

A CLAIM FOR COMPENSATION FOR RECOVERY COSTS UNDER ARTICLE 10 OF THE ACT ON COUNTERACTING EXCESSIVE DELAYS IN COMMERCIAL TRANSACTIONS – SELECTED ISSUES

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Abstract. Compensation for recovery costs, referred to in Article 10 of the Act on Counteracting Late Payments in Commercial Transactions, is an additional amount due to a creditor when a debtor delays a pecuniary performance arising from a commercial transaction. The nature of this performance is controversial both among legal scholars and in judicial decisions. On the one hand, it is pointed out that it does not depend on incurring any costs, while, on the other, the meaning of the word “compensation” is emphasized, and no costs are expected to be borne in order to acquire the right to claim them from the debtor. The author of the article brings together some of the currently trending views and reviews them taking into account some key challenges. He then supports one of them, justifying his choice and highlighting its practical consequences. Also, he indicates under what conditions and using which defence measures the debtor can defend themselves against such claims before court.

Keywords: compensation for recovery costs; delays in commercial transactions; defence of abuse of a personal right

INTRODUCTION

The Act on combating late payment in commercial transactions,¹ which

¹ The Act of 8 March 2013 on combating excessive delays in commercial transactions, Journal of Laws of 2022, item 893 as amended [hereinafter: Late Payment Act or LPA]. The title of the act was changed under Article 10 of the Act of 19 July 2019 on amending certain acts to reduce payment backlogs (Journal of Laws item 1649), which entered into force on 1 January 2020. The change of the title was primarily substantiated by the fact that the amendment yielded proposals to add provisions to regulate proceedings before the President of the Office for Competition and Consumer Protection (UOKiK) on excessive late payments (see reasoning for the draft act, Sejm document no. 3475, p. 17, <https://orka.sejm.gov.pl/Druki8ka.nsf/0/25F61482AF05ECCEC12584090025522D/%24File/3475.pdf> [accessed: 28.02.2023]). It must be noted on the side that the title adopted by the legislator seems imprecise from the linguistic point of view and should rather read: on counteracting excessive delays “in payments for commercial transaction” or “in fulfilling financial performances that result from commercial transactions”, which would clearly show that the act intends to limit the occurrence of late payments exactly when it comes to carrying out financial performances.

implements Directive 2011/7/EU,² introduced in 2013 the option that creditors of amounts due in commercial transactions executed as part of their economic activity may demand flat rate amounts for late payments for a delivered non-financial performance.³ A decade of said laws being in force has shown practical problems with claiming these payments from contractors, also through litigation. The legislator has managed to solve some of those doubts by precise amendments of specific laws, but some of them stayed unchanged, which means that courts still remain a place where they are interpreted, thus there are bound to be discrepancies in judicial decisions.

The subject of the discussion in this study will be problems associated with pursuing claims resulting from late financial performances in commercial transactions, which the author believes is particularly important from the perspective of coherent interpretation of provisions of the act for effective redress, while at the same time avoiding excessive burdening of the debtor. The author will also attempt to demonstrate in a practical way the gravity of these issues from the point of view of both the creditor, who optimises satisfaction of their claims, and from the point of view of the debtor, who, in a specific interpretation of said provisions, may experience a rightful sense of excessive burden of these legal measures.

1. NATURE OF A CLAIM FOR COMPENSATION FOR DELAYS IN COMMERCIAL TRANSACTIONS

The first issue to be explained, and which is fundamental for a further discussion, is to specify the nature of the performance identified in Article 10(1) LPA as “compensation for recovery costs”. This expression is a source of many interpretation ambiguities that in consequence lead to extremely different rulings on essentially similar facts.

To interpret it correctly, we must first look at the recitals of the Directive in question and its Article 6. Admittedly, both its recitals and further regulations talk about “compensation for recovery costs,”⁴ which would seem to suggest that this amount has a compensatory character and thus, the creditor must cover any costs to recover amount due resulting from commercial transactions. The legislator’s use of the EU term “compensation”⁵

² 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, p. 1-10.

