Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 April 2016*

(Reference for a preliminary ruling — Self-employed commercial agents — Directive 86/653/EEC — Article 17(2) — Indemnity in respect of customers — Conditions for granting — Acquisition of new customers — Concept of 'new customers' — Principal's customers purchasing, for the first time, goods which the commercial agent was assigned to sell)

In Case C-315/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 14 May 2014, received at the Court on 2 July 2014, in the proceedings

Marchon Germany GmbH

v

Yvonne Karaszkiewicz,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal and K. Jürimäe (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2015,

after considering the observations submitted on behalf of:

— Marchon Germany GmbH, by C. Stempfle, C. Nitsche, A. Zafar and A. Herbertz, Rechtsanwälte,

— Ms Karaszkiewicz, by G. Heinicke, Rechtsanwalt,

— the German Government, by T. Henze, B. Beutler, J. Kemper and J. Mentgen, acting as Agents,

— the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

— the European Commission, by K.-P. Wojcik and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2015,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(2)(a) 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 The request has been made in proceedings between Marchon Germany GmbH ('Marchon') and Ms Karaszkiewicz, concerning the indemnity in respect of customers, claimed by the latter against Marchon, following the termination of her commercial agency contract.

Legal context

EU law

3 The second and third recitals of Directive 86/653 state as follows:

'... the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the [European Union] and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; ... moreover, those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agents are established in different Member States;

... trade in goods between Member States should be carried on 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; ... 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'.

4 Article 1(1) and (2) of that directive provides:

'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.'

5 Article 3 of that directive is worded as follows:

'1. In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith.

2. In particular, a commercial agent must:

(a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;

…’

6 Article 17(1) and (2) of Directive 86/653 provides:

‘1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

2.

(a) The commercial agent shall be entitled to an indemnity if and to the extent that:

— he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

— the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. …

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent’s average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

…’

German law

7 Under Paragraph 89b(1) of the Commercial Code (Handelsgesetzbuch):

‘The commercial agent may, after termination of the contractual relationship, demand from the principal a reasonable indemnity if and to the extent that:

1. the principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business with new customers which the commercial agent has brought; and

2. the payment of an indemnity is equitable having regard to all the circumstances, particularly the loss of the commission of the commercial agent from the business transacted with those customers.

It is equivalent to acquiring a new customer if the commercial agent has expanded the volume of business with an existing customer so significantly that, in commercial terms, it is equivalent to acquiring a new customer.’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In the context of its activity as a wholesaler of spectacle frames, Marchon markets a range of frames of different models, brands and collections to customers comprising opticians.

9 In order to ensure distribution of its frames, Marchon has recourse to the services of a number of commercial agents. It thus entrusts each of them with the task of negotiating the sale, not of its entire range of frames, but of those belonging to one or more specific brands. The order for reference states that, for the same geographical sector, each commercial agent is obliged to compete with the agents whom Marchon has entrusted with the sale of its other brands of frames.

10 Ms Karaszkiewicz, who worked as a commercial agent for Marchon between September 2008 and June 2009, was given responsibility by Marchon for the sale of frames of brands C. K. and F. To that end, Marchon had made available to her a list of opticians with whom it already had business relations with regard to other brands of frames. Ms Karaszkiewicz negotiated, primarily with those opticians, the sale of the frames entrusted to her.

11 Following the termination of her contract, Ms Karaszkiewicz brought a claim against Marchon, pursuant to Paragraph 89b of the Commercial Code, for an indemnity in respect of customers. In this regard, she submitted, inter alia, that the opticians who had purchased for the first time, through her involvement, the frames of brands C. K. and F. should be regarded as 'new customers' within the meaning of that provision, even though they had already been on the list of customers that Marchon had made available to her.

12 The Landgericht München I (Regional Court, Munich I) upheld Ms Karaszkiewicz's claim, limiting on equitable grounds, however, the amount of indemnity to be granted to half of the amount sought. That court held that the negotiation undertaken by Ms Karaszkiewicz had been facilitated by the fact that the new customers whom she claimed to have acquired for Marchon were already aware of that company.

13 Marchon appealed against that decision to the Oberlandesgericht München (Higher Regional Court, Munich). That court upheld the decision and the company appealed on a point of law ('Revision') to the Bundesgerichtshof (Federal Court of Justice).

14 The referring court takes the view that the outcome of the appeal depends on the interpretation of Article 17(2)(a) of Directive 86/653, and in particular on whether a commercial agent must be viewed as having acquired new customers, within the meaning of that provision, in circumstances such as those in the main proceedings.

