In Case 139/80

REFERENCE to the Court under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the action pending before that court between

BLANCKAERT & WILLEMS PVBA, having its registered office in Eeklo, Belgium,

defendant and appellant in the appeal on a point of law,

and

LUISE TROST, Aachen,

plaintiff and respondent in the appeal on a point of law,

on the interpretation of the words "agency" and "other establishment" within the meaning of Article 5 (5) of the Convention of 27 September 1968,

THE COURT (Third Chamber)

composed of: J. Mertens de Wilmars, President, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Blanckaert & Willems (hereinafter referred to as "Blanckaert"), the defendant in the main action, whose registered office is at Eeklo, Belgium,

entered into a contract with the German undertaking Hermann Bey (hereinafter referred to as "Bey"), a furniture agency (Möbelagentur), under which Bey undertook to set up a sales network in the Federal Republic for Blanckaert's furniture. Bey represented several Belgian furniture manufacturers under similar conditions.

Bey, in its turn, signed the following contract on 30 November 1975 with the Trost undertaking (hereinafter referred to as "Trost"), the plaintiff in the main action:

"On behalf of Blanckaert & Willems of Eeklo, Belgium, I hereby authorize you to represent the aforesaid undertaking in the Rhine and Ruhr, Eifel and South Westphalia area.

You will be working as the direct representative of Blanckaert & Willems. You will also receive from them a commission of 5%.

However, I would ask you kindly to send all orders exclusively to my address in Aachen.

Please be understanding about this. The reason is that as I am answerable for you, I must be kept informed of each order.

Naturally, your name will appear on all copies as representative.

I look forward to a profitable association with you . . .".

In December 1976 Blanckaert, having discovered that Trost was representing various Belgian furniture manufacturers, terminated its contract with Trost. Shortly afterwards it also terminated its contract with Bey.

Trost brought an action against Blanckaert in the Landgericht [Regional Court] Aachen for payment of outstanding commission and agent's adjustment fees. Blanckaert challenged the jurisdiction of that court. Trost contended that it had jurisdiction under Article 5 (5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention").

The Landgericht Aachen refused to accept that argument and declined jurisdiction. However, the Oberlandesgericht Köln [Higher Regional Court, Cologne] held that Bey is in fact an agency or other establishment of Blanckaert and that its role as Verkaufsleiter [sales manager] in the relaltionship between Blanckaert and Trost provided grounds for the jurisdicton of the Landgericht Aachen in the dispute.

Hearing the appeal on a point of law, the Bundesgerichtshof found that Bey belongs to the specific category of "Vermittlungsvertreter" (business negotiator) within the class of "Handelsvertreter" (commercial agents) within the meaning of Article 84 et seq. of the German Commercial Code [Handelsgesetzbuch], which states that:

"(1) A commercial agent is one who, as an independent businessman, is charged on a permanent basis with negotiating business on behalf of another undertaking (the principal) or with concluding transactions in the name of the latter. An independent businessman means one who is basically free to organize his own work and hours of work.

(2) Any person who, without being independent within the meaning of paragraph (1), is responsible on a permanent basis for negotiating business for a principal or for concluding transactions in the latter's name, is considered as an employee.

(3) The principal may also be a commercial agent."

Being of the opinion that the dispute raised questions concerning the interpretation of the Convention, the Bundesgerichtshof referred the following questions of the Court of Justice for a preliminary ruling by an order of 21 March 1980:

1. Is a commercial agent [Handelsvertreter] who is a business negotiator [Vermittlungsvertreter] within the meaning of Article 84 et seq. of the Commercial Code [Handelsgesetzbuch] to be considered as an "agency" or "other establishment" within the meaning of Article 5 (5) of the European Communities' Convention on Jurdisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (hereinafter referred to as "the Convention")?
2. If the answer to Question 1 is in the affirmative.
   (a) Is there a dispute "arising out of the operations" of an agency or other establishment within the meaning of Article 5 (5) of the Convention if the agency or other establishment, acting under the authority of the undertaking in respect of which it operates as commercial agent, appoints a third person as an additional commercial agent for the undertaking, accepts against payment of a commission the documents relating to transactions negotiated by the third person and transmits them to the undertaking, and instructs and supervises the third person

   and

   if a dispute arises out of the activities of that third person in his capacity as a commercial agent between the undertaking and himself concerning his entitlement to commission and payment by way of adjustment on termination of the agency agreement?
   (b) If the answer to Question 2 (a) is in the negative:

   Does a dispute between the undertaking and the agency of other establishment concerning the latter's entitlement to commission and payment by way of adjustment on termination of the agency agreement fall within the concept of "a dispute arising out of the operations of ... [an] agency or other establishement" within the meaning of Article 5 (5) of the Convention?

