Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 9 June 2022 [1]

Case C-64/21

Rigall Arteria Management Sp. z o.o. sp.k.
v
Bank Handlowy w Warszawie S.A.

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Directive 86/653/EEC – Article 7(1)(b) – Self-employed commercial agents – Remuneration – Entitlement to commission in respect of transactions concluded during the agency contract with customers previously acquired by the commercial agent for transactions of the same kind – Mandatory or non-mandatory rule – Possibility to derogate by contract)

I. Introduction

1. The present case arises from a request for a preliminary ruling submitted by the Sąd Najwyższy (Supreme Court, Poland) concerning the interpretation of Article 7(1)(b) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. [2]

2. Article 7(1)(b) of Directive 86/653 provides that a commercial agent is entitled to commission on commercial transactions concluded during the period covered by the agency contract where the transaction is concluded with a third party whom the commercial agent has previously acquired as a customer for transactions of the same kind. I shall refer to this as commission on repeat transactions. [3]

3. The main issue raised by the present case is whether Article 7(1)(b) of Directive 86/653 should be construed as a mandatory or non-mandatory rule and therefore whether the parties to the agency contract may be permitted, or not, to exclude the commercial agent's right to the commission on repeat transactions.

[1] Original language: English.

[2] OJ 1986 L 382, p. 17.

[3] See, for example, Saintier, S. and Scholes, J., *Commercial Agents and the Law*, Routledge, London, 2005, pp. 116-118; Singleton, S., *Commercial Agency Agreements: Law and Practice*, Fifth edition, Bloomsbury Professional, London, 2020, p. 99.

II. Legal framework

A. European Union law

4. Article 7(1) of Directive 86/653 provides:

'A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

(a) where the transaction has been concluded as a result of his action; or

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.'

B. Polish law

5. Article 761(1) of the Civil Code,[4] which transposes Article 7(1) of Directive 86/653 into Polish law, states:

'The agent may demand a commission on contracts concluded during the term of the agency contract, if they have been concluded as a result of his activities or if they have been concluded with customers previously acquired by the agent for contracts of the same kind.'

III. The facts in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

6. According to the order for reference, Rigall Arteria Management Sp. z o.o. sp.k. ('Rigall Arteria Management') concluded a series of agency contracts with Bank Handlowy w Warszawie S.A. ('Bank Handlowy') for the period between 1 June 1999 and 30 June 2015. Under those contracts, Rigall Arteria Management and Bank Handlowy had the status of agent and principal, respectively.

7. The agency contract concerned the performance of financial intermediation services, which included intermediation in the performance of ancillary and promotional activities connected with the handling and acquisition of credit cards and other financial services offered by Bank Handlowy.

8. The agency contract indicated how the agent was to be remunerated, stipulating that remuneration should be calculated in relation to the number of contracts concluded. In most cases, this was a specific amount paid per credit card issued or per loan application successfully processed. It did not stipulate any type of commission-based remuneration other than commission in respect of contracts concluded with the agent's direct participation.

[4] Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code) (Dz. U. of 2019, item 1145, as amended) ('the Civil Code').

9. Bank Handlowy terminated the agency contract on 17 December 2014. As a result, Rigall Arteria Management requested Bank Handlowy to provide information on the commission due for the period from 1 June 1999 to 31 January 2015.

10. Bank Handlowy refused to do so, arguing, in particular, that the information hitherto provided to the agent had made it possible to calculate the total remuneration due under the agency contract and, consequently, there were no grounds to provide any further information. Rigall Arteria Management brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), by which it requested information on contracts concluded by Bank Handlowy with customers previously acquired as a result of the agent's intermediation.

11. By judgment of 20 June 2016, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) dismissed the action. That court found, inter alia, that it did not follow from the wording of the contract between the parties that the agent was entitled to claim commission on repeat transactions.

12. By judgment of 28 February 2018, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) dismissed Rigall Arteria Management's appeal. In particular, that court considered that commission on repeat transactions, as referred to in Article 761(1) of the Civil Code implementing Article 7(1)(b) of Directive 86/653, is of a supplementary nature, which enables the parties to the agency contract to regulate the matter differently. In the view of that court, the circumstances of the case indicated that the parties tacitly excluded the agent's right to the commission in question, which was apparent both from the fact that no reference was made to that type of commission in the wording of the contract and from the parties' conduct during its performance.

13. Rigall Arteria Management brought an appeal in cassation against that judgment before the Sąd Najwyższy (Supreme Court), which is the referring court in the present case. In support of that appeal, Rigall Arteria Management alleges infringement of Article 761(1) of the Civil Code, interpreted in the light of Article 7(1)(b) of Directive 86/653, in that that provision is regarded as supplementary in nature.

14. The referring court explains that it has not yet been clarified whether it is possible under Polish law contractually to modify or exclude a commercial agent's claim for commission on repeat transactions. Given that the relevant Polish law transposed Directive 86/653, the referring court is of the opinion that its interpretation depends on the interpretation as to whether Article 7(1)(b) of that directive is a mandatory or non-mandatory rule.

15. In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the main proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the light of the wording and purpose of Article 7(1)(b) of [Directive 86/653], must that provision be understood as conferring on a self-employed commercial agent an absolute right to commission on a contract concluded during the term of an agency contract with a third party whom he or she has previously acquired as a customer for transactions of the same kind, or may that entitlement be contractually excluded?'

16. Written observations were submitted to the Court by Rigall Arteria Management, Bank Handlowy, the German, Italian and Polish Governments and the European Commission. A hearing was held on 23 March 2022 at which Rigall Arteria Management, Bank Handlowy, the German and Polish Governments and the Commission presented oral argument.

IV. Analysis

17. Directive 86/653 is an exceptional piece of EU legislation in that it regulates business-to-business contracts. It applies to agency contracts [5] concluded between the commercial agent and the principal who are both acting as independent businesspersons. [6] Directive 86/653 applies exclusively to such contracts in which the agent's activities are provided for remuneration. [7] It harmonises only certain aspects of the relationship between commercial agents and principals, and more specifically, basic mutual rights and obligations of the parties (Chapter II), the remuneration of commercial agents (Chapter III) and the conclusion and termination of agency contracts (Chapter IV). Article 7(1)(b) of Directive 86/653 is part of Chapter III (Articles 6 to 12) thereof.

18. It should be borne in mind that Directive 86/653 was adopted in the 1980s pursuant to internal market legal bases which required unanimity, [8] following lengthy and complex negotiations, with some Member States opposing the need for such a directive altogether. [9] Thus, in the end, it was the result of compromises among Member States with very different philosophies regarding the regulation of contracts generally, and agency contracts specifically.

19. It is, therefore, no surprise that the Court has already been invited on multiple occasions to interpret different provisions of Directive 86/653. [10] This is, however, the first time that the Court is invited to explain the nature of Article 7(1)(b) thereof.