15 According to the referring court, the concept of 'new customers', within the meaning of that provision, could be limited to persons who, prior to the involvement of the commercial agent concerned, maintained no business relations with the principal. However, it is unsure whether a broader interpretation of that provision should not be accepted in the case where, in light of the principal's sales structure, the commercial agent is responsible for the distribution of only a portion of the principal's goods. With regard to the spirit and purpose of Directive 86/653, and in particular the aim of protecting commercial agents in their relations with the principal, persons who had up to that point not purchased from the principal any of the goods which the commercial agent was entrusted to promote, despite transactions between those persons and the principal in regard to different goods, could be regarded as new customers within the meaning of Article 17(2)(a) of that directive.

16 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must the first indent of Article 17(2)(a) of Directive 86/653 be interpreted as precluding the application of a national provision under which "new customers" can also be customers acquired by the commercial agent who have already had business relations with the principal for products sold by him from a range of products but not for products whose sole representation the principal has entrusted to the agent?'

The request for reopening of the oral part of the procedure

17 By document lodged at the Registry of the Court on 18 November 2015, Marchon requested the Court to order the reopening of the oral part of the procedure.

18 Marchon submits, essentially, that certain of the terms used by the Advocate General in his Opinion, namely 'product', 'new category of products' and 'brand', were not the subject of discussion between the parties.

19 In that regard, it must be noted that, pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

20 In the present case, the Court, after hearing the Advocate General, considers that it has all the information necessary to answer the question raised by the referring court and that the case does not have to be decided in the light of a new fact of such a nature as to have a decisive bearing on its decision or of an argument which has not been debated before it.

21 With regard, in particular, to the concepts of 'product', 'new category of products' and 'brand' used by the Advocate General in his Opinion, the Court notes that the parties had ample opportunity, both in their written submissions and at the hearing, to discuss those terms.

22 Accordingly, it is not appropriate to accede to Marchon's request for a reopening of the oral procedure.

The question referred for a preliminary ruling

23 Before examining the question raised by the referring court, it should be noted that, as is clear from its Article 1, Directive 86/653 harmonises the laws, regulations and administrative provisions of the Member States governing the relations between the parties to commercial agency contracts and in particular, in Articles 13 to 20, those regulating the conclusion and termination of such contracts.

24 With regard to the termination of commercial agency contracts, Article 17 of that directive requires Member States to put in place a mechanism for providing compensation to the commercial agent, allowing them to choose between two options: either an indemnity determined according to the criteria set out in Article 17(2), namely, the system of indemnity in respect of customers, or compensation according to the criteria set out in Article 17(3), namely the system of compensation for damage (judgment in *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 24).

25 It is common ground that the Federal Republic of Germany has opted for a system of indemnity in respect of customers.

26 It is in this context that, by its question, the referring court asks, in essence, whether the first indent of Article 17(2)(a) of Directive 86/653 must be interpreted as meaning that the customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell can be regarded as new customers within the meaning of that provision, even though those customers already maintained business relations with that principal in regard to other goods.

27 Under the first indent of Article 17(2)(a) of Directive 86/653, the commercial agent is to be entitled to an indemnity if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. The payment of this indemnity must be equitable, having regard to all the circumstances, and, in particular, to the commission lost by the commercial agent on the business transacted with such customers.

28 The very wording of that provision, in that it differentiates between new customers and existing customers, might, it is true, suggest that only customers with whom the principal had, until the commercial agent's involvement and generally speaking, maintained no business relations, are to be regarded as new customers. However, those words, by themselves, do not establish for certain whether the 'new' or 'existing' nature of a customer must be assessed in relation to the principal's entire range of goods or in relation to certain goods in particular.

29 Article 17(2) of Directive 86/653 must consequently be interpreted by taking account of the context of that provision and the objectives pursued by that directive (see, by analogy, judgments in *Csonka and Others*, C-409/11, EU:C:2013:512, paragraph 23, and *Vnuk*, C-162/13, EU:C:2014:2146, paragraph 42).

30 As regards, first, the context in which that provision features, that provision constitutes one of the measures harmonising, as has been noted in paragraph 23 above, the rules applicable to commercial agency contracts. On that point, it is clear from Article 1(2) of Directive 86/653 that, under such a contract, a commercial agent is someone who, as a self-employed intermediary, has continuing authority to negotiate the sale or purchase of goods on behalf of the principal, and who can negotiate and conclude such transactions on behalf of and in the name of the latter.

31 Furthermore, it follows from Article 3(1) and (2) of that directive that, under that contract, the commercial agent must safeguard the principal's interests by, in particular, making proper efforts to negotiate and, where applicable, to conclude the transactions of which he has been instructed to take care by the principal.

32 As the German Government essentially stated in its written observations, the purpose of a commercial agent's activity thus depends on the terms of the contract which binds him to the principal and, in particular, on the agreement between the parties with regard to the goods which the principal intends to sell or purchase through the mediation of that commercial agent.

