OPINION OF ADVOCATE GENERAL COSMAS
delivered on 4 July 1996 *

1. In this case the Court is called upon to interpret, for the first time, in reply to questions referred to it for a preliminary ruling by the Polimeles Protodikio, Athens, Article 7(2) 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. [1]

I — The main proceedings

2. As is recounted in the order for reference, Mr Kontogeorgas brought an action before the Polimeles Protodikio, Athens, against Kartonpak AE, Anonimos Viomichaniki kai Emboriki Etairia Idon Siskevasias ('Kartonpak'), established in the municipality of Neokhoroudas, Thessaloniki. In his action, the plaintiff states as follows: On 10 February 1981 he entered into the commercial agency agreement at issue, under which it was agreed that from 1 January 1981 he would be its commercial agent for the marketing of its products in the Departments of Achaia and Ilia, and would receive commission of 3% on sales in that area. The applicant claims that from 1988 onwards the defendant sold its products to customers in the above area, concealing the relevant contracts from him in order to deprive him of the commission to which he was entitled. The plaintiff further alleges that the defendant terminated the agreement binding them without complying with the agreed two-month period of notice. Accordingly the plaintiff claims that the defendant should pay him certain amounts of commission and damages for failing to comply with the two-month period of notice to terminate the agreement.

3. The defendant denies the plaintiff's claims and states in its pleadings before the Polimeles Protodikio, Athens, that: (a) in 1985 the company 'Anonimos Etairia Kataskevis kai Emborias Kartokivotion kai Lipon Idon Siskevasias Kartonpak AE' merged with the company 'Saint Ritsis Ellas AVEE', which had the same business objects as the defendant; and (b) the plaintiff was not entitled to commission since, firstly, the customers to which the applicant refers are not customers found by him but former customers of the merged company Saint Ritsis and, secondly, some of them did not have their seat in the plaintiff's area of activity.

* Original language: Greek.

1 — OJ 1986 L 382, p. 17.

4. The Polimeles Protodikio, Athens, considered that the case before it gave rise to a question of interpretation of Community law, in particular of Article 7(2) of Directive 86/653/EEC ('the Directive') and accordingly decided to stay proceedings and refer, pursuant to Article 177 of the EC Treaty, certain questions to the Court of Justice for a preliminary ruling.

II — Questions referred to the Court

5. The Polimeles Protodikio, Athens, asks the Court to give a ruling on the following questions: [2]

'1. Where a commercial agent is responsible for a specific geographical area, is he entitled to commission on transactions entered into without his involvement at any stage and irrespective of whether he himself had found the customers in question, or is he so entitled only on transactions concluded in his area of activity as a result of his intervention and with customers which he himself has found; and

2. What is the meaning to be attached to the term "customer belonging" to that area? In particular, where the customer is a company whose seat is located in a different place from that in which its business and trading activities are carried on, does the word "belonging" refer to the company's seat or to the place in which its commercial activity is actually carried on and/or its plant or other establishments are located, where the transaction in respect of which commission is sought was to supply that plant or those establishments and the relevant transaction in respect of which the agent claims commission was entered into in that place within the agent's geographical area of activity?' [3]

III — Legal background

6. Article 7(1) of the Directive provides as follows:

'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

2 OJ 1995 C 174, p. 3.

3 — It should be noted that, although the Greek Government concludes that a reply should be given to the questions referred for a preliminary ruling, it points out, incidentally, that the dispute before the court is an internal situation. That is, of course, immaterial in the case in point, since the questions concern provisions in a directive harmonizing national legislation in a particular sector, which was adopted on the basis of Articles 57(2) and 100 of the EC Treaty.

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

Member States shall include in their legislation one of the possibilities referred to in the above two indents.'

7. Article 7(2), interpretation of which is sought in this case, provides as follows:

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

— either where he is entrusted with a specific geographical area or group of customers,

— or where he has an exclusive right to a specific geographical area or group of customers,

and where the transaction has been entered into with a customer belonging to that area or group.