³ Depending on the amount in the invoice, this amount is EUR 40 (where the value of the performance exceeds PLN 5,000, but is not more than PLN 50,000) or PLN 100 (where the value of the financial performance is at least PLN 50,000).

⁴ See recitals 12, 19, 21 and 28 of Directive 2011/7/EU.

⁵ Importantly, it is not solely a linguistic nuance resulting from the Polish translation of the text of the Directive. This phrase was also used in, for example, the French version (“indemnisation”).

seems *prima facie* to confirm this thesis;⁶ however, before we draw such conclusions we must look at the broader interpretative context made up of, in particular, the aim of the Directive and the construction of provisions on the right to charge this amount.

As for the Directive's fundamental aim, it must be concluded that it is to protect creditors against debtors' bad practices.⁷ It is worth looking here at recital 12 of the Directive, which reads: "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". This may suggest a shift in the burden of the principal function of this compensation onto the repressive and guarantee function, thus moving the compensatory function to the back burner.

The construction of the provision of Article 6(1) of Directive 2011/7/EU seems to also suggest the same thing, as it stipulates that Member States shall ensure that the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 where late payment interest becomes due in commercial transactions. The Union legislator does not mention "compensation" in this provision, but a "fixed amount", which seems to reflect the more universal nature of the sum discussed better. This is also evident in the fact that the said provision conditions the entitlement to obtain this fixed amount only on due and payable late payment interest. On the other hand, recital 17 of the Directive helps specify when the payment is late. It lays down that a debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations. The above was successfully implemented in the Polish legal order in Article 10(1) LPA, which stipulates that the creditor is entitled to obtain from the debtor a fixed amount as "compensation for recovery costs" from the date he acquires the right to interest on delays in commercial transactions, which in turn occurs, pursuant to Article 7(1) and Article 8(1) LPA, when the creditor carries out the performance resulting from the debt on the one hand and has not received the payment within a specified time limit on the other. What is also crucial, this amount is due without issuing a request for payment, which means that the creditor may

⁶ In particular, the costs incurred could be expressed in administrative costs involved in recovering amounts due (see e.g. recital 19 of the Directive) or requests for payment.

⁷ E.g. recitals 29, 33, 36 and 28 of Directive 2011/7/EU.

charge it on the first day when the payment for the commercial transaction becomes due and payable.

The author believes that the above suggests that the performance discussed is primarily repressive and guarantee in nature, intending to ensure tools the creditor may use to pressure the debtor to pay the financial performance within the agreed deadline. That is why it must be believed that the name “compensation” is misleading despite being in line with the terminology used by the EU legislator. However, the character of this performance cannot be specified as detached from its goal, solely on the basis of its name, as discussed later herein.

2. POSSIBILITY TO CLAIM COMPENSATION AND THE NEED TO DEMONSTRATE RECOVERY COSTS INCURRED

The discussion so far has shown that despite the fact that the Directive and the act that implements it to the Polish legal order alike talk about “compensation” or “recovery of due amount”, the fee is rather repressive and guarantee in nature. This may inspire further interpretative problems in the context of the obligation or lack thereof for the creditor to demonstrate whether or not he incurred any recovery costs. The provision of the act seems precise on the one hand, but on the other, as pointed out before, both the act and the Directive talk about “compensation”. Legal scholars do not see eye to eye here, the same is the case for judicial decisions when it comes to premises to order such a performance.