The order making the reference was received at the Registry of the Court on 11 June 1980.

The plaintiff in the main action (Trost) and the Commission submitted written observations as provided for by Article 5 of the Protocol of 3 June 1971, in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By an order dated 29 October 1980 made under Article 95 of the Rules of Procedure the Court assigned the case to the Third Chamber.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the plaintiff in the main action (Trost)

First question

According to the plaintiff in the main action both Bey and herself operated as commercial agents (Handelsvertreter), and more specifically as business negotiators (Vermittlungsvertreter), on behalf of Blanckaert and should therefore be considered as independent businessmen (selbständige Gewerbetreibende) within the meaning of Article 84 (1) of the

German Commercial Code. She does not accept the defendant's view that a commercial agent is an independent entrepreneur (selbständiger Unternehmer) in the same way as the holder of an exclusive sales concession, and that he cannot therefore be considered as an "agency or other establishment" within the meaning of Article 5 (5) of the Convention.

In support of her argument that Bey is an agency within the meaning of Article 5 (5) the plaintiff in the main action puts forward a number of factors said to be evidence of the supervision and control exercised by Blanckaert over Bey:

— Bey depends on instructions from Blanckaert not only as regards the selection and the identity of contracting parties, the conditions of sale and the completion of transactions, but also as regards the extent of the interests of the principal undertaking for which it is responsible and the duty of the commercial agent to give an account of his actions.

— In a letter of 14 October 1975 sent to the plaintiff's son Bey stated that it was to be considered as a sales manager (Verkaufsleiter) for Blanckaert.

— The letter of 30 November 1975 sent by Bey to Trost shows that Bey entered into the commercial agency contract with Trost at the request and in the name of Blanckaert.

The plaintiff in the main action (Trost) rejects Blanckaert's argument that there can be no question of a relationship of dependency between Blanckaert and Bey because Bey has been an independent commercial agent for approximately 20 years. It is quite possible for an independent commercial agent to be in a true relationship of dependency with respect to his principal undertaking, to be integrated into the distribution network and to be subject by reason of that to instructions from that principal undertaking. The only condition is that those instructions should not affect the substance of the legal autonomy of the commercial agent. Applying that principle to the present case the plaintiff in the main action (Trost) finds that Bey's activities on behalf of Blanckaert must be considered as nothing other than an external service of Blanckaert.

Second question

The plaintiff in the main action is of the opinion that in the present case the issue turns on Bey's activities, because that undertaking entered into a contract on behalf of Blanckaert which is binding on the Belgian undertaking. Anything done by Trost to market Blanckaert's products thus has considerable influence on Bey's business. The plaintiff is of the opinion that the words "disputes arising out of the operations" should be understood as covering not only those arising out of selling operations but also those resulting from Bey's other operations and activities carried out by that undertaking for Blanckaert in return for payment of a special commission.

Third question

The jurisdiction of the Landgericht Aachen also derives from the fact that the concept of "a dispute arising out of the operations of [an] ... agency or other establishment" referred to in Article 5 (5) of the Convention likewise covers disputes between the entrepreneur and the agency itself, that is to say, in this case, the disputes concerning Trost's claims for compensation and commission and not only the disputes between

Blanckaert and clients of the latter with whom the agency was in contact as an intermediary.

On the basis of the foregoing considerations the plaintiff in the main action believes that the questions which have been raised should be answered in the affirmative.

B — Observations of the Commission

First question

The Commission observes, first, that according to the judgment of the Court of 22 November 1978 (Case 33/78 *Somafer* [1978] ECR 2183), the concepts referred to in Article 5 (5) of the Convention require independent interpretation. According to that judgment, the concept of "branch, agency or other establishment" implies "a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension".

Those conditions are not met in the case of a commercial agent within the meaning of Article 84 et seq. of the German Commercial Code. Giving its interpretation of Article 84 of the Code, the Commission takes the view that the commercial agent merely intervenes in transactions as an intermediary, or even concludes them as an intermediary, on behalf of the principal, whereas the performance of and the conditions relating to the transactions which have been negotiated or concluded are a matter for the principal on whose behalf the commercial agent is acting. Operating as an independent businessman, the commercial agent cannot, as a matter of principle, constitute a "place of business" of the principal. That is particularly true when a commercial agent does not act exclusively on behalf of one principal alone but, as in the case of Bey, represents several.