8. The Greek legislature transposed Article 7(2) of the Directive into Greek law by Article 6(1) of Presidential Decree 219/91, [4] which provides as follows:

'A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract where he is entrusted with a specific geographical area and the transaction was entered into with a customer belonging to that area.' [5]

4 — Presidential Decree No 219/91 'on commercial agents, implementing Directive 86/653/EEC of the Council of the European Communities' (FEK (*Official Gazette of the Hellenic Republic*) A 81 of 30 May 1991).

5 — Strangely, Presidential Decree 219/91, in its original version, did not contain any provision reproducing Article 7(1) of the Directive. Perhaps the Greek legislature considered, wrongly, that the last subparagraph of Article 7(2) did not allow the Member States a choice between the two alternative solutions provided for in that paragraph, but rather a choice between the provisions of Article 7(1) on the one hand and Article 7(2) on the other. Moreover, Article 6(1) of Presidential Decree 219/91, set out in the text, did not (although provided for in Article 7(2) of the directive) refer to the payment of commission to a commercial agent responsible for a specific group of customers. Subsequently, however, after the decision of the Protodikio, Athens, referring questions to the Court of Justice was delivered, Article 6(1) of Presidential Decree 219/91 was replaced by Article 4(2) of Presidential Decree 312/95 (FEK (*Official Gazette of the Hellenic Republic*) A 168 of 22 August 1995), which now reproduces correctly, in my opinion, the content of Article 7(1) and (2) of the Directive.

IV — Observations concerning admissibility

9. At the hearing, the defendant in the main action, referring to its arguments in the written procedure, contended that the questions referred for a preliminary ruling should not be answered as to substance. That was because, in its view, it was not objectively necessary in order to resolve the dispute in the main proceedings, in view of the fact that the plaintiff in the main action had never had a contractual relationship with the company Saint Ritsis, which had merged with Kartonpak, and, for that reason, he was not in any event entitled to commission for contracts concluded with customers of the former company.

10. The defendant in fact contended before the national court (see point 3 above) that the action against it should be dismissed, *inter alia* since the customers to whom the plaintiff referred were former customers of Saint Ritsis, with which the plaintiff did not have a contractual relationship. Nevertheless, the national court considered [probably because the plaintiff had claimed before it that 'he was entitled to commission (...) regardless whether he had himself found the customers or whether they were customers of Saint Ritsis and (...) he had not been involved at all in the sales to them'] that, before deciding on the question whether the defendant's arguments were well founded, it should refer questions for a preliminary ruling to the Court of Justice, in order to have the exact meaning of Article 7(2) of the directive clarified, with the reservation, as expressly stated in the order for reference, that after the ruling of the Court of Justice 'to the extent to which the applicant's claims are found in principle to be legally substantiated it will then be a matter of examining the defendant's objections.'

11. According to the case-law of the Court of Justice it is for the national court before which the proceedings are pending to determine, having regard to the special features of the case, both the need for a preliminary ruling to enable it to give judgment and the relevance of the questions which it refers to the Court, [6] and also to decide at which stage of the proceedings to refer such questions. [7] Taking that case-law into account, and inasmuch as the questions referred to the Court by the Polimeles Protodikio, Athens, cannot be regarded as manifestly lacking any significance for the resolution of the case before it, the contentions of the defendant in the main action to the effect that the questions are not objectively necessary for the resolution of that dispute, must in any case be rejected, *a fortiori* since the defendant's contention is linked to assessment of the facts, the ascertainment of which (where, as in the present case, there is a material disagreement between the parties [8]) is, under the system

6 — See, for example, Case 247/86 *Alsatel* [1988] ECR 5987, paragraph 8, and Case C-134/94 *Esso Española* [1995] ECR I-4223, paragraph 9.

7 — See Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5 et seq., and Cases 338/85 *Pardini* [1988] ECR 2041, paragraph 8, and C 348/89 *Mecanarte* [1991] ECR I 3277, paragraph 48.