Some commentators believe that the concept of “fixed compensation” is new in the majority of EU’s legal systems, but there should be no doubt that, contrary to the literal interpretation of Article 10(1) LPA, the possibility to obtain it from the debtor should not be entirely automatic but it should be conditioned at least on substantiating the activities taken up [Fik and Staszczuk 2015, 122]. In justifying their position, authors refer to the *ratio legis* of this institution and the dictionary meaning of “compensation”. Invoking the meaning of this word, used by both the Polish and the EU legislator, is in fact quite a popular argument against awarding the creditor entitlement to charge the equivalent of EUR 40, 70 or 100 pursuant to a liberal wording of this provision and to make the right to this performance conditioned on demonstrating that the creditor has made any steps to recover the due amounts.⁸ We cannot deny that this argument is valid, yet still it must be noted that it must not be an overwhelming one. As follows from findings made by Fik and Staszczuk, the word “compensation” means “removing losses or damage suffered by someone” [Drabik and Sobol 2007, 210

⁸ See for example: Kaźmierczak 2020, 81-82; Gołębiowski 2015, 42; Fik and Staszczuk 2015, 123.

as quoted in Fik and Staszczyk 2015, 122]. However, it is a vague expression which mainly refers to the meaning of specific words in general language, which are not necessarily reflected in the language of the law. You cannot overlook that the general understanding of terms such as “loss” and “damage” could accommodate a meaning according to which if the creditor does not have the due amount in their bank account on the date when it is payable, this constitutes “loss” or “damage”. In this case it will be understood as e.g. being unable to use funds, which could lead to a measurable loss or violation of a sense of financial security, which in essence could constitute damage.

Another argument advocating that the entitlement under Article 10 LPA be not associated with the right to charge interest on late payments in commercial transactions would be the circumstance that creditors often treat this provision as a source of additional remuneration, even if no enforcement procedures have been initiated yet or have been initiated collectively. This may lead to a situation where the debtor may face having to pay to the creditor a grossly overinflated recovery amount that does not correspond to the costs incurred [Każmierczak 2020, 75]. Some experts in the field believe, that, in other words, such an interpretation of this provision is simply unfair. Moreover, in contrast to liquidated damages, there is no room for dosing the flat-rate charge discussed.⁹ Legal scholars and commentators think it important in the fact that in the case of minor figures of the principal the additional flat rate charge of EUR 40 would have to be considered excessive, which would blur the concept of the main amount due and costs of its enforcement. Such costs should not be its sole basis, and in particular they should not exceed the value of a basic performance because such a solution leads to a clear strain on trust in the law [Fik and Staszczyk 2015, 125]. While again we cannot deny a certain merit to the quoted views, using concepts such as “injustice” or “gross excess” seems inadequate in a situation where, which must not be forgotten, even a different, restrictive approach to the content of Article 10 LPA conditions the charging of the flat-rate amount on two premises. The first one, greatly dependent on the creditor, involves the performance of a consideration. The second one, fundamentally influenced by the debtor, is to carry out the financial performance in time. Therefore, since the creditor’s right is correlated with debtor’s omission, that is failure to carry out the financial performance in time, we cannot accept that the creditor, charging a flat-rate sum for the recovery of amounts due, violates in any way the principles of equity and community life and abuses a personal right. Naturally, it is possible that the debtor is not entirely responsible for failure to pay on time since it may be down to his current

⁹ Judgment of the District Court for Łódź-Śródmieście in Łódź of 11 April 2016, ref. no. XIII GC 1966/15, Lex no. 2244109.