20. By its question, the referring court essentially seeks to ascertain whether a commercial agent's entitlement to commission on repeat transactions provided for in Article 7(1)(b) of Directive 86/653 can be modified or excluded by the parties to the agency contract.

5 By agency contracts, the self-employed commercial agent and the principal establish a lasting relationship. The agent's task is to find customers for the principal, negotiate with them and, if possible, enable the conclusion of commercial transactions between the principal and such customers. See Directive 86/653, in particular Articles 1(2) and 3. Such description of the tasks of the agent is based on the actual commercial relationships as they appear in a real economic context. See, in that regard, judgment of 12 December 1996, *Kontogeorgas* (C-104/95, EU:C:1996:492, paragraph 26).

6 For an analysis of Directive 86/653, see Saintier, S., 'Commercial agency in European Union private law', in Twigg-Flesner, C. (ed.), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, pp. 273-285; see also citations in footnotes 3 and 71 to this Opinion. For a broader discussion, see, for example, Jansen, N. and Zimmermann, R., *Commentaries on European Contract Laws*, Oxford University Press, Oxford, 2018, pp. 587-594.

7 According to the first indent of Article 2(1) of Directive 86/653, that directive does not apply to commercial agents whose activities are unpaid.

8 Directive 86/653 was adopted before the introduction of what is now Article 114 TFEU into the Treaty framework by way of the Single European Act, which entered into force on 1 July 1987. It was based on Articles 57(2) and 100 EEC (now Articles 53(1) and 115 TFEU).

9 See, for example, Council Doc. 7251/1/83 REV 1, 14 June 1983; Council Doc. 9274/84, 19 September 1984; Council Doc. 7242/85, 6 June 1985. See also, in that regard, Lando, O., 'The EEC Draft Directive Relating to Self-Employed Commercial Agents: The English Law Commission *versus* the EC Commission', *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law*, Vol. 44, 1980, p. 1.

10 There are already about 20 judgments of the Court in response to preliminary references from national courts concerning Directive 86/653. However, despite insufficient clarity of the text of that directive, the Commission found that Directive 86/653 has been a success, as the number of cross-border agency transactions has increased. See, in that regard, Commission Staff Working Document, Evaluation of Directive 86/653 (REFIT Evaluation), SWD(2015) 146 final, 16 July 2015 ('REFIT report').

21. With a view to answering that question, I will begin by addressing the Court's jurisdiction to give a preliminary ruling in the circumstances of the present case (A). I will then proceed to my substantive assessment (B), by first providing some preliminary observations concerning the distinction between mandatory and non-mandatory rules governing contracts more generally (B.1), before turning to the interpretation of Article 7(1)(b) of Directive 86/653 (B.2).

22. On the basis of that analysis, I have reached the conclusion that the Court has jurisdiction to give a preliminary ruling in the present case and that Article 7(1)(b) of Directive 86/653 should be interpreted as a non-mandatory rule, thereby permitting the parties to the agency contract to modify or exclude its application.

A. Jurisdiction of the Court

23. According to its Article 1(2), Directive 86/653 applies to commercial agents whose activities involve, in particular, negotiating or concluding 'the sale or the purchase of goods'. However, as seen in point 7 of this Opinion, it appears that the situation in the main proceedings is not about the sale of goods, but rather the sale of (financial) services. Therefore, it might be wondered whether the Court has jurisdiction to give a preliminary ruling in this case, [11] given that Directive 86/653 does not apply to the circumstances from which the dispute in the main proceedings arose. [12]

24. Nevertheless, as indicated by Rigall Arteria Management, the German Government and the Commission, it seems that the Court's jurisdiction to answer the question referred in the present case can be established on the basis of the *Dzodzi* case-law. [13]

25. Applying that case-law, the Court has already held that, when national legislation transposing Directive 86/653 adopts a single solution for all types of agency contracts, it has jurisdiction to interpret that directive even if the case arises from the situation that concerns services and not goods. Establishing jurisdiction in such cases is considered to be in the interest of the EU legal order in order to forestall future differences of interpretation. [14]

[11] It is worth noting that, even though the series of agency contracts at issue were concluded starting before the date of Poland's accession to the EU on 1 May 2004 (see point 6 of this Opinion), no issues have been raised before the Court regarding the applicability *ratione temporis* of Directive 86/653 in the present case. In any event, this does not seem to me to be problematic in the light of the Court's case-law, given that the legal effects of those agency contracts continued after that date. See, in that regard, judgment of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraph 32). Indeed, in the context of Directive 86/653, the Court has not raised the matter in its case-law involving facts spanning pre- and post-accession. See judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 20); see also, in that regard, Opinion of Advocate General Jacobs in *Centrosteel* (C-456/98, EU:C:2000:137, points 21 to 25).

[12] See, in that regard, order of 6 March 2003, *Abbey Life Assurance* (C-449/01, not published, EU:C:2003:133, paragraphs 13 to 20) (concerning life insurance, annuities and savings); and judgments of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraph 16) (concerning banking services and insurance); and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraph 28) (concerning insurance services).

[13] On account of the first case which gave birth to this established line of case-law: see judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 to 43).

[14] See, in that regard, judgments of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraphs 11 to 19); of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraphs 23 to 28); of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraphs 30 and 31); of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraphs 17 to 19); and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraphs 29 to 32). See also Opinion of Advocate General Tanchev in *The Software Incubator* (C-410/19, EU:C:2020:1061, point 45 and footnote 39).

26. Furthermore, as the Court has emphasised in recent case-law outside the context of Directive 86/653, an interpretation by the Court of provisions of EU law in situations not falling within the scope of EU law is warranted where such provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those situations and equivalent situations falling within the scope of EU law are treated in the same way. [15]

27. In the present case, it is apparent from the information provided by the referring court in response to a request for information from the Court that, in transposing Directive 86/653 into domestic law (its Civil Code), the Polish legislature has expressed its intention to treat agency contracts relating to goods and services in a uniform manner with regard to the application of the provisions deriving from EU law.

28. Accordingly, it should be considered that Polish law has made Article 7(1)(b) of Directive 86/653 directly and unconditionally applicable to the situation in the main proceedings and that it is in the interest of the EU legal order that the Court rule on the request for a preliminary ruling submitted by the referring court.

29. Therefore, I am of the opinion that the Court has jurisdiction to give a preliminary ruling in the present case.

B. Substance

1. Preliminary observations on the distinction between mandatory and non-mandatory rules

30. Contract laws of the Member States make a distinction between mandatory and non-mandatory rules that relate to the substantive rights and obligations of the parties to the contract. [16] In a nutshell, mandatory rules do not allow for derogation and thus cannot be contracted out of by the parties to the contract, while non-mandatory rules do not need to become part of the contract if the parties wish to organise their relationship differently.

