Concurrences
Competition Laws Review

Concurrences
Antitrust Publications & Events

N° 4-2022

Late payment: The Court of Justice of the European Union considers that Directive 2011/7 on combating late payment in commercial transactions does not preclude a practice whereby, for late payments of less than one month, the creditor shall not recover interest for late payment or compensation for recovery costs in exchange for payment of the principal amount of the debts payable, provided that the creditor has freely agreed to waiving payment of the sums due in respect of that interest and compensation *(A Oy / B Ky)*

DISTRIBUTION, FRANCE, BURDEN OF PROOF, INVESTIGATIONS / INQUIRIES, ALL BUSINESS SECTORS, SANCTIONS / FINES / PENALTIES, PUBLIC ORDER

CJEU, Oct. 20th, 2022, case C 406/21A Oy c/ B Ky

This article was first published in Lettre de la distribution published by the Centre du Droit de l'Entreprise of the University of Montpellier.

Jean-Michel Vertut | Jean-Michel Vertut - Avocat (Montpellier)

Concurrences N° 4-2022 | Alertes | Distribution

**This article is an automatic translation of the original article, provided here for your convenience. Read the original article (fr).*

Facts. The dispute was between a book seller and its buyer in the Finnish courts over the late payment of 135 invoices. These invoices had due dates between April 10, 2015 and February 21, 2018.

As these deadlines were not met, the seller claimed to be owed 172.81 euros in late payment interest as well as 5,400 euros in lump sum compensation for collection costs, as provided for in the Finnish regulations transposing Directive 2011/7/EU on combating late payment in commercial transactions. As a reminder, this Directive establishes a " *compensation for collection costs* ", which aims at the payment of a minimum lump sum of 40 euros per late paid invoice, without the need for a reminder, as well as a reasonable compensation for other collection costs, in addition to the above-mentioned lump sum (art. 6 § 1 and 3).

On its side, the purchaser invoked a practice established between parties, common in the sector of the bookshop according to him. The buyer claimed that during the 8 years of the relationship, the seller had never invoiced him for any sums in this respect, while the delays noted, less than one month, remained reasonable (from 2 days to 3 weeks after the due date) and that the sums due had been paid *in fine*. But could such a plea not run counter to the provisions of the Directive and the mandatory Finnish transposition regulation? For the record, article 7 of the Directive provides in § 2 *that* " *any contractual term or practice excluding the payment of interest for late payment shall be regarded as grossly unfair* ", and in § 3 that " *a contractual term or practice excluding compensation for collection costs* [lump sum compensation and compensation for other costs] *shall be presumed to be grossly unfair* ". Once the dispute reached the level of the Finnish Supreme Court, the latter had to refer two questions to the CJEU for a preliminary ruling. The first, which we are only mentioning here, although interesting, concerned the scope *rationae temporis* of the domestic transposition texts in respect of practices that we will say "straddle" the period before and after transposition (judgment, points 38 to 49). The second concerned the interpretation of Article 7, § 2 and 3, mentioned above. We will deal with this.

Problem. Must article 7, § 2 and 3 of Directive 2011/7 be interpreted as precluding a practice whereby, for late payments of less than one month, the creditor does not recover interest for late payment or compensation for recovery costs in return for payment of the principal amount of the claims due?

Solution. For the CJEU, " *Article 7(2) and (3) of Directive 2011/7 must be interpreted as not precluding a practice under which, for late payments of less than one month, the creditor does not recover interest for late payment or compensation for recovery costs, in return for payment of the principal amount of the claims due, provided that, by so doing, the creditor has freely consented to waive payment of the sums due in respect of that interest and compensation.* " (pt 62). In the particular case, it will therefore be for the national court, which alone has jurisdiction to assess the facts, " *to determine whether it can be considered that, by its practice of not collecting the sums corresponding to that interest and compensation, the creditor freely consented to waive payment of the sums due in respect of that interest and compensation, it being specified that such consent cannot be expressed at the time of the conclusion of the contract under which the payments in question were due* " (pt 61).

Observations. The solution is dictated by the purpose of Article 7(2) and (3) of Directive 2011/7, which is to prevent the waiver by a creditor of interest for late payment or compensation for recovery costs from occurring at the time of the conclusion of the contract, i.e., when the creditor's freedom of contract is exercised and there is a risk of abuse of that freedom by the debtor to the creditor's detriment (CJEU, February 16, 2017, C-555/14, pt. 30) (pt 57).

The judgment teaches that " *where the conditions laid down in Directive 2011/7 are met and interest for late payment and compensation for recovery costs are payable, a creditor must remain free, having regard to his contractual freedom, to waive payment of the sums due by way of such interest and compensation, in particular in return for immediate payment of the principal amount* ". This is, moreover, confirmed in recital 16 of the Directive, which states that the Directive should not oblige a creditor to require the payment of interest for late payment (CJEU, 16 Feb 2017, supra, pts 31 and 32) (judgment, para 58). However, " *such a waiver is subject to the condition that it has been consented to in an effectively free manner, so that it must not constitute an abuse of the creditor's contractual freedom which would be attributable to the debtor* " (CJEU, 16 Feb 2017, supra, pts 33 and 34) (judgment, para 59).