financial problems, thereby issuing sanctions against the debtor for exceeding the payment deadline would be a mistake;¹⁰ however, from the perspective of the creditor, debtor's financial troubles should not be a mitigating circumstance at all. The debtor has the right to expect that his counterparty, pursuant to, e.g. Article 355(2) of the Civil Code, will run his economic activity with due diligence required for the specific characteristics of a given industry, which does not preclude the right to expect that certain universal standards should be respected, such as for example, keeping a certain reserve to cover running costs in the event of temporary payment backlogs. Adopting a different view and excusing the defaulting debtor for financial reasons without giving it any consideration is a simple way to wind up a vicious circle of insolvency and of enhancing payment backlogs. This is why, even though the legislator did not wish to design criminal sanctions for late payment, one cannot agree with Kaźmierczak, who claims that because the Directive intended to encourage debtors to make timely payments, not to penalise them for defaulting, upholding repressive measures for debtor's liability also after he has carried out the performance will not result in encouraging him to carrying out financial performances on time [Kaźmierczak 2020, 84-86]. At this point we must also note that even though the aim of the Directive itself is not a subject of controversy, some legal scholars and commentators draw other conclusions from it. This discussion cannot take place without recalling findings made by Dolniak. She notes that the main goal of a claim for the equivalent of EUR 40, as a mechanism that is to counteract late payments, is not to compensate the creditor for the costs incurred due to failure to pay on time, but to motivate debtors to pay their debt timely. This is why conditioning the right to the equivalent of EUR 40 on the creditor's suffering damage seems groundless [Dolniak 2019, 31].¹¹ The author also rightly points out that "this cost must be burdensome for the defaulting debtor. In consequence, absence of cost on the side of the creditor will not mean that he will not be allowed to request compensation for recovery costs" [Idem 2021, 104]. We should agree with this, but at the same time, contrary to what Kaźmierska believes, we must acknowledge that satisfying the obligation to pay compensation in the amount that is equivalent to EUR 40, 70 or 100, even in the case of payment of the main amount due, may be educational. To illustrate this, the debtor, aware of the potential burdensome consequences for defaulting, will be more willing to pay before the agreed deadline, even if this should be done for counter parties other than the creditor.

Some believe that since the premises for a claim for payment of interest on late payment were constructed in a similar fashion to compensation

¹⁰ See for example Kaźmierczak 2020, 84.

¹¹ Similar in Naworski 2019, 14-15. See also judgment of the Supreme Court of 7 July 2017, ref. no. V CSK 660/16, Lex no. 2350004.

for recovery costs, it must be construed that the creditor has other legal measures at his disposal which he may also exercise if the debtor does not keep the payment deadline and, as a consequence, there is no need to establish another institution whose application depends on meeting the same requirements. This, however, does not seem convincing. The amount of the claim for payment of interest is not a zero or negligent value, as assumed in the Directive's preamble, but a value that gives a real chance to repair the creditor's damage suffered as a result of the delay [ibid., 84]. We should first note that for reasons pointed out above (not having funds in a bank account on maturity date, not being able to use the funds due in transactions), one cannot accept that a claim for payment of interest fully compensates the effects of late payment the creditor suffered. Secondly, the interest itself does not fully satisfy the purpose of the Directive, that is encouraging fulfilment of financial obligations in time. This interest, albeit high,¹² may still mean that part of the debtors, somehow crediting their activity, will be late in carrying out a financial performance, assuming that the only negative consequence will be having to pay interest on late payment in commercial transactions. Only a real threat that the creditor will charge compensation (without having to demonstrate activities undertaken intended to recover the amounts due) may truly fulfil the aim of the Directive.

We must also note on the side that the postulate that the creditor must at least substantiate any activities to recover the amounts due, that is in particular requests for payment issued for the debtor in the form of effective service of an invoice [Fik and Staszczyk 2015, 123], pursuant to recitals of Directive 2011/7/EU, materialises itself somehow by demonstrating that the invoice was served on the debtor. Because, pursuant to recital 18, invoices trigger requests for payment and are important documents in the chain of transactions for the supply of goods and services, inter alia, for determining payment deadlines, the mere service of an invoice may be seen as an activity intended to recover amounts due. Moreover, one needs to note that in the reality of practice of economic transaction, the start of the payment deadline is marked indeed by serving the invoice, which means that it is a very rare occasion that the business operator pays the counter party before receiving an accounting document. This, in turn, implies a conclusion that for the needs of judicial proceedings it should be enough to demonstrate that an invoice has been issued and the that the defendant has paid it after the deadline, which may prove with high likelihood that this invoice was delivered to the debtor.

¹² In the first half of 2023 this interest rate is 16.75% per year for transactions in which the debtors are entities that are not public health care entities and 14.75% per year in situations where the debtor is a public health care entity.