31. Furthermore, many legal systems recognise different kinds of mandatory and non-mandatory rules. [17]

32. Mandatory rules can be fully mandatory, which means that the parties cannot diverge from them. They can also be only semi-mandatory, in which case such rules may be contracted out of, but only under certain conditions. Semi-mandatory rules may, for example, allow for derogations which are in the interest of the weaker party or which preserve the core of the rule, or a certain minimum imposed by the legislature.

[15] See, for example, judgments of 12 December 2019, *G.S. and V.G. (Threat to public policy)* (C-381/18 and C-382/18, EU:C:2019:1072, paragraph 43), and of 30 January 2020, *I.G.I.* (C-394/18, EU:C:2020:56, paragraph 48). See also Opinion of Advocate General Pikamäe in *Deutsche Post and Others* (C-203/18 and C-374/18, EU:C:2019:502, points 43 to 62); Opinion of Advocate General Bobek in *J & S Service* (C-620/19, EU:C:2020:649, points 27 to 96); and my Opinion in *BALTIJAS STARPTAUTISKĀ AKADĒMIJA and STOCKHOLM SCHOOL OF ECONOMICS IN RIGA* (C-164/21 and C-318/21, EU:C:2022:333, points 57 to 64).

[16] See, for example, Hesselink, M.W., 'Non-Mandatory Rules in European Contract Law', *European Review of Contract Law*, Vol. 1, 2005, p. 44; Grigoleit, H.C., 'Mandatory Law (Fundamental Regulatory Principles)', in Basedow, J. et al., *Max Planck Encyclopedia of European Private Law*, Oxford University Press, Oxford, 2012.

[17] See, in that regard, Hesselink, cited in footnote 16 to this Opinion, pp. 56-61.

33. Similarly, there is not just one kind of non-mandatory rule. Most commonly, under such a term, we refer to the so-called supplementary or classic default rules. Such non-mandatory rules serve to fill the gaps that the parties have left open in the contract by, intentionally or unintentionally, leaving unregulated certain aspects of their contractual relationship. However, there are also other types of non-mandatory rules. Among them are model rules that serve as an aid in drafting the contract, indicating possible solutions as to how the parties may resolve certain issues. Those model rules seem to fall into at least two categories: first, they may offer the parties a list of choices while not precluding others (which I will refer to as a non-mandatory open model rule) and, second, they may limit the parties only to the choices specifically set down therein.

34. Finally, it is important to note that national contract laws use different techniques for indicating whether particular rules are mandatory or non-mandatory, and of which type. Often, those laws are silent as to the legal nature of a particular rule and leave the clarification of such questions to the courts.

35. Directive 86/653 is no exception to the foregoing description. It contains different types of mandatory and non-mandatory rules, and it uses several techniques for describing their nature. [18]

36. In the case of mandatory rules, certain provisions of Directive 86/653 expressly state that no derogation by the parties is permitted. [19] Some provisions are, however, of a semi-mandatory nature. They either impose minimum rules from which the parties may not derogate, [20] or they allow for derogation, but only if that is not to the detriment of the commercial agent. [21] Some derogations are allowed only after the termination of the contract and cannot therefore be contracted in advance. [22]

37. When it comes to non-mandatory rules, some provisions of Directive 86/653 indicate clearly that the rules laid down in the relevant provision are default rules, to be applied in the absence of any agreement between the parties on the matter. [23]

38. Finally, some provisions of Directive 86/653 are silent as to their mandatory or non-mandatory nature. [24] That is so with regard to Article 7(1)(b) of that directive, whose interpretation is at issue in the present case. In fact, Directive 86/653 is silent as to the nature of the entire Article 7 thereof.

[18] See, in that regard, Opinion of Advocate General Léger in *Ingmar* (C-381/98, EU:C:2000:230, points 81 to 91), and Opinion of Advocate General Szpunar in *Agro Foreign Trade & Agency* (C-507/15, EU:C:2016:809, points 36 and 37).

[19] See Directive 86/653, Article 5 ('The parties may not derogate from the provisions of Articles 3 and 4.'); Article 13(1) ('Waiver of this right shall not be permitted.').

[20] See Directive 86/653, Article 15(2) ('The parties may not agree on shorter periods of notice.').

[21] See Directive 86/653, Article 10(4) ('Agreements to derogate from paragraphs 2 and 3 to the detriment of the commercial agent shall not be permitted.'); Article 11(3) ('Agreements to derogate from paragraph 1 to the detriment of the commercial agent shall not be permitted.'); Article 12(3) ('Agreements to derogate from paragraphs 1 and 2 to the detriment of the commercial agent shall not be permitted.').

[22] See Directive 86/653, Article 19 ('The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.').

[23] See Directive 86/653, Article 6(1) ('In the absence of any agreement on this matter between the parties …'); Article 15(5) ('Unless otherwise agreed by the parties …').

[24] In addition to Article 7 of Directive 86/653, this is also the case with regard, for example, to Articles 8, 9 and 10(1) thereof.

2. Interpretation of Article 7(1)(b) of Directive 86/653

(a) Wording

39. To recall, the question in the present case is whether or not the parties to the agency contract are permitted to contract out of the rule contained in Article 7(1)(b) of Directive 86/653, which entitles a commercial agent to commission on repeat transactions.

40. In my view, and notwithstanding the lack of any express indication as to the mandatory or non-mandatory nature of Article 7(1)(b) of Directive 86/653, this case is one of the rare examples in which the answer to the referring court's question can be deduced from the wording of the provision whose interpretation is sought.

41. As seen in point 4 of this Opinion, Article 7(1) of Directive 86/653 provides that, during the period covered by the agency contract, a commercial agent is entitled to commission:

'(a) where the transaction has been concluded as a result of his action; *or*

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.' [25]

42. It may be inferred from the use of the word 'or' in that provision that a commercial agent may be entitled to either of the types of commission which are referred to in points (a) and (b) of Article 7(1) of Directive 86/653. [26]

43. Words, in my opinion, have no meaning outside of the context in which they are used. The wording of Article 7(1)(b) of Directive 86/653, which therefore cannot be read separately from Article 7(1)(a) thereof, suggests that that provision contains a non-mandatory open model rule (see point 33 of this Opinion).

44. Thus, in my view, Article 7(1) of Directive 86/653 provides the parties with suggestions from which they may choose when concluding the contract. The two listed solutions might have been chosen by the EU legislature as the most common ways in which commission is contracted in the case of agency contracts. [27] Choosing between these options saves the parties transaction costs, which arise when contracts are negotiated. [28] However, the parties are not bound by these model rules, but may freely choose a different option.

[25] Emphasis added. The word 'or' is used in other language versions of Directive 86/653, such as the German, Spanish, French, Croatian, Italian, Portuguese and Slovenian texts.