This interpretation reconciles the objective of prompt payment with the need to preserve the relationship despite the debtor's failure to pay on time. Since the right to waive is thus recognized and its conditions set out, the solution is aimed at situations where there is an established prior " *practice* " between the parties not to claim interest for late payment or compensation for collection costs (intermittent favors, even if frequent, are not sufficient) and where payments are made within a reasonable period of time, with a delay of less than one month. Moreover, on reading the judgment, there seems to be no reason to extend the latter beyond such a delay, even with a waiver meeting the other conditions set by the CJEU. As a reminder, waiver is a

unilateral abdicative act based, in view of our domestic case law, on acts unequivocally expressing the will to waive (Civ. 2, March 10, 2005, no. 03-11.302). In our view, this faculty of renunciation thus framed should be inoperative in the case where, having been made in expectation of a payment to be made, albeit with delay, it is followed by a failure to make payment outright.

The light given by the CJEU invites us to shift our questions to our domestic law in terms of the fight against late payment, as this is a mandatory regulation (rappr. Com. 17 Apr. 2019, No. 18-11.280, Lettre distrib. 05/2019; Civ. 3e, 30 Sept. 2015, No. 14-19.249, Lettre distrib. 10/2015). From an obligation standpoint, it is understandable that a creditor who waives the right granted to him by the Directive to charge interest for late payment or lump-sum compensation for late payment, in return for payment of the principal amount of the claims due, will no longer be entitled to do so when his debtor has performed. The temptation to do so could be encountered by a supplier who, tired of his customer's countless delays in paying his debt, would consider retrospectively demanding a catch-up of the aforementioned interest or compensation, as a reminder. It can also occur during a settlement of accounts between parties, following for example the termination of a commercial relationship. Therefore, in view of the case reported and even if the waiver cannot be presumed, the supplier could opportunely consider indicating from time to time, in writing, that his favours do not call into question the rights he holds under the terms of articles L. 441-9 I al 5 (invoicing) and L. 441-10 II (payment deadlines) C. com. At the very least and in a less comminatory manner, he could specify in his GTC that the fact of not having claimed any interest for late payment or fixed compensation for collection costs, could not be analysed as a renunciation of title.

The interpretation of the CJEU is also to be taken into account in terms of the assessment of the risks of administrative sanctions following controls on the compliance of practices with the provisions of the Commercial Code, providing in particular for the fixed indemnity of 40 euros in the context of the transposition of Directive 2011/7 (cf. art. 121 of law no. 2012-387 of March 22, 2012 and decree no. 2012-1115 of October 2, 2012). It will be recalled that on the occasion of a July 2013 Q&A devoted to the lump-sum indemnity for late payment, the DGCCRF had adopted a rather strict position on the issue of the payment of the indemnity in question. To the question " *1/ Is the mention of the indemnity on the general terms and conditions of sale (GTCs) and invoices and its payment in case of delay compulsory when the commercial relationship with the customer is good?* ", it had answered " *Yes, the compulsory mention of this indemnity and its amount in the GTCs and on the invoices is compulsory. The indemnity is due from the first day of late payment, even in the context of a non-conflictual commercial relationship* ". Subsequently, the mention in question/reply n° 19, that the ceiling of the fines mentioned in articles L. 441-6 and L. 441-4 C. com. should be multiplied by 5 concerning legal persons (C. pén., art. 131-38), " *as for any criminal fine* " (administrative fine since then. Cf. art. L. 441-16 C.com), implied that the failure to " *pay* ", expressly referred to in question n° 1, of the aforementioned indemnity was sanctionable. The position of the Minister's office was thus less flexible than that of the CEPC, three years earlier, on the occasion of opinion no. 10-08 relating to the practice of a creditor not demanding payment of late payment penalties. The CJEU's ruling therefore gives the Administration an opportunity to modify its aforementioned question-and-answer game on this point if it considers it desirable. Could it not also provide a starting point for further reflection on the regulation of payment periods?

Finally, it should be noted that late payment penalties and collection fees are, for the purposes of determining taxable income, attributable to the year in which they are collected or paid (CGI, Art. 237 sexies and BOI-BIC-BASE-20-10, no. 230). The advantage of this rule is that it prevents suppliers from being taxed on income that has not been received when the aforementioned penalties or fees are not claimed from the client. It will be remembered that the exigible nature of penalties (indemnities for collection costs having been introduced later in the Commercial Code) had, in the aftermath of the NRE law of May 15, 2001, caused some torment to creditors (Lettre distrib. 03/2009, *nos obs*; Lettre distr. 02/2005). Although not claimed by the latter, these penalties were nonetheless income at the time. Article 237 sexies of the CGI has remedied this. On this last subject, mentioned for the record and which is no longer problematic, the CJEU ruling does not seem to us to have any impact.