The Supreme Court's adoption of a resolution of 11 December 2011 was a breakthrough moment in several aspects.¹³ This resolution stipulated that the creditor has the right to compensation for recovery costs in the value of EUR 40 without having to demonstrate that these costs have been incurred and this claim arises after the lapse of deadlines stipulated in an agreement or agreed under Article 7(3) and Article 8(4) LPA. First of all, it was the first such a clear stand of the Supreme Court in this matter which solved the question of interpretation of Article 10 LPA. However, as Naworski rightly notes, even though this regulation was indeed adopted, a contrary belief dominates in the established line of decisions of lower instance courts [Naworski 2019, 9]. Second of all, despite a clear stance on the interpretation of the provision discussed, the Supreme Court pointed to the option to invoke an effective defence measure against the creditor's pursuing claims for the payment of compensation for recovery costs. It is the defence of abusing a right under Article 5 CC and the court pointed out that due to the burden of the sanction imposed on the debtor the adjudicating court should examine whether a personal right was infringed in the circumstances of a given case.

It seems that such a position is most appropriate because, on the one hand, it corresponds with a literal wording of Article 10 LPA and also implements the purpose of the compensation which has its source in this provision. On the other hand, it allows the debtor to free himself from the obligation to pay this amount if the creditor has abused this right. However, we need to emphasize that the possibility of effective transfer of this challenge could be exceptional and cannot result in a certain automation that means that the creditor's demanding that the debtor pay the equivalent of EUR 40, 70 or 100, where the debtor has paid it voluntarily (albeit late), will result in dismissal of the claim.

3. THE DEFENCE OF ABUSE OF A PERSONAL RIGHT AS THE DEFENDANT'S PROTECTION MEASURE

The aforementioned challenge of violation of a personal right is one of the leading defence measures afforded to the defendant in proceedings in which the applicant requests the payment of the equivalent of EUR 40, 70 or 100 to cover recovery costs. Naturally, the defendant may bring other defence measures, e.g. he may state that the payment was indeed done in time and the applicant calculated the deadline wrongly (this will be the case in particular where the invoice was delivered by post and the applicant

¹³ Resolution of the Supreme Court of 11 December 2015, ref. no. III CZP 94/15, OSNC 2017, No. 1, item 5.

calculated the deadline from the date of sending the invoice and the defendant from the date he received it). However, this is not always possible, especially in the case of very late payments. The defence of abuse of a personal right does, however, seem like a potentially most effective defence measure, especially in a situation where the creditor claims the said compensation for a late payment of more than one invoice.

Legal commentators point out a fundamental practical problem associated with the application of Article 5 CC, namely that taking into account the challenge of violation of a personal right is in practice an exceptional situation and that effectiveness of the debtor's defence depends entirely on judicial discretion and the chances to reverse results of such evaluation are smaller than in the case of bringing in challenges of violation of provisions that do not have the nature of a general clause [Kaźmierczak 2020, 82]. We must also note here the principle of clean hands developed by legal scholars, according to which "the person who himself violates the principles of community life cannot invoke them and use them to demand that judicial protection be refused to a person whose right has been violated. This would constitute erroneous understanding of the general clause expressed in Article 5 CC."¹⁴ While Kaźmierczak believes that the possibility of defence before the claim for payment of a flat-rate charge under Article 10 LPA based on this defence is, from the point of view of the debtor, unfair [ibid., 83], one cannot note that the debtor, by paying his obligations after the deadline, did undoubtedly violate principles of community life himself and the principles of trader's integrity, thus should not invoke creditor's abuse of a right unless other, exceptional circumstances that substantiate this defence, are found.

