JUDGMENT OF THE COURT (First Chamber)

17 January 2008 *

In Case C-19/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 19 December 2006, received at the Court on 23 January 2007, in the proceedings

Heirs of Paul Chevassus-Marche

v

Groupe Danone,

Kro beer brands SA (BKSA),

Évian eaux minérales d'Évian SA (SAEME),

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the heirs of Mr Chevassus-Marche, by SCP Waquet, Farge and Hazan, lawyers,

— Groupe Danone, Kro beer brands SA (BKSA) and Évian eaux minérales d'Évian SA (SAEME), by SCP Célice, Blancpain and Soltner, lawyers,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the German Government, by M. Lumma and A. Dittrich, acting as Agents,

— the Commission of the European Communities, by H. Støvlbæk and A. Bordes, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 1986 L 382, p. 17) ('Directive 86/653').

2 The reference has been made in the course of proceedings between the heirs of Mr Chevassus-Marche and Groupe Danone, Kro beer brands SA and Évian eaux minérales d'Évian SA regarding the liability of those companies for the payment of commission to Mr Chevassus-Marche.

Legal context

3 Article 1(2) of Directive 86/653 defines a commercial agent as being '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'.

4 Article 4(1) of Directive 86/653 states:

'In his relations with his commercial agent a principal must act dutifully and in good faith.'

5 Article 7 of that directive provides:

'1. 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.

2. 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.

Member State[s] shall include in their legislation one of the possibilities referred to in the above two indents.'

6 As regards the time when the right to commission arises, Article 10(1) and (2) of Directive 86/653 states:

'1. The commission shall become due as soon as and to the extent that one of the following circumstances obtains:

(a) the principal has executed the transaction; or

(b) the principal should, according to his agreement with the third party, have executed the transaction; or

(c) the third party has executed the transaction.

2. The commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have.'

7 As regards the extinguishment of the right to commission, Article 11(1) of that directive provides:

'The right to commission can be extinguished only if and to the extent that:

— it is established that the contract between the third party and the principal will not be executed,

and

— that fac[t] is due to a reason for which the principal is not to blame.'

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

8 In 1987, BSN, now Groupe Danone, concluded with Mr Chevassus-Marche an exclusive mandate to represent its subsidiaries, Brasseries Kronenberg, now Kro beer brands SA, and Évian eaux minérales d'Évian SA in their dealings with the importers, wholesalers and retailers of their goods in a specific geographical area including the islands of Mayotte and La Réunion (a French overseas collectivity and a French overseas department respectively).

9 Following the termination of that contract, Mr Chevassus-Marche requested from Groupe Danone and its subsidiaries the payment of various sums, among which were commissions relating to purchases made by two companies established in his geographical area. Those requests were refused on the ground that the purchases concerned had been made from central buying offices or dealers in metropolitan France, outside the control of Groupe Danone and it subsidiaries and without any action on the part of Mr Chevassus-Marche.

10 Since the Paris Commercial Court and the Paris Court of Appeal dismissed his action insofar as it concerned the payment of those commissions, Mr Chevassus-Marche lodged an appeal at the Cour de Cassation, which was continued by his heirs following his death.

11 The Cour de Cassation considers that in order to give judgment in the main proceedings it requires an interpretation of Article 7(2) of Directive 86/653. Consequently, it has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 7(2) of … Directive 86/653/EEC … to be interpreted as meaning that a commercial agent entrusted with a specific geographical area is entitled to commission where a commercial transaction between a third party and a customer belonging to that area has been concluded without any action, either direct or indirect, on the principal's part?'

The question referred for a preliminary ruling

12 By that question, the national court asks, in essence, whether the first indent of Article 7(2) of Directive 86/653 should be interpreted as meaning that a commercial agent entrusted with a specific geographical area has the right to a commission for transactions concluded by customers belonging to that area with a third party, without any action, direct or indirect, on the part of the principal.

13 In Case C-104/95 *Kontogeorgas* [1996] ECR I-6643, the Court was called upon to interpret Article 7 of Directive 86/653 in a situation where the principal itself sold its goods to customers belonging to a geographical area which it had entrusted to a commercial agent. When asked whether that agent could claim commission for transactions concluded without any action on his part, the Court held, at paragraph 16 of the judgment, that Article 7 of that directive provides for entitlement to commission in two alternative cases. Paragraph 1 refers to the agent's ongoing or previous activities, whereas paragraph 2 provides that a commercial agent is to be remunerated for all transactions entered into with customers belonging to a certain area or group, no mention being made of the need for any particular activity on the part of the agent.