8 — From the order for reference, it appears that the plaintiff rejects the defendant's arguments to the effect that the customers to whom he refers in his pleadings were former customers of Saint Ritsis.

established by Article 177 of the Treaty, solely for the national court. [9]

12. The defendant in the main action maintained, moreover, at the hearing before the Court, that if the questions referred for a preliminary ruling are held admissible, the first question requires to be reformulated. It argues that it should be accepted, in interpreting the order for reference as a whole, that by its first question the national court is asking whether, within the meaning of the second indent of Article 7(2) of the Directive, and in the light of Articles 17 and 19 of the Third Directive concerning mergers of public limited liability companies, [10] a commercial agent is entitled to commission for contracts concluded with customers of a third company which has taken over the company with which he had contracted.

13. On that point it need merely be pointed out that, according to settled case-law, by virtue of the division of jurisdiction provided for in Article 177 in preliminary-ruling proceedings, it is for the national court alone to determine the subject-matter of the questions which it wishes to refer to the Court; the Court cannot, therefore, at the request of a party to the main proceedings, examine a question which has not been referred to it by the national court or enlarge the scope of the question referred. [11] In this case, there is no indication in the decision to refer a question to the court which would permit the construction of the first question proposed by the defendant in the main action. Accordingly, to accept that interpretation would in fact amount to enlarging the scope of that question which, primarily for the above reason, cannot be permitted.

14. Before examining the merits, the following points should be made: Article 11 of Presidential Decree 219/91 contains transitional provisions corresponding to the transitional arrangements provided for in Article 22(1) of the Directive. In accordance with Article 11(1) of Presidential Decree 219/91, it is to apply to contracts concluded after its entry into force. Moreover, Article 11(2) provides as follows: 'As regards the rights and duties of the parties under contracts concluded prior to the entry into force of this Presidential Decree, the provisions of that Decree are to apply from 1 January 1994.' Consequently, in view of the fact that Presidential Decree 219/91 was published in the Official Gazette of the Hellenic Republic on 30 May 1991, the right laid down in that Decree applied to new contracts, that is to say those concluded after that date and thenceforth. Conversely, the Presidential Decree did not apply to previous contracts, that is to say to those concluded prior to the above date, in respect of

9 — See, for instance, Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 12, and Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraphs 16 and 17.

10 — The defendant is clearly referring to Council Directive 78/855/EEC of 9 October 1978 (OJ 1978 L 295, p. 36).

11 — See, for instance, Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 20; Case C-381/89 *Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others* [1992] ECR I-2111, paragraphs 18 and 19; and Case C-30/93 *AC-ATEL Electronics*, referred to in footnote 9, at paragraph 19.

which a transitional period was provided, which ran until 1 January 1994. Consequently, until 31 December 1993, the previous system applied to those contracts.

15. As the pleadings show, the commercial agency contract in question was concluded prior to the entry into force of Presidential Decree 219/91, on 10 February 1981. Thus it is not covered by the new régime laid down in the Decree, unless it was still in force on the determinant date of 1 January 1994, that is to say on the date on which the Decree began to apply to previous contracts as well. From the order for reference it appears, moreover, that the defendant took steps to terminate the agreement at an unspecified date. Accordingly, if the agreement in question was terminated prior to 1 January 1994, it falls outside the scope of Presidential Decree 219/91, which would probably automatically deprive the questions referred for a preliminary ruling of any effect on the outcome of the main proceedings. Since, however, the national court considers the dispute before it to be covered by the provisions of Presidential Decree 219/91, its questions must be examined as to substance.

V — Question 1

16. By this question the national court asks the Court to clarify whether a commercial agent who is contractually responsible for or has exclusive rights over a specific geographical area is entitled to commission even where the commercial transaction was not concluded as a result of his personal intervention.

17. In the order for reference, the national court expresses the view that 'even if the transaction was concluded without the involvement of the representative and with a customer which he did not find, as long as that transaction was concluded in his geographical area ... the agent is entitled to commission.' Apart from the plaintiff, the Commission and the Governments of the French Republic, the Federal Republic of Germany and the Hellenic Republic, which submitted written observations, all support that view.