[26] It should be noted that the use of the word 'or' appears in other provisions of Directive 86/653, none of which is indicated to be mandatory or semi-mandatory. See Directive 86/653, Article 7(2); see also Articles 8 and 10(1) thereof, which may be read as setting out a non-mandatory open model rule. By contrast, certain provisions expressly indicated in Directive 86/653 as mandatory use the word 'and': see Directive 86/653, Articles 11(1) and 17(2)(a); see also Article 17(3) thereof, which refers to 'and/or'.

[27] As regards the difficulties which the legislature faces when looking for the best content of non-mandatory rules, see Hesselink, cited in footnote 16 to this Opinion, pp. 77-83. In that regard, one method for finding a proper rule is a sociological method which takes into consideration existing practice relating to certain types of contracts. The legislature's choice may also reflect its understanding of which type of rule is economically most efficient or which rule reflects an appropriate balance between the interests of the parties in typical situations.

[28] As regards the importance of non-mandatory rules in terms of saving transaction costs, see, for example, Hesselink, cited in footnote 16 to this Opinion, p. 46; Storme, M.E., 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law', *European Review of Private Law*, Vol. 15, 2007, p. 233, at pp. 237-238.

45. As Article 7(1) of Directive 86/653 only offers suggestions to the parties, not only does that provision not qualify as a mandatory rule, but also it cannot be understood as a non-mandatory default rule. This is because it does not lay down a single rule to regulate the commercial agent's entitlement to a commission which could serve to fill the gap in the contract if left open by the parties.[29] Rather, it offers a choice. Separating points (a) and (b) of Article 7(1) of Directive 86/653 by 'or' makes it impossible for the parties to the agency contract, or the court deciding the dispute between them, to resort to that provision without first making the choice as regards the solutions it offers.

46. It is true that 'or' can sometimes be read as 'and'.[30] This, however, would not make sense in the case of Article 7(1) of Directive 86/653. The wording in point (b) implies that what is described under point (a) has already happened: a transaction was concluded as a result of direct action by the commercial agent. While it may be possible for a commercial agent to obtain only the commission under point (a), it would be difficult (though not impossible) to imagine a commercial agent obtaining only the commission under point (b) for customers whom the agent 'previously acquired' for the principal, without presuming commission on the transactions concluded with those customers as a result of the agent's direct action under point (a). If the EU legislature aimed at creating the entitlement to commission under point (b), which also entails the commission under point (a), having two separate sentences divided by 'or' would be a strange way to express it.

47. An interpretation that could allow reading Article 7(1) of Directive 86/653 as one sentence, entitling the commercial agent to commission for both direct and repeat transactions would, therefore, demand turning 'or' into 'and', as well as disregarding that point (b) entails point (a). However, even then, such an interpretation would still only turn Article 7(1) of Directive 86/653 into a single rule, without resolving the question whether that rule is a mandatory or non-mandatory rule.

48. Such a far-stretched reading of the provision in question is not, as I will show, justified by systemic reasons relating to the freedom of contract or by the objectives of Directive 86/653, its legislative history and the context in which Article 7(1)(b) of that directive is situated.[31] In other words, these other interpretative reasons, to which I shall now turn, also lend support to the view that Article 7(1)(b) of Directive 86/653 should be interpreted as a non-mandatory rule.

(b) Systemic reasons relating to the freedom of contract

49. As the Court has consistently held, the provisions of EU law must be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter of Fundamental Rights of the

[29] For the same reason, Article 7(1)(b) of Directive 86/653 cannot be interpreted, as claimed by Rigall Arteria Management and the Polish Government, as a semi-mandatory rule, which allows for derogation by the parties only if that would be favourable to the commercial agent. As I have suggested, the possibility under that provision is only one of the options as to how to regulate the commission of the agent.

[30] See, most famously, judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 83), in which the Court considered that the word 'or' in Article 228(2) EC (now Article 260(2) TFEU) does not preclude the imposition of both a lump sum and a penalty payment for the same infringement of EU law by a Member State.

[31] As the Court has consistently held, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. See, for example, judgment of 16 February 2017, *Agro Foreign Trade & Agency* (C-507/15, EU:C:2017:129, paragraph 27).

European Union ('the Charter').[32] In the light of such a requirement for systemic interpretation, I would first observe that holding Article 7(1)(b) of Directive 86/653 to be a non-mandatory rule is consonant with the principle of freedom of contract.

50. Freedom of contract, as invoked by Bank Handlowy and the German Government, represents a fundamental principle of the national and EU legal orders. It is recognised in Article 16 of the Charter as part of the freedom to conduct a business.[33]

51. Agency contracts are commercial (business-to-business) contracts in the sense that both commercial agents and principals are businesspersons.[34] Thus, commercial agency relationships are in principle governed by the freedom of contract, which protects both parties' right to pursue business. This freedom, which includes the autonomy of the parties to determine the terms of the contract, is not absolute and may be subject to justified limitations which must, in particular, be provided for by law and be proportionate, as required by Article 52(1) of the Charter.[35]

52. In the present case, however, there is no provision of Directive 86/653 which clearly indicates that Article 7(1)(b) of that directive is meant to limit the freedom of contract.

53. While the Commission asserted at the hearing that public interest objectives, namely, the protection of commercial agents as the weaker party to the agency contract, support a restriction on the parties' freedom of contract in respect of the commission provided for in Article 7(1)(b) of Directive 86/653, the fact remains that no such justification is provided for in the relevant EU law in accordance with Article 52(1) of the Charter. Moreover, such limitation does not seem either necessary or appropriate for the protection of commercial agents in all possible situations, as will be explained below (see points 63 and 65 of this Opinion).

54. In those circumstances, there is no legal basis in Directive 86/653 for construing Article 7(1)(b) thereof as a mandatory or semi-mandatory rule in the absence of any duly justified limitation placed, in line with Articles 16 and 52(1) of the Charter, on the freedom of contract of the parties in relation to freely choosing the type of commission.

(c) Objectives

55. Interpreting Article 7(1)(b) of Directive 86/653 as a non-mandatory rule is not in conflict with the objectives pursued by that directive.

[32] See, for example, judgments of 25 May 2016, *Meroni* (C-559/14, EU:C:2016:349, paragraph 45), and of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraph 70).

[33] See, for example, judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraph 79). As indicated in the Charter Explanations, Article 16 of the Charter codifies the Court's case-law which already recognises that freedom of contract is part of EU law. See, for example, judgments of 5 October 1999, *Spain* v *Commission* (C-240/97, EU:C:1999:479, paragraph 99), and of 18 July 2007, *Société thermale d'Eugénie-Les-Bains* (C-277/05, EU:C:2007:440, paragraph 28); see also Opinion of Advocate General Szpunar in *Thelen Technopark Berlin* (C-261/20, EU:C:2021:620, points 75 to 84).

[34] See point 17 of this Opinion. According to the Commission's 2015 evaluation of Directive 86/653, most commercial agents are small and medium-sized enterprises ('SMEs') or sole owners, while a majority of principals are also SMEs. See REFIT report, cited in footnote 10 to this Opinion, points 3.2.3 and 6.