One cannot rule out a situation in which the debtor, pursuing his claims under Article 10 LPA, abuses this right, which will make the defence under Article 5 CC valid. This may be the case when, for example, the delay is negligent and through no fault of the debtor, caused e.g. by sudden and unforeseen financial problems about which he informed the creditor and finally, in the case where the creditor gives the debtor his permission for a late payment and then, the creditor requests that the performance under Article 10 of the act be additionally fulfilled. However, it must be clearly emphasized that these reasons should be exceptional and that they should each time be examined through the prism of a given case. For this reason, it is impossible to share the view of the District Court for Łódź-Śródmieście,¹⁵ which

¹⁴ Judgment of the Supreme Court of 4 January 1979, ref. no. III CRN 273/78, Lex no. 8161; judgment of the Regional Court in Warsaw of 22 December 2017, ref. no. I C 780/17, Lex no. 2439687.

¹⁵ Judgement of the District Court of Łódź-Śródmieście of 11 April 2016, ref. no. XIII GC 1966/15, Lex no. 2244109.

took into consideration the defence of violation of a personal right only because the defendant carried out her performances late, though voluntarily, that is without the creditor taking any enforcement steps; the delay was only slight and the interest negligent; interest is a basic form of compensation for creditor's damage in the form of lack of funds caused by debtor's delay in payment and, finally, that the sum of EUR 40 amounts, converted into the Polish currency pursuant to the instruction of Article 10(1) of the Late Payment Act, that is PLN 2,029.34, exceeds more than 79 times the amount of late payment interest on the amount due that is the basis for redress under the legal basis quoted. This ruling, in a model fashion violated the purpose of the act, that is encouraging debtors to keep their deadlines in paying their commitments resulting from commercial transactions. Granting protection to such debtors who are late in their payment without a clear and exceptional reason is a clear signal that they do not face any severe consequences of these violations and thus it is not only a *contra legem* interpretation, but also contrary to the functions of the measure in question, which has been discussed above. For this reason, a judgement of the Regional Court in Rzeszów deserves more attention. It states that "the defendant's defaulting, albeit minor, and considering that he did pay the principal amount due after the deadline without a separate request for payment, is permanent, recurring and continuous, which rules out the understanding of the relations between the plaintiff and the defendant as exceptional and thus rules out application of Article 5 CC."¹⁶

The court rightly noted that where the delays are permanent, extension of deadlines turns into common practice, reflects behaviour that it not deserving of legal protection and thus rules out fall-back on Article 5 CC. It is also worth noting here that when deadlines are longer in economic trading it should be the debtor's responsibility to make sure that such deadline is not missed. There are no contraindications that this performance should not be made before the deadline, for example on the twentieth day, instead of waiting till the last moment, that is till the thirtieth day. No provision asks to wait till the very end of the deadline and such actions are, unfortunately, quite common, which may, inevitably, cause slight delays. This may be the case in particular where the payment is to be made in a foreign currency. It must be concluded that in the event of default for technical reasons, where the payment mechanism has been initiated on the last possible day, this circumstance should be counted against the debtor.

Therefore, we need to conclude that in essence the defence of violation of Article 5 CC should be treated as a basic and most important tool

¹⁶ Judgement of the Regional Court in Rzeszów of 24 August 2018, ref. no. VI Ga 469/18, Lex no. 2537616.

of defense in proceedings for the payment of compensation under Article 10 LPA, and its exceptional character is not contrary to such a conclusion – since payment of amounts due should be made in time as a rule, there are no reasons to look for systemic, permanent defence measures to evade adverse consequences of behaviours which constitute violations of the purpose of the act.

4. SELECTED PROCEDURAL ASPECTS ASSOCIATED WITH SEEKING COMPENSATION UNDER ARTICLE 10 LPA

Pursuing compensation for recovery costs together with the principal may give rise to specific problems in practice. One of them is the question of how such a claim should be treated in the context of Article 20 CC, pursuant to which the value in dispute does not include interest, fruits and costs requested along the principal? These costs identified in this provision are this very problem. It is a rather broad term and legal scholars believe that it covers, *inter alia*, both litigation costs and costs resulting from substantive law activities, such as costs of receipt (Article 462(3) CC), costs of handing over and collecting a thing (Article 547 CC) [Wójcik 2017, 71], remittance costs (Article 454(1)) [Stefańska 2021, 100-101], or costs of private expert opinions [Zieliński 2017, 77]. This signalled problem mainly concerns qualification of the compensation under Article 10 LPA, which the legislator directly calls “recovery costs” and thus the possibility to add this amount to the value in dispute, which may ultimately affect issues such as: a filing fee, representation costs if a professional attorney is involved or court’s material competence.

