ORDER OF THE COURT (First Chamber)
10 February 2004 *

In Case C-85/03,

REFERENCE to the Court under Article 234 EC by the Polimeles Protodikio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Mavrona & Sia OE

and

Delta Etairia Symmetochon AE,

on the interpretation 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 (OJ 1986 L 382, p. 17),

* Language of the case: Greek.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. La Pergola, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

the referring court having been informed that the Court proposes to give its decision by reasoned order, in accordance with Article 194(3) of its Rules of Procedure,

the persons referred to in Article 23 of the Statue of the Court of Justice having been invited to submit any observations which they might wish to make in that regard,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By order of 27 April 2001, received at the Court Registry on 26 February 2003, the Polimeles Protodikio Athinon referred to the Court four questions for a

preliminary ruling under Article 234 EC on the interpretation 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 (OJ 1986 L 382, p. 17).

2 Those question were raised in proceedings between Mavrona & Sia OE ('Mavrona'), a commercial partnership governed by Greek law, and Delta Eltaireia Symmetochon AE ('Delta') concerning remuneration and allowances payable under a commission contract.

Legal framework

3 The scope of Directive 86/653 is defined in Articles 1 and 2 thereof, which provide:

'*Article 1*

1. The harmonisation measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States governing the relations between commercial agents and their principals.

2. For the purposes of this Directive, "commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal.

3. A commercial agent shall be understood within the meaning of this Directive as not including in particular:

— a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association,

— a partner who is lawfully authorised to enter into commitments binding on his partners,

— a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy.

Article 2

1. This Directive shall not apply to:

— commercial agents whose activities are unpaid,

— commercial agents when they operate on commodity exchanges or in the commodity market,

— the body known [as] the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries.

2. Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State.'

4 Directive 86/653 was transposed into Greek law by Presidential Decree No 219 of 18 and 30 May 1991 on commercial agents and by Presidential Decree No 312 of 8 and 22 August 1995 amending and supplementing Presidential Decree No 219/91 as amended by Presidential Decrees Nos 249/93 (FEK A' 108, 28 June 1993) and 88/94 (FEK A' 64, 22 April 1994), which, essentially, appear to reproduce the terms of that directive.

Main proceedings and questions referred to the Court

5 It is apparent from the order for reference that Delta and Mavrona concluded a contract under which Mavrona was supposed to purchase Delta's products on its own behalf. Upon receiving those products, Mavrona paid for them, after deducting an amount equal to 19% corresponding to its commission, and it subsequently sold the products to third parties, acting on behalf of Delta.

6 It appears that Mavrona requested that Delta pay damages for loss of custom, as provided for in Article 9(19) of Presidential Decree No 312, claiming that it was acting in a manner comparable to that of a commercial agent. Delta objected to the payment sought by Mavrona and on 2 July 1996 Mavrona brought proceedings before the Polimeles Protodikio Athinon.

7 That court states that, on a 'grammatical interpretation' of both Directive 86/653 and Presidential Decree No 312, Mavrona's activity is not covered by those measures, since it operated under Greek law as a 'commission agent', by contracting on behalf of the principal but in its own name. The question arises, however, as to whether those provisions should be applied by analogy to the situation of the company in question. Such an application by analogy, moreover, has attracted much conflicting comment in academic writing and in the case-law of the Greek courts.

8 Before Directive 86/653 was transposed, Greek law drew no distinction between commercial agents and commission agents, which explains why there is now a lacuna or at least some uncertainty as regards commission agents in Greek law.

9 The Polimeles Protodikio Athinon therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the definition of a commercial agent in Article 1(2) of Directive 86/653/EEC extend to a self-employed intermediary who purchases in his own name goods from the principal, deducting his commission from the purchase price, and subsequently sells those goods to third parties, but acting on behalf of the principal?

2. If the answer is in the negative, in the present instance has the definition of commercial agent laid down by that article been laid down in contra-distinction to the foregoing person (that is to say to a self-employed intermediary who purchases in his own name goods from the principal, deducting his commission from the purchase price, and subsequently sells those goods to third parties, but acting on behalf of the principal), or is there in fact a lacuna?