[35] According to Article 52(1) of the Charter, limitations may be imposed on the exercise of rights enshrined by the Charter as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in accordance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. See, for example, judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraph 83).

56. It might be the case that the assessment that commercial agents are weaker parties to agency contracts influenced the EU legislature's choice to include mandatory provisions in Directive 86/653. However, the protection of commercial agents is not the only, or even the principal, aim of that directive. [36] In any case, the fact that the concerns about the weaker position of commercial agents influenced the choice of certain solutions during the decision-making process cannot lead to the conclusion, as suggested by the Commission, that Directive 86/653 only contains mandatory rules whose aim is to protect commercial agents.

57. It is clear from the second and third recitals of Directive 86/653 that the main purpose of that directive is to create an internal market for commercial agency and eliminate barriers to the cross-border activities of commercial agents and principals. [37] In that connection, as I have mentioned in a previous Opinion, [38] one indication of the will of the EU legislature which is objectively ascertainable in EU law is the choice of the legal basis for the act at issue. Directive 86/653 was adopted on dual internal market legal bases (see point 18 of this Opinion). That indicates that the main idea behind that directive is to remove the obstacles for cross-border agency contracts. [39]

58. That aim is achieved by removing 'the differences in national laws', recognised as the main obstacle in the second recital of Directive 86/653. Offering the parties to agency contracts a set of harmonised rules (either mandatory, semi-mandatory, default or model) across the EU is, therefore, the method chosen by the EU legislature to facilitate commercial agents and principals in different Member States to enter into cross-border agency contracts. [40]

59. When deciding about the appropriate content of harmonised rules, ensuring the protection of commercial agents as the weaker party to agency contracts can, and should, be taken into consideration by the EU legislature. [41] That, however, does not mean that such protection is, nor can it be under the current division of competences between the EU and its Member States, a self-standing goal of Directive 86/653. [42]

36 See, for example, judgments of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraph 23); of 16 February 2017, *Agro Foreign Trade & Agency* (C-507/15, EU:C:2017:129, paragraph 29); and of 16 September 2021, *The Software Incubator* (C-410/19, EU:C:2021:742, paragraph 48).

37 The second and third recitals of Directive 86/653 read as follows:
'Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents *vis-à-vis* their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States;
Whereas trade in goods between Member States should be carried out under conditions which are similar to those of a single market, and this necessitates approximation of the legal systems of the Member States to the extent required for the proper functioning of the common market; whereas in this regard the rules concerning conflict of laws do not, in the matter of commercial representation, remove the inconsistencies referred to above, nor would they even if they were made uniform, and accordingly the proposed harmonisation is necessary notwithstanding the existence of those rules'.

38 See my Opinion in *Commission* v *Denmark (PDO 'Feta')* (C-159/20, EU:C:2022:198, point 64).

39 See, in that regard, REFIT report, cited in footnote 10 to this Opinion, point 3.1.

40 The importance of the internal market objective pursued by Directive 86/653 has been confirmed by the Court. See, for example, judgment of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 17), in which the Court held, in the context of finding national rules on the registration of agency contracts to be inconsistent with that directive, that those rules were 'capable of significantly hindering the conclusion and operation of agency contracts between parties in different Member States'.

41 See, in that regard, Directive 86/653, fifth recital, which refers to 'the principles' of what is now Article 151 TFEU concerning social policy 'when harmonising the laws of the Member States relating to commercial agents'.

42 The possibility, or even the obligation, of the EU legislature to take into consideration different concerns (including those for the harmonisation of which the EU lacks self-standing competence) when adopting rules for the approximation of national laws, with a view to ensuring the establishment and functioning of the internal market, was confirmed by the Court's case-law concerning what is now Article 114 TFEU. See, inter alia, judgment of 5 October 2000, *Germany* v *Parliament and Council ('Tobacco Advertising')* (C-376/98, EU:C:2000:544), or, more recently, judgments of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323), and of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325).

60. That being said, adequately protecting commercial agents has been recognised by the Court as a legitimate interest.[43] Therefore, the protection of commercial agents is one of the objectives built in the system of Directive 86/653.

61. Addressing the agents' weaker position serves to restore the economic balance in the legal relationship between commercial agents and principals.[44] Legislative intervention is thus necessary in those situations in which the legislature considers that there exists an important market failure.[45]

62. The Polish Government and the referring court have suggested that such a failure exists in the commercial agency market in Poland. They have indicated that that market is characterised by an asymmetry in which principals are in a position to offer standard form contracts to agents without leaving them the possibility to negotiate the contractual terms.

63. If that might be characteristic of the Polish commercial agency market, or at least, of that market in the field of financial services, Directive 86/653 cannot be interpreted only so as to suit the market of one Member State. Thus, it is possible to consider that had the EU legislature found such an asymmetry in negotiating power between commercial agents and principals across the EU, it would address it in an appropriate way. What comes to mind is, for example, the nullity of non-negotiated contractual terms resulting in significant imbalance. Such a solution, and there might be others, would be less limiting to the freedom of contract than a mandatory rule depriving parties from negotiating the type of commission.

64. Additionally, as indicated by the German Government, the legal systems of the Member States contain principles providing for general protection of parties to contracts when the balance between them is significantly uneven. Such rules would apply to commercial agents in situations where, for example, they have been excessively deprived of commission.

65. Furthermore, one should not forget that Directive 86/653 governs a wide range of possible commercial realities, in which the interests of both commercial agents and principals may differ.[46] Interpreting Article 7(1)(b) of Directive 86/653 as a mandatory rule might not be protective for commercial agents in certain types of agency relationships. However, if that provision were to be interpreted as mandatory, it would prevent commercial agents and principals from finding the solution that best fits their contract.

66. Therefore, interpreting Article 7(1)(b) of Directive 86/653 as mandatory is not necessarily conducive to protecting commercial agents and may be, as indicated by Bank Handlowy, liable to disrupt the functioning of the commercial agency market. Principals that have not taken into account in their calculation the need to pay the commission in question may resort to other solutions, such as, for example, reducing the rate of basic commission, limiting or excluding the expenses incurred by commercial agents which are reimbursed by the principal or other elements of remuneration, or no longer using a commercial agent at all.

[43] See, in that regard, judgments of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 22); of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraph 33); and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraph 41); see also Opinion of Advocate General Poiares Maduro in *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2005:641, point 31).

[44] See, in that regard, Opinion of Advocate General Szpunar in *ERGO Poist'ovňa* (C-48/16, EU:C:2017:15, points 36 and 37).

[45] See, in that regard, Weatherill, S., 'Why Object to the Harmonisation of Private Law by the EC?', *European Review of Private Law*, Vol. 12, 2004, p. 633, at p. 635. See also Zamir, E. and Ayres, I., 'A Theory of Mandatory Rules: Typology, Policy, and Design', *Texas Law Review*, Vol. 99, 2020, p. 283, at p. 292.