Legal commentators point to a broad array of ways to treat this amount – from increasing the value in dispute by this amount, to demanding it next to the principal, without charging it to the value in dispute, to adding it to litigation costs, next to the filing fee and representation fees [Dolniak 2021, 112] (which also means that this amount is not taken into consideration in the value in dispute). It is worth pointing out in this question to the fact that a claim for the equivalent of EUR 40, 70 and 100 is of a substantive law nature, whereas a claim to award litigation costs to a party – a civil law character [Grochowski 2017, 162-63]. For this reason, it does not seem valid to add it to litigation costs because the obligation to pay it arises by operation of law upon the debtor’s delay in making the financial performance resulting from a commercial transaction. In other words, it is not necessary for this amount to arise to initiate proceedings in which a competent court must award it so that the obligation to pay it to emerge only then.

Advocates of the thesis that it is not allowed to add an amount equivalent to EUR 40 to the value in dispute often invoke Gołębiewski’s position,

who believes that it seems reasonable to add this claim towards costs that will include both costs associated with actions under substantive law (sending a financial performance, confirmation of receipt, handing over and receipt of a sold item, notarial certification of a failure to pay a bill-of-exchange) and steps under procedural law, and also other necessary costs, such as those of drawing up private opinions and also requests for voluntary payment. Costs understood this way overlap, in author's belief, with the notion of costs of recovering amounts due whose flat-rate amount is indeed the equivalent of EUR 40. This means that it is not valid to charge this performance in the value in dispute [Gołębiowski 2015, 38-43].¹⁷ We cannot deny a certain truth of this view, though we must not forget the purpose of Directive 2011/7/EU and the nature of this claim. Since, as concluded earlier, compensation is to be also an additional element that sanctions debtor's disloyal behaviour and will also be due in a situation there the creditor has not incurred any additional costs, we cannot talk in essence about "costs" in their model form. In reality it seems that the greatest problem of both the Directive and the Polish implementing act is the terminology applied, which may be confusing both under substantive and procedural law. However, we must support the view that compensation referred to in Article 10 LPA does not constitute costs referred to in Article 20 of the Code of Civil Procedure and thus should be added to the value in dispute under Article 21 of the CCP.

However, in practice the court that examines the case will sometimes verify the value in dispute as a result of which a decision is made in camera under Article 25(1) CCP, subtracting the equivalent of the compensation from the amount specified as value in dispute. Leaving aside the correctness of this solution, one may consider a potential solution to this problem by charging interest on this compensation, which should lead to it losing the nature of a subsidiary amount due. In this context one should point to a principle that has been in effect for years, pursuant to which interest is not pursued along the principal, if their character changes from the periodic payment to the amount given in the interest, that is capital, and Article 20 CCP does not apply to capitalisation of interest in a legal meaning.¹⁸ Therefore, since capitalization of interest for a specific period causes it to lose its indirect character, even where interest so calculated, specified as a specific amount (most often for the period from the maturity date to the date of filing a claim with the court) is claimed in single proceedings together with the principal claim, it seems that a similar rule should be applied for pursuing amounts that are compensation referred to in Article

¹⁷ Similar in judgment of the District Court in Tychy of 23 January 2018, ref. no. VI GC 1103/17, Lex no. 2454051.

¹⁸ Decision of the Supreme Court of 30 May 2007, ref. no. II CZ 38/07, Lex no. 346207.