3. If there is a lacuna, is it possible, on the basis of the principles of equity, for the foregoing definition in Article 1(2) of the directive to be applied by analogy to a self-employed intermediary who purchases in his own name goods from the principal, deducting his commission from the purchase price, and subsequently sells those goods to third parties, but acting on behalf of the principal?

4. If the answer is in the negative, may the courts of the Member States extend the meaning of a commercial agent to cover the foregoing person, by analogical application of their national legislation which incorporated the directive into their domestic law, or is that impermissible because it runs counter to the uniformity of Community law?'

The questions referred to the Court

10 The Court took the view that the answers to those questions left no room for reasonable doubt and, pursuant to Article 104(3) of its Rules of Procedure, informed the national court that it was proposing to give its decision by reasoned

order and invited the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations they might have in that regard.

11 Delta, the German Government and the Commission of the European Communities agreed that the Court should give its decision by reasoned order. The Italian Government informed the Court that it had no observations to make in that regard. Mavrona maintained that from the outset there had been no reason to refer those questions to the Court, since it was perfectly clear that the contract in this case was an agency contract and not a commission contract. In any event, Directive 86/653 must be applied to the facts of the case before the national court.

12 By its questions, which must be examined together, the national court is essentially asking whether the scope of Directive 86/653 includes, in addition to intermediaries acting in the name and on behalf of a principle, persons who act on behalf of a principle but in their own name and, if not, whether the national courts may none the less apply that directive by analogy to the situation of commission agents.

13 The Greek and German Governments and the Commission submit that the clear and unequivocal wording of Directive 86/653 precludes its application, even by analogy, to commission agents. Such application must be precluded in the same way at community level and at national level. Commercial agents and commission agents are engaged in different occupations and their needs for protection in their relations with their principals are different. A measure which harmonises the applicable law to a certain, well-defined contractual relationship cannot be extended to other types of contractual relationships which are not covered by the measure.

14 However, Mavrona and the Italian Government claim that Directive 86/653 must be applied to the situation at issue in the main proceedings, because the decisive point of that situation lies in the fact that the person concerned acts on behalf of the principal. A commission agent must therefore be treated in the same way as a commercial agent.

15 In that regard, it is apparent from the clear wording of Article 1(2) of Directive 86/653 that that directive defines a commercial agent as 'a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal'. In Article 1(3) and Article 2, that directive precisely circumscribes the concept of commercial agent and limits it to well-defined situations.

16 There is no reference in any provision of Directive 86/653 to persons who, while acting on behalf of a third party, none the less do so in their own name; nor, moreover, does that directive contain any indication from which it might be assumed that it applies to contractual relationships such as those in issue in the main proceedings.

17 The activity pursued by persons acting on behalf of a third party but in their own name is different from that pursued by commercial agents and, as the German Government rightly observes, the interests and the need for protection of the two occupations are not the same.

18 Accordingly, there is no reasonable doubt that the scope of Directive 86/653 does not include the situation in issue in the main proceedings.

19 Independently of whether it might prove useful to harmonise the rules of the Member States on the protection of the occupation of commission agent, a question which it is not for the Court to resolve, it is common ground that no harmonisation of that nature exists at present. In any event, that harmonisation cannot be introduced into Community law by judicial decision.

20 In any event, such a legislative situation at Community level does not preclude a national legislature from introducing, for the protection of commission agents, appropriate rules inspired by the provisions of Directive 86/653 where it appears expedient to do so and provided that no other provision of Community law prevents it from doing so.

21 The answer to the questions referred to the Court must therefore be that Directive 86/653 is to be interpreted as meaning that persons who act on behalf of a principal but in their own name do not come within the scope of that directive.

Costs

22 The costs incurred by the Greek, German and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

hereby orders:

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 persons who act on behalf of a principal, but in their own name, do not come within the scope of that directive.

Luxembourg, 10 February 2004.

R. Grass

Registrar

P. Jann

President of the First Chamber