[46] See, in that regard, judgment of 4 June 2020, *Trendsetteuse* (C-828/18, EU:C:2020:438, paragraph 30).

67. Finally and importantly, it should also be pointed out that commercial agents are protected not only by mandatory rules, but also by the legal certainty [47] brought about by the harmonised rules. [48] Clarification of the nature of Article 7(1)(b) of Directive 86/653 will therefore contribute to the objectives pursued by that directive, whether that provision is interpreted as mandatory or non-mandatory.

(d) Legislative history

68. The legislative history of Article 7(1)(b) of Directive 86/653 also militates in favour of interpreting that provision as non-mandatory.

69. As illustrated by the case-law concerning Directive 86/653, [49] the Court has considered the legislative history of an EU measure helpful for discerning the EU legislature's intent underlying that measure or particular provision thereof. That is so, particularly where there has been a change made to the provision in question during the decision-making process from which the EU legislature's intent may be inferred, as is the case here.

70. In the Commission's initial proposal, [50] Article 7(1) of Directive 86/653 appeared as draft Article 12(1). [51] That latter provision was included in a specific list of mandatory provisions of the proposed directive set out in draft Article 35, which stated that 'any stipulation whereby the parties derogate, to the detriment of the agent, from the provisions next hereinafter mentioned shall be void'. [52]

71. In its opinion on the proposal, [53] the European Economic and Social Committee emphasised, in particular, that draft Article 35 was fundamental to the whole directive, in that it specifies the extent and limits of the parties' freedom to manoeuvre within the agency relationship, and therefore must remain in the proposed directive.

47 See, in that regard, judgment of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 31).

48 For views confirming that harmonisation can also be pursued through non-mandatory rules, see, for example, Hesselink, cited in footnote 16 to this Opinion; Storme, cited in footnote 28 to this Opinion; Gutman, K., *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, Oxford University Press, Oxford, 2014.

49 See, in that regard, judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraphs 11 and 16), and of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraph 40); order of 6 March 2003, *Abbey Life Assurance* (C-449/01, not published, EU:C:2003:133, paragraph 15). See also, inter alia, Opinion of Advocate General Wahl in *Quenon K.* (C-338/14, EU:C:2015:503, point 39), and Opinion of Advocate General Szpunar in *Agro Foreign Trade & Agency* (C-507/15, EU:C:2016:809, points 48 to 54).

50 See Commission, Equality of rights for commercial agents. Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, COM(76) 670, 13 December 1976 ('Proposal').

51 Draft Article 12(1) provided: 'The commercial agent shall be entitled to commission on commercial transactions entered into the currency of the contract:
(a) where the transaction is procured by the commercial agent, or
(b) where the transaction is entered into with a third party with whom the agent has previously negotiated or agreed a transaction falling within the terms of his agency, or
(c) where the commercial agent is appointed to cover a specific geographical area or a specific group of people and the transaction is entered into in that geographical area or with a person belonging to that group, notwithstanding that the transaction was negotiated or agreed otherwise than by the commercial agent.' See Proposal, cited in footnote 50 to this Opinion, p. 10.

52 See Proposal, cited in footnote 50 to this Opinion, draft Article 35(1), p. 16, and Commentary, pp. 25-26.

53 See European Economic and Social Committee, Opinion on the proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, 24 November 1977 (OJ 1978 C 59, p. 31), points 2.9.6 to 2.9.8.

72. By contrast, in its first reading of the proposal,[54] the European Parliament considered that the long list of mandatory provisions contained in draft Article 35 made the proposed directive too inflexible and requested that that provision be redrafted.

73. Consequently, in the Commission's revised proposal,[55] draft Article 35 was 'shortened so as to allow greater flexibility', with several provisions removed. Thus, the list of mandatory provisions set out in the revised version of that provision referred, in particular, to the commission mentioned in point (a) of draft Article 12(1), and no longer to the other points, including the commission on repeat transactions referred to in point (b), of that provision.[56]

74. Through the course of the decision-making process, there was agreement to delete the reference to point (a) of draft Article 12(1) from the list of mandatory provisions in draft Article 35.[57] Ultimately, the decision was made to delete draft Article 35 altogether and instead to specify the mandatory character of the provisions of the proposed directive in the particular articles.[58] That approach was maintained in the final version of Directive 86/653.[59]

75. Consequently, it may be inferred from the removal of the provision corresponding to Article 7(1)(b) of Directive 86/653 from the list of mandatory provisions contained in draft Article 35 and the agreement to delineate the mandatory nature of the provisions of the directive per article that, in the absence of an express indication to that effect, the EU legislature did not intend Article 7(1)(b) of Directive 86/653 to be a mandatory rule.[60]

76. In that regard, I am not persuaded by the arguments put forward by Rigall Arteria Management, the Polish Government and the Commission essentially disputing the relevance of the legislative history of Directive 86/653 on account of the significant changes culminating in

[54] See European Parliament, Report on the proposal from the Commission of the European Communities (Doc. 514/76) for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, Explanatory Statement, Document 222/78, 27 July 1978, points 110 and 111, and Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, 12 September 1978 (OJ 1978 C 239, p. 18), point 17.

[55] See Commission, Amendment to the proposal for a Council Directive to co-ordinate the laws of the Member States relating to (self-employed) commercial agents, COM (78) 773 final, 22 January 1979 ('Revised Proposal'), Explanatory Memorandum, pp. 8-9, and draft Article 35(1), p. 21.

[56] In the Commission's revised proposal, draft Article 12(1) remained unchanged except for point (b), which was modified as follows: 'where the transaction is entered into with a third party *whom the agent had previously acquired as a client for transactions of the same kind*'. See Revised Proposal, cited in footnote 55 to this Opinion, Explanatory Memorandum, p. 4, and draft Article 12(1), pp. 10-11.

[57] See, in that regard, Council Doc. 6877/80, 6 May 1980, p. 16. It is worth noting that, as indicated in certain institutional documents issued early on, the majority of Member State delegations favoured the non-mandatory character of draft Article 12, while the Commission considered that it was of a mandatory character, subject to derogations where appropriate. See Council Doc. 7527/81, 23 June 1981, p. 4. Thereafter, with the removal of draft Article 35, it appeared that the majority of Member State delegations were in favour of specifying draft Article 12(1)(a) as mandatory. See, for example, Council Doc. 7381/83, 9 June 1983, p. 8 footnote 4; Council Doc. 7379/86, 4 June 1986, p. 8 footnote 6. However, this was not taken up in the final version of Directive 86/653.

[58] See, in that regard, Council Doc. 5442/82, 10 March 1982, p. 2; Council Doc. 7013/83, 18 May 1983, p. 5; Council Doc. 7778/83, 17 June 1983, p. 9; Council Doc. 7379/86, 4 June 1986, p. 22.