14 In the situation in question in *Kontogeorgas* the Court held that the first indent of Article 7(2) of Directive 86/653 must be interpreted as meaning that, where a commercial agent is entrusted with a geographical area, he is entitled to commission on transactions concluded with customers belonging to that area, even if they were concluded without any action on his part (*Kontogeorgas*, paragraph 19).

15 The present order for reference asks whether that interpretation should also apply in a situation, such as that in the dispute in the main proceedings, where the sales of goods concluded with the customers established in the geographical sector entrusted to the relevant commercial agent were concluded not only without any action by that agent but also without any action, direct or indirect, on the part of the principal.

16 In that regard, it must be acknowledged that, as the heirs of Mr Chevassus-Marche have pointed out, Article 7(2) of Directive 86/653 merely refers to any 'transactions concluded during the period covered by the agency contract', without any other requirement than that those transactions have been entered into with a customer belonging to a geographical area or a group of customers for whom the commercial agent is responsible. There is no more an express requirement for action on the part of the principal than there is for action on the part of the commercial agent.

17 However, Article 7(2) of Directive 86/653 must be read together with Article 10 of that directive, which specifies the conditions to which the commercial agent's right to commission is subject.

18 Article 10 of that directive establishes the circumstances which give rise to that right. Article 10(1) distinguishes three alternative circumstances which are capable — each

on its own — of constituting the event giving rise to the right to commission. The right is thus acquired as soon as and to the extent that the principal has executed the transaction or should have executed it, according to his agreement with the third party, or as soon as or to the extent that the third party has executed the transaction. Article 10(2) of Directive 86/653 states that the commission becomes due, at the latest, when that third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction.

19 It follows from the combination of those two paragraphs of Article 10 of Directive 86/653 that the commercial agent's right to commission arises either when the principal has or should have carried out his obligation, or when the third party to the agency contract, that is the customer, has or should have carried out his obligation. In each instance, the presence of the principal in the transactions for which the commercial agent can claim commission is indispensable.

20 That interpretation of Article 10 of Directive 86/653 is supported by the wording of Article 11(1) of that directive, according to which the commercial agent's right to commission can be extinguished only if and to the extent that it is established that the contract between the third party and the principal will not be executed, and that fact is due to a reason for which the principal is not to blame. That sole ground for extinguishment, which requires the combination of two sets of circumstances in which express reference is made to the principal, emphasises the importance of his role for the existence of the right to commission.

21 It therefore follows from Articles 7(2), 10(1) and (2), and 11(1) of Directive 86/653, read in conjunction with each other, that the commercial agent can claim commission on the basis of a transaction only to the extent that the principal acted, directly or indirectly, in the conclusion of that transaction.

22 It is for the national court to establish whether or not the evidence before it, assessed in the light of the aim of protecting the commercial agent — which is one of the objectives of that directive (Case C-215/97 *Bellone* [1998] ECR I-2191, paragraph 13; Case C-381/98 *Ingmar* [2000] ECR I-9305, paragraph 20; and Case C-465/04 *Honyvem Informazioni Commerciali* [2006] ECR I-2879, paragraph 19) — and of the obligation on the principal to act dutifully and in good faith under Article 4 of that directive, allow it to establish the existence of such action, be that action of a legal nature, for example through the intermediary of a representative, or of a factual nature.

23 Having regard to the foregoing considerations, the reply to the question referred must be that the first indent of Article 7(2) of Directive 86/653 must be interpreted as meaning that a commercial agent entrusted with a specific geographical area does not have the right to a commission for transactions concluded by customers belonging to that area with a third party without any action, direct or indirect, on the part of the principal.

Costs

24 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 (First Chamber) hereby rules:

The first indent of Article 7(2) of 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 a commercial agent entrusted with a specific geographical area does not have the right to a commission for transactions concluded by customers belonging to that area with a third party without any action, direct or indirect, on the part of the principal.

[Signatures]