6 (1) of Directive

“commercial transaction” as a “contract” would be contrary to the definition of the material scope of the Directive.

This position follows from an autonomous interpretation of the provisions of the Directive in accordance with the principle of equality, as well as the requirements of uniform application of European law. The ultimate goal is to ensure free access to the European internal market and equal treatment of all participants there.

IV. Conclusion

Undoubtedly, the case law of the Court of Justice of the European Union has a subsequent impact on national legislation. The concept of commercial transaction is clearly defined in national law, as well as in supranational law, with many differences in required conditions. National law considers a transaction as commercial either because it is concluded by a trader within his professional activity (Art. 286 (1) of the Commerce Act), or because it is included in a special list of transactions (Art. 286 (2) of the Commerce Act). Contrary to that, supranational law comprehends commercial transactions more broadly. It is not necessary for the party to act in special capacity as a trader. There also is not a special list of transactions.

Even with these differences, in both cases there has been no doubt that the transaction is a constituted legal fact, since a contract has been reached, from which the obligation arises. Implemented in Bulgaria on 28 February 2013, the Directive 2011/7/EU on combating late payment in commercial transactions provides such a concept. Ten years later the case law of the Court of Justice of the European Union issued many important judgments which shift the doctrine's view about the commercial transaction as a concept.

According to the new view of the Court of Justice the concept of “commercial transactions” under Article 2 (1) of Directive 2011/7/EU covers each successive delivery of goods or provision of services

2011/7, read in conjunction with Article 4 of that directive, must be interpreted as meaning that where a single contract provides for successive deliveries of goods or provision of services, each requiring payment within a specified period, the fixed minimum sum of EUR 40 by way of compensation for recovery costs is payable to the creditor for each late payment.

carried out under a single contract. It also stated, that the Article 6 (1) of Directive 2011/7/EU, read in conjunction with Article 4 of that Directive, must be interpreted as meaning that where a single contract provides for successive deliveries of goods or provision of services, each requiring payment within a specified period, the fixed minimum sum of EUR 40 by way of compensation for recovery costs is payable to the creditor for each late payment.

As can be seen, the new vision of jurisprudence delivered by the Court of Justice erases the difference between a contract as a legal fact and the performance of an obligation arising from the same legal fact. As a result, the creditor may obtain multiple compensation for recovery costs as a fixed sum within the meaning of the provision of Art. 6 (1) of the Directive. In other words, failure to perform a single contract gives right to more than one piece of compensation.

As the Court has stated, the concept of “commercial transactions” must be understood broadly and does not necessarily coincide with the concept of “contract”. A restrictive interpretation of “commercial transaction” as a “contract” would be contrary to the definition of the material scope of the Directive.

It should be noted that the Directive does not fully harmonize all the rules on late payment and Member States may adopt different ones. Nevertheless, the new rules must be settled in favor of creditors to ensure that their rights are fully protected. It must be pointed out in this connection that the Directive aims principally to discourage late payment by ensuring that it is not financially attractive to debtors (recitals 7 and 16). To achieve the goal, however, the Court of Justice of the EU insists on an autonomous and uniform interpretation of the concepts of “commercial transaction” and “undertaking” in accordance with the principle of equality, as well as the requirements for the uniform application of European law.