[59] In addition, there was a proposal made by certain Member States at the time (namely, the Kingdom of Denmark, supported by the Federal Republic of Germany, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland) to include a provision in the proposed directive to affirm the freedom of contract and thus to make it clear that where a particular provision of the proposed directive was not indicated as mandatory, the parties were free to derogate from it. That proposal was not taken up in the final text. See, in that regard, Council Doc. 7013/83, 18 May 1983, p. 5; Council Doc. 7251/1/83 REV 1, 14 June 1983, p. 7.

[60] It is worth noting that, as regards the historical context in which Directive 86/653 was situated, the Benelux Convention on commercial agency, which was signed at the Hague on 26 November 1973, but did not enter into force due to the absence of ratification by the Kingdom of Belgium and the Grand Duchy of Luxembourg, formed the basis of discussions in the decision-making process concerning that directive. Article 5(1) of that convention, which was similar to draft Article 12(1) of the Commission's original and revised proposals, was not mentioned in the specific list of mandatory provisions contained in Article 19 thereof.

the final text of that directive in contrast to the Commission's proposals and the fact that the EU legislature took up a different approach in Article 6 of Directive 86/653, which they consider supports interpreting Article 7(1)(b) of that directive as mandatory.

77. It is true that many provisions from the Commission's original and revised proposals are not in Directive 86/653. However, provisions corresponding to Article 6 of Directive 86/653 appeared in both of those proposals.[61] Moreover, the fact that the wording of Article 6(3) of Directive 86/653 was not in those proposals, but was added later in the decision-making process,[62] does not supplant or invalidate the choice taken up by the EU legislature to delineate the mandatory nature of the provisions of that directive in the particular articles, which was not done for Article 7(1)(b) thereof.

(e) Context

78. The proposed interpretation of Article 7(1)(b) of Directive 86/653 as non-mandatory is consistent with other provisions of that directive.

79. Following from the legislative history of Directive 86/653 and as pointed out by Bank Handlowy and the German and Italian Governments, the general scheme of that directive indicates that the provisions from which the parties are not permitted to derogate are set out in a precise and detailed manner and their mandatory nature is expressly stated in the particular article. That is the case, in particular, with regard to the provisions of Directive 86/653 contained in Chapter III of that directive relating to remuneration, as seen in Articles 10(4), 11(3) and 12(3) thereof. There are also similar provisions contained in other chapters of Directive 86/653.[63]

80. This strongly suggests that the rules established by Directive 86/653 which are not expressly envisaged as mandatory are, in principle, non-mandatory rules.[64] It follows that, in the absence of any such express indications in Directive 86/653, Article 7(1)(b) of that directive should be regarded as a non-mandatory rule. As emphasised by Bank Handlowy, it seems illogical for the EU legislature to lay down a set of expressly described mandatory provisions in Directive 86/653 if all the provisions of that directive were mandatory in nature.

81. Rigall Arteria Management, the Polish Government and the Commission offered, in favour of interpreting Article 7(1)(b) of Directive 86/653 as mandatory, an argument which flows from Article 6(3) thereof. That provision states that 'Articles 7 to 12 shall not apply if the commercial agent is not remunerated wholly or in part by commission'. From this, they conclude that, to the contrary, Articles 7 to 12 of Directive 86/653 mandatorily apply if the parties choose commission

[61] See Proposal, cited in footnote 50 to this Opinion, draft Article 11, p. 10, and Commentary, p. 20. The first paragraph of draft Article 11 largely corresponds to Article 6(2) of Directive 86/653 and the second paragraph thereof to Article 6(3) of Directive 86/653; the third paragraph of that draft article, which does not appear in Directive 86/653, stated: 'Agency contracts which exclude the agent's right to commission shall be void'. See also Revised Proposal, cited in footnote 55 to this Opinion, Explanatory Memorandum, p. 3, and draft Article 11, p. 10 (adding a reference to remuneration in kind and reshuffling the order of certain paragraphs).

[62] See, in that regard, Council Doc. 9253/80, 13 August 1980, p. 11 (first reading); Council Doc. 7527/81, 23 June 1981, p. 3 (second reading); Council Doc. 7348/82, 2 June 1982, pp. 11-12 (third reading). In fact, as indicated in certain institutional documents, the wording of Article 6(3) of Directive 86/653 appears to stem from certain proposed amendments put forward by the Kingdom of Belgium and the Federal Republic of Germany in respect of draft Articles 12 and 13 (corresponding to Articles 7 and 8 of Directive 86/653). See Council Doc. 6877/80, 6 May 1980, pp. 15 and 19.

[63] See Directive 86/653, Articles 5, 13(1), 15(2) and 19.

[64] See, in that regard, Opinion of Advocate General Cosmas in *Kontogeorgas* (C-104/95, EU:C:1996:274, point 23, footnote 13).

as a form of remuneration of the commercial agent (even if commission is chosen only as part of the remuneration). That means that Article 7(1)(b) of Directive 86/653 is a mandatory provision when commercial agents are remunerated by commission.

82. In my view, that argument fails to convince. I can agree that Article 6(3) of Directive 86/653 makes Article 7 thereof applicable if the parties have agreed on remuneration by commission. However, the fact that the latter provision is applicable does not turn it into a mandatory rule.

83. Additionally, as indicated by Bank Handlowy, if Article 6(3) of Directive 86/653 expressly permits the parties to exclude commission entirely as a form of remuneration of the commercial agent, the exclusion of a type of commission such as the commission provided for in Article 7(1)(b) of the same directive would also seem to be permitted.

84. Article 6(3) of Directive 86/653 therefore suggests that the parties to the agency contract can freely decide how to arrange the remuneration of the commercial agent and that, if they choose commission, they may fall back on the rules of Articles 7 to 12 of Directive 86/653. That includes the model rules in respect of the possible types of commission as set out in Article 7(1) of that directive.

85. Interpreting Article 7(1)(b) of Directive 86/653 as non-mandatory is, therefore, not in contradiction with Article 6(3) thereof.

86. Furthermore, to support the mandatory nature of Article 7(1)(b) of Directive 86/653, Rigall Arteria Management has advanced an argument based on Articles 17 to 19 thereof, according to which if the right to commission for repeat transactions is not mandatory, that could influence the amount of indemnity or compensation to which commercial agents are entitled on the basis of Article 17 thereof upon termination of the agency contract. As Article 19 of Directive 86/653 prohibits derogations from Articles 17 and 18 thereof to the detriment of the commercial agent, the argument essentially goes, interpreting Article 7(1)(b) of that directive as non-mandatory would affect the semi-mandatory nature of Articles 17 and 18 thereof.[65]

87. That argument is not persuasive. First, as recognised in the Court's case-law,[66] the determination of the indemnity and compensation provided for in Articles 17 and 18 of Directive 86/653 is assessed on the basis of all the relevant circumstances of each individual agency relationship, and does not depend exclusively on the commercial agent's lost commission. Second, even if the amount of commission an agent was earning on average might influence the amount of indemnity to which that agent is entitled after the termination of the contract, this does not affect the semi-mandatory nature of Articles 17 and 18 of Directive 86/653, nor does it argue in favour of the mandatory nature of Article 7(1)(b) of that directive.