18. The formulation and structure of Article 7(1) and (2) also lend support to that view. In the cases of Article 7(1)(a) and (b) of the directive, the legislature proceeds on the basis that, for a commercial agent's claim to commission to arise, the contract should be the consequence of his personal involvement. Consequently a causal connection between the conclusion of the contract in question and the intermediary role of the representative is required. Conversely, the case dealt with in Article 7(2) does not presuppose the existence of such a relationship. A commercial agent with an assigned area has a claim to commission for every transaction concluded with a customer belonging to that

area. The sole precondition for the claim to commission is, in this case, simply the conclusion of a contract with a customer in his area, not the conclusion of the contract as a result of the agent's activity as intermediary. The right to commission is thus here independent of any such activity. Thus the claim to commission is not affected by the fact that the contract was concluded directly by the principal where the other party is a customer in the area assigned to the commercial agent.

19. That interpretation is consistent with the formulation of Article 7(2), according to which the agent 'shall also be entitled to commission' in the cases provided for in that provision. That formulation indicates that what is laid down in Article 7(2) goes beyond that provided for in Article 7(1) and accordingly conclusion of a contract following the involvement of the agent does not, under the abovementioned Article 7(2), constitute the precondition for entitlement to commission. Moreover, if that condition had to be met in the cases provided for in Article 7(2), then the existence of that paragraph would be unnecessary.

20. Accordingly, the following reply should be given to the first question: Article 7(2) of the directive should be interpreted to the effect that, where the commercial agent is responsible for a specific geographical area, he is entitled to commission even on transactions concluded without his involvement.

VI — Question 2

21. The second question concerns the interpretation of the term 'customer belonging', in particular where the customer is a company. In that question the word 'belonging' may refer either to the place where the seat of the company is located or the place in which its commercial activity is actually carried on or, possibly, its works or other establishments are located.

22. In the view of the national court, the commercial agent is entitled to commission on the conclusion of the contract with a customer whom he did not find, 'as long as that transaction was concluded in his geographical area and irrespective of whether the seat or any other establishment in which the customer carries on his commercial activity is located in that area.' The defendant in the main proceedings contends that it is the place central to the decision to conclude the contract and where all the necessary documents are executed that is of crucial significance. According to the Commission, the place where the commercial activities of the customer are actually exercised must be taken into account, unless the relevant commercial agency contract shows a different intention on the part of the contracting parties. In the view of the Greek Government, it is for the national court to determine, in the light of the actual circumstances of each contract, whether a particular customer belongs to the geographical area for which the commercial agent is responsible. The German Government observes that on this point the Community legislature adopted the same

solution as the German legislature and states that the Directive was drafted on the model of the corresponding provisions of German law, which have been applicable since 1953; it suggests an interpretation similar to that given by German case-law on the second subparagraph of Paragraph 87 of the Handelsgesetzbuch (HGB). The formulation of that provision is analogous to that of Article 7(2) of the Directive. [12] Thus, according to the German Government, the determinant factor is whether the customer is established or has its seat in that particular area. Where a customer has several undertakings or where an undertaking has several establishments, then the undertaking or the establishment from which the order emanates is determinant.

23. I consider that the term 'customer belonging to a geographical area' must be defined on the basis of the commercial agency contract binding the parties. In view of the fact that commercial relations are involved which are governed as a rule by the principle of the parties' freedom to decide the terms of the contract, the definition on a geographical or other basis of the circle of customers falling within the scope of the commercial agent's activities as intermediary is, first and foremost, a question for the parties. [13] Accordingly in each case the intention of the contracting parties must be ascertained. Ascertainment of that intention is, of course, a matter solely for the national court.

24. However, in a case where the intention of the parties is not apparent from the contract, a criterion must be determined on the basis of which it can be decided whether a customer belongs to the area covered by the agent. Where natural persons are involved, the basic criterion is whether the person's residence is in the area assigned. If a business is involved, residence must in principle be regarded as its place of business. [14]

25. Where legal persons are involved and, in particular, companies, the criterion to which recourse should principally be had is their seat. That criterion, however, should not be regarded as absolute, since otherwise problems would be created in cases where, for instance, there is more than one place of business, branch, or so forth. The present question referred to the Court demonstrates those problems particularly vividly. On the actual facts before the national court, the seat of one of those customers was in the Attiki area, whereas its plant was in another area, specifically in the area where the plaintiff carried out his activities as a commercial agent. Application of the criterion of the seat in such a case would lead to recognition of a claim to commission solely in favour of an