33 As regards, second, the objectives pursued by Directive 86/653, it is important to note that that directive seeks, inter alia, to protect the commercial agent in his relations with the principal (see, to that effect, judgments in *Honyvem Informazioni Commerciali*, C-465/04, EU:C:2006:199, paragraph 19, and *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 23). The Court has already held that Article 17 of that directive is, in that regard, of particular importance (see, to that effect, judgment in *Unamar*, C-184/12, EU:C:2013:663, paragraph 39). It is therefore necessary to interpret the wording of Article 17(2) in a manner which contributes to that protection of the commercial agent and which therefore takes full account of the merits of the latter in carrying out the transactions assigned to him. The concept of 'new customers', within the meaning of that provision, may not therefore be construed restrictively.

34 In the light of the foregoing, the view must be taken that it is in relation to the goods in respect of which the commercial agent was assigned by the principal to negotiate and, if applicable, to conclude the sale or purchase that it is necessary to determine whether a customer is new or existing within the meaning of Article 17(2) of Directive 86/653.

35 Thus, in a situation such as that in the main proceedings, in which, in compliance with the terms of the commercial agency contract, the commercial agent is assigned to negotiate the sale of a portion of the principal's range of goods and not all of that range, the fact that a person already maintained

business relations with the principal in respect of other goods does not exclude that person from being regarded as a new customer brought in by that commercial agent when the latter has managed, through his efforts, to initiate business relations between that person and the principal for the goods which the agent has been assigned to sell.

36 Marchon, however, submits that, in the present case, the customers relied on by Ms Karaszkiewicz cannot be considered to be new within the meaning of Article 17(2) of Directive 86/653 in respect of the goods sold by her. In fact, it argues, those customers already maintained business relations with Marchon in regard to spectacle frames similar to those in respect of which that commercial agent was tasked with negotiating the sale, the latter frames being only of different brands.

37 In that regard, the mere fact that, in circumstances such as those in the main proceedings, customers brought in by a commercial agent for his principal had already purchased from the principal goods comparable in nature to those in respect of which that commercial agent had negotiated the sale to those customers cannot suffice as a basis for taking the view that the latter goods already formed part of the pre-existing business relations with those customers.

38 In such circumstances, regard being had to the commercial agent's role as sales negotiator, described in paragraphs 30 and 31 above, it is necessary to examine whether the sale of the goods in question required, on the part of the commercial agent, particular negotiating efforts and sales strategy, leading to the establishment of specific business relations, particularly in so far as those goods relate to a different portion of the principal's range.

39 In that regard, as noted by the Advocate General in point 52 of his Opinion, the fact that the principal entrusted a commercial agent with the marketing of new goods to customers with whom the principal already maintained certain business relations may indicate that those goods relate to a different portion of the range to that which those customers had purchased up to that point and that the sale of those new goods to the latter customers would require that commercial agent to set up specific business relations, this, however, being a matter for the referring court to determine.

40 That analysis is supported by the fact that the sale of the goods generally takes place in a different setting depending on the brands to which they belong. In that regard, the Court has already held that a brand is often, in addition to being an indication of the origin of the goods or services, an instrument of commercial strategy used for, inter alia, advertising purposes or to acquire a reputation in order to develop consumer loyalty (judgment in *Interflora and Interflora British Unit*, C-323/09, EU:C:2011:604, paragraph 39).

41 Thus, circumstances such as those in the main proceedings, in which, as is apparent from the order for reference, the offer of the principal's goods is divided up into different brands, each of its commercial agents being entrusted with negotiating the sale of one or more brands only, tends to suggest — this, however, being a matter for the referring court to determine — that those commercial agents are required to establish, with each customer, business relations specific to the brands assigned to them.

42 As regards, finally, Marchon's argument that it is easier for commercial agents to place new goods with persons who already have business relations with the principal, that assertion, even if considered to be proven, could be fully taken into account by the national court in the course of its analysis seeking to ascertain, in conformity with the second indent of Article 17(2) of Directive 86/653, the equitable nature of his indemnity (see, by way of analogy, judgment in *Volvo Car Germany*, C-203/09, EU:C:2010:647, paragraph 44).

43 In the light of the foregoing, the answer to the question referred is that the first indent of Article 17(2) of Directive 86/653 must be interpreted as meaning that customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell must be regarded as new customers, within the meaning of that provision, in the case where, even though those customers

already had business relations with that principal in relation to other goods, the sale, by that agent, of the first goods required the establishment of specific business relations, this being a matter for the referring court to determine.

Costs

44 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The first indent of Article 17(2)(a) 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 customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell must be regarded as new customers, within the meaning of that provision, in the case where, even though those customers already had business relations with that principal in relation to other goods, the sale, by that agent, of the first goods required the establishment of specific business relations, this being a matter for the referring court to determine.

[Signatures]