88. Interpreting Article 7(1)(b) of Directive 86/653 as non-mandatory is, therefore, not in contradiction with Articles 17 to 19 thereof.

[65] It is important to note that the Court based its finding about the mandatory nature of Articles 17 and 18 of Directive 86/653 on the express provision of Article 19 thereof, prohibiting derogation from those provisions to the detriment of the commercial agent. See judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, in particular paragraphs 21 to 24); see also, in that regard, judgments of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 40), and of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraphs 32 and 34 to 36).

[66] See, with regard to Article 17 of Directive 86/653, judgments of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraphs 19 and 20); of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraph 44); of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraph 28); and of 7 April 2016, *Marchon Germany* (C-315/14, EU:C:2016:211, paragraph 27). See also Commission, Report on the application of Article 17 of Council Directive on the co-ordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC), COM(96) 364 final, 23 July 1996, in particular pp. 2-4.

89. Finally, Rigall Arteria Management, the Polish Government and the Commission assert that it would be illogical for the EU legislature to make certain conditions relating to the entitlement to commission subject to the agreement of the parties, but not others, such as the rules relating to the extinction of the commercial agent's right to commission set out in Article 11 of Directive 86/653.

90. It is, first, necessary to explain that the question of the moment when the right to commission arises, or of its extinction, matters only if that right to commission existed in the first place. There is no reason to make a type of commission mandatory only because there are mandatory rules about the extinction of the right to commission, once such a right was agreed upon.

91. Second, in the case-law,[67] the Court has considered that Article 7 of Directive 86/653 should be read in the light of Articles 10 and 11 of that directive, which lay down rules generally concerned with when the commercial agent's right to commission becomes due and with its extinction. Nevertheless, it should be pointed that, in that case-law, the mandatory nature of Article 7 of Directive 86/653 was not at issue. Moreover, those latter provisions contain express indications in Articles 10(4) and 11(3) of that directive, prohibiting the parties from derogating from the relevant rules to the detriment of the commercial agent. That is not the case with Article 7(1)(b) thereof.

92. Interpreting Article 7(1)(b) of Directive 86/653 as non-mandatory is, therefore, not in contradiction with Articles 10 or 11 thereof.

[67] See, in that regard, judgments of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraphs 17 to 21), and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraph 40).

93. Before concluding, it should be added that, according to the information before the Court, interpreting Article 7(1)(b) of Directive 86/653 as non-mandatory accords with the approach taken in the law and case-law of several Member States, which include Germany,[68] Italy, Austria and Poland,[69] among others.[70] Such interpretation is also supported by a number of scholarly writings,[71] including certain research groups involved in European private law.[72]

94. Consequently, on the basis of all the reasons outlined above, I take the view that Article 7(1)(b) of Directive 86/653 should be construed as a non-mandatory rule and thus may be modified or excluded by the parties to the agency contract.

V. Conclusion

95. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Sąd Najwyższy (Supreme Court, Poland) as follows:

Article 7(1)(b) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that the entitlement of a commercial agent to the commission referred to in that provision may be contractually modified or excluded.

[68] As indicated by the German Government, German case-law has confirmed that the provisions of German law transposing Article 7(1)(b) of Directive 86/653 are considered to be non-mandatory in nature.

[69] In that regard, Rigall Arteria Management and Bank Handlowy assert that the dominant position in the Polish case-law is that Article 761(1) of the Civil Code is non-mandatory, while Rigall Arteria Management points out that opinions are divided in the scholarly literature, and the Polish Government emphasises that, as indicated in the order for reference, the Sąd Najwyższy (Supreme Court) will rule on the matter for the first time in the present case.

[70] It should be noted that, in their written observations, Rigall Arteria Management mentions three Member States (Germany, Austria and Poland) in which the relevant national provisions transposing Article 7(1)(b) of Directive 86/653 are apparently regarded as non-mandatory and one Member State (Belgium) in which they are apparently mandatory, while Bank Handlowy refers to seven Member States (the Czech Republic, Germany, Italy, Austria, Poland, Finland and Sweden) in which such provisions are apparently considered to be non-mandatory. See further, in that regard, Bogaert, G. and Lohmann, U. (eds), *Commercial Agency and Distribution Agreements: Law and Practice in the Member States of the European Union*, Third edition, Kluwer, The Hague, 2000, pp. 67-676.

[71] In much of the scholarly literature, the rules set out in Article 7(1)(b) of Directive 86/653 are considered to be non-mandatory. See, for example, Crahay, P., 'La directive européenne relative aux agents commerciaux indépendants', *Tijdschrift voor Belgish Handelsrecht/Revue de droit commercial belge*, Vol. 10, 1987, p. 564, at pp. 576-580; Saintier and Scholes, cited in footnote 3 to this Opinion, pp. 109 and 115-118; Randolph, F. and Davey, J., *The European Law of Commercial Agency*, Third edition, Hart, Oxford, 2010, pp. 79-80; Singleton, cited in footnote 3 to this Opinion, p. 98. There are, however, also different points of view. For example, de Theux, A., *Le statut européen de l'agent commercial: Approche critique de droit comparé*, Publications des Facultés universitaires Saint-Louis, Brussels, 1992, pp. 116-117 and 357-365, argues that such rules should be regarded as semi-mandatory; see also Rott-Pietrzyk, E. and Grochowski, M., 'Prowizja agenta w czasie trwania umowy (imperatywny czy dyspozytywny charakter regulacji i wynikające z tego konsekwencje)', *Transformacje Prawa Prywatnego*, 2018, p. 73, which, as mentioned by Rigall Arteria Management, argues that Article 761(1) of the Civil Code should be understood as a mandatory rule.

[72] It is worth noting that, as indicated by Rigall Arteria Management, in the context of European private law scholarship, the work of an academic group appears to regard the rules on the commission in question as mandatory (see Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services*, Sellier, Munich, 2009, Article 7:H-02: Mandatory Nature, p. 36). However, the work of other academic groups in this context seems to take a different view, and thus does not specify that such rules are mandatory (see, in that regard, Hesselink, M.W. et al. (eds), *Principles of European Law, Commercial Agency, Franchise and Distribution Contracts*, Sellier, Munich, 2006, pp. 93-95 and 173-177; von Bar, C. and Clive, E. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full edition, Vol. 3, Sellier, Munich, 2009, pp. 2282-2283 and 2349-2353).