12 — The second subparagraph of Paragraph 87 of the HGB states as follows: 'Ist dem Handelsvertreter ein bestimmter Bezirk oder ein bestimmter Kundenkreis zugewiesen so hat er Anspruch auf Provision auch fur Geschafte, die ohne seine Mitwirkung mit Personen seines Bezirkes oder seines Kundenkreises wahrend des Vertragverhaltnisses abgeschlossen sind.'

13 — The rules introduced by the Directive (and, accordingly, the provisions by which they are transposed into national law) are, in principle, rules of dispositive law (*jus dispositivum*); for an exception, see the provisions of Article 5 of the Directive).

14 — See A. Liakopoulos: *Γενικό Εμπορικό Δίκαιο* (General Commercial Law) (2nd edition), p. 120; D. Bruggemann: *Staub*, Grosskommentar HGB (4th edition), Paragraph 87 HGB, No 38 et seq.

agent operating where the seat of the company was situated.

26. That is a particularly stringent solution, which leads to an unfair result in cases where the order or initiative for the order came from a branch or plant in the area of another agent. In such a case, the order and the conclusion of the ensuing contract can well be ascribed to the overall activities carried out by the latter agent as regards attending to the interests of his principal in the area assigned. Although independent of any actual activity as an intemediary on the part of the agent, his claim to commission for contracts concluded with customers belonging to the region assigned to him essentially constitutes remuneration (indirect) not solely for each particular contract but for the overall activities of the agent in the geographical area for which he is responsible. [15] Those considerations lead me to the conclusion that instead of the standard criterion of the seat, the essential criterion to be preferred is who placed the order. Where the branch or plant functions as an independent establishment and is allowed by the central administration of the legal person to place orders, it should be regarded as a customer belonging to the region assigned to the agent within the meaning of the provision to be interpreted. If, conversely, the plant or branch located in the area in question is not free to act independently, then the company itself whose seat is outside the assigned area should be regarded as the customer. That solution has been adopted, as the German Government has stated in its observations, in the case-law of the German courts when interpreting the second subparagraph of Paragraph 87 of the HGB which, as mentioned above, contains a provision analogous to Article 7(2) of the Directive. [16] On the basis of that interpretation, a commercial agent is entitled to commission on contracts drawn up by the principal following an order from an establishment of a company operating as an independent unit within his area even though the contract was concluded outside his assigned area. Conversely, a commercial agent cannot claim commission for a contract drawn up by the principal with a customer who does not belong to that area in the sense set out above, even though the contract was concluded within that area. [17] Thus the additional criterion which, from the formulation of the second question referred to the Court, the national court would appear to regard as acceptable, that is to say the place where the contract *was concluded*, does not affect the system of the Directive.

27. Accordingly, the following reply should be given to the second question: The term 'customer belonging' at the end of the first subparagraph of Article 7(2) of Council Directive 86/653/EEC should be interpreted as referring, whenever a customer is a legal person with several establishments, to the establishment which placed the order, unless the agreement provides otherwise.

15 — See Brüggemann, op. cit., No. 32.

16 — The second subparagraph of Paragraph 87 of the HGB uses the term 'persons in his area' ('Personen seines Bezirkes').

17 — See Brüggemann, op. cit., No. 38.

VII — Conclusion

In the light of the foregoing, I suggest that the Court should give the following reply to the questions referred to it by the Polimeles Protodikio, Athens:

(1) Article 7(2) of Council Directive 86/653/EEC should be interpreted to the effect that, where a commercial agent is responsible for a specific geographical area, he is entitled to commission even on transactions concluded without his involvement.

(2) The term 'customer belonging' at the end of the first subparagraph of Article 7(2) of Council Directive 86/653/EEC should be interpreted as referring, whenever a customer is a legal person with several establishments, to the establishment which placed the order, unless the agreement provides otherwise.