10(1) LPA. This seems especially true considering that pursuant to recital 19 of Directive 2011/7/EU compensation may be combined with late interest, though this should not be statutory interest for delays in commercial transactions, but statutory interest for a delay provided for in Article 481(2) CC [Dolniak 2021, 111]. The proposed solution seems to be getting approval from the judicature. We may point out here the position of the District court in Bartoszyce, which held that it is allowed to charge statutory interest on the amount referred to in Article 10(1) of the Late Payment Act, especially given the recent introduction of the regulation of Article 98(1¹) CCP. This court believed that by charging interest on this amount due it loses its auxiliary character thus itself becomes the principal on which another amount under Article 20 CCP is being claimed – late interest. If we were not to recognize the interest on the amount due as the principal, we would deal with a situation in which another indirect claim is pursued for the indirect claim, and the regulation of Articles 20 and 21 CCP does not provide for this. Given the above, the court concluded that the amount due under Article 10 of the Late Payment Act, as a result of the interest rate, has gained the character of capital and lost its indirect (accessory) character. This is why Article 21 CCP will apply to it.¹⁹ However, irrespective of the above one needs to clearly advocate admissibility of charging the amount referred to in Article 10(1) LPA to the value in dispute, without additional steps.

As has been mentioned earlier, the claim for the compensation for recovery costs may incur interest. Therefore, we need to consider the issue of when it should be charged? In practice we may see a few techniques used. The first one, objectively least problematic, covers demanding interest on compensation from the date of filing the claim at the court. The second one – from the date of expiry of the deadline specified in the request for payment, where we must note that it should not be treated as a rule, since the claim for payment of compensation is afforded without a request. The third one, in turn, is based on the wording of Article 10(1) LPA. It reads that if the claim for compensation for recovery costs is afforded, by operation of law, from the date of acquiring the right to charge interest, this will mean that the first possible day on which the creditor may request that the performance resulting from compensation be made will be the maturity date of the principal. At the same time, considering that it is necessary that there is at least one day on which the debtor is not late in making the performance, we must conclude that when it comes to the claim for compensation, the debtor will be late the earliest on the following date, that is on the date after the day on which the creditor gained the right to claim it, thus two days after the principal's deadline.

¹⁹ Decision of the District Court in Bartoszyce of 16 July 2020, ref. no. II NSW 46/20, Lex no. 3040447.

CONCLUSIONS

The purpose of Directive 2011/7/EU and of regulations that implement it to the Polish legal order do not raise doubts among legal commentators or in judicial decisions. It is precisely specified in Directive's recitals and it involves motivating debtors to carry out their financial performances resulting from commercial transactions timely, that is agreements between traders. Interpretation discrepancies related to this purpose arise when specifying the nature of compensation for recovery costs referred to in Article 10(1) LPA. One must clearly advocate the view that treats a flat-rate charge as a performance that is to be burdensome on the debtor when he does not make his performance on time, which means that this amount is due to the creditor also in the case when the payment is made. What is important, pursuant to the position taken, it is due even when the performance is made without the creditor taking additional enforcement steps and the only two premises that allow for it to be charged are the creditor's carrying out the performance and the debtor's being late with the payment.

Consequently, we may assume then that the only effective challenge that allows the debtor to free himself from the obligation to pay this amount will be the defence of violation of a personal right. Still though, this defence should be exceptional and refer to a situation in which the delay is independent of the debtor or when the creditor consents to extending the deadline and then, contrary to the previous position, demands payment. On the other hand, the creditor's exercising his statutory right to charge this amount cannot be treated as violation of a personal right, even if the delay was marginal and the amount due was paid voluntarily, without the creditor's performing any additional steps aimed to recover the amount due; especially if the delays are regular and the debtor somehow credits his activity at the expense of the creditor. Such action is a direct violation of the aim of the Directive and the act, and thus should not deserve legal protection.

A performance resulting from compensation may incur interest (in the amount of late interest) and it may begin as early as on the first day after the deadline for paying the principal. One must also recognize that it is possible to add this amount to the value in dispute since it is not costs referred to in Article 20 CC. This question should nor raise doubts, especially where this performance is subject to interest the way it is described above.

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