The Commission's view is that this case does present, however, a number of features foreign to the normal sphere of activities of a commercial agent. Thus Bey did not merely conclude a commercial agency contract with Trost in Blanckaert's name, but it also had the orders collected by Trost sent to it for transmission to Blanckaert. A certain amount of supervision was thereby clearly being exercised by Bey over Trost's activities, in Blanckaert's name, and that supervision was recompensed by Blanckaert's payment of a special commission. Those facts do not, however, make it apparent that Bey was also responsible for stipulating the conditions governing the transactions which were negotiated by Trost and the performance of a supervisory role does not suffice to make of Bey, within the meaning of the definition given by the Court in the *Somafer* judgment, a "place of business" of Blanckaert "which has the appearance of permanency".

The Commission goes on to criticize the view that the concept of "agency" used in Article 5 (5) of the Convention extends to cover specifically the activities of a commercial agent (Handelsvertreter) who is also sometimes called "Handelsagent". The Court of Justice has already stated in its judgment of 6 October 1976 (Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497) that the three concepts

employed in Article 5 (5) of the Convention comprise the same essential characteristics, so that the concept of an agency covers, in the same way as a branch, a component which is not legally independent of the parent body. In consequence the concept of an "agency" does not extend to intermediary agencies which are legally independent in so far as those agencies manifestly appear as such in the course of business. That interpretation is consistent with the sense and purpose of the special jurisdiction envisaged by Article 5 of the Convention. The conferment of jurisdiction on the basis of the geographical location of the establishment or agency is marked by the presence of a special and objective relationship with the legal circumstances giving rise to the litigation in every case where the legal relationships at issue in the dispute are constituted essentially by an establishment or an agency acting on its own responsibility, something which cannot be said of transactions concluded through the intermediary of a commercial agent because in that case the business is actually transacted by the principal himself.

In the present instance the reply to the question to what extent Trost is entitled to payment of commission by Blanckaert depends on whether or not the latter went on to carry through the transactions in which Trost served as intermediary, as provided for by Article 87 (a) of the German Commercial Code, with purchasers of Blanckaert's furniture. As regards entitlement to payment by way of adjustment under the terms of Article 89 (b) of the German Commercial Code it is necessary to determine to what extent Blanckaert continues to benefit, even after the commercial agency contract was rescinded, from the clients won by Trost.

Second question

In view of the reply which it proposes for the first question the Commission considers that its reply to the second one may be brief.

In its opinion the claims advanced by Trost do not relate to a dispute arising "out of the operations" of Bey, because the rights on which it relies depend on conditions which do not result from the commercial activities of that concern, but from the business operations of Blanckaert in Belgium. In that regard the Court of Justice has held, in the *Somafer* judgment, that the concept of "operations" concerns only actions relating to the contractual or non-contractual rights and obligations concerning the management properly so-called of the agency or the establishment itself, and actions relating to undertakings which have been entered into by the agency or establishment in its capacity as the place of business, in the name of the parent body, and which must be performed in the Contracting State where the place of business is established.

Question 2 (b) in the order making the reference proceeds on the assumption that the operations of Trost, as a commercial agent, amounted, on her part, to the creation of an agency or other establishment of Blanckaert, and with regard to that situation the Bundesgerichtshof asks whether the claims put forward by the commercial agent with regard to the principal establishment constitute a dispute as described by Article 5 (5) of the Convention.

The Commission's view is that the reply to that question should be in the negative. Jurisdiction may be conferred in the manner provided for in Article 5 (5) of the Convention only where there are undertakings which are largely fulfilled by an establishment or agency on its own responsibility on behalf of the parent body. That condition is not fulfilled in the case of the rights relied upon on its own account by the establishment or agency as against the

parent body because those are claims which must be satisfied, not by the agency or the establishment, but by the parent body itself.

On the basis of the foregoing considerations the Commission suggests the following reply to the questions which have been referred to the Court for a preliminary ruling:

"A commercial agent, whose activities consist in serving as an intermediary in transactions which are subsequently completed and acted upon by its principal (Article 84 et seq. of the Handelsgesetzbuch), is not to be considered as an 'agency' or 'other establishment' within the meaning of Article 5 (5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters."

III — Oral procedure

The plaintiff in the main action, represented by Jakob K. Stang of the Cologne Bar, and the Commission of the European Communities, represented by Wolf-Dietrich Krause-Ablass of the Düsseldorf Bar, presented their oral observations at the hearing on 11 December 1980.

The Advocate General delivered his opinion at the sitting on 5 February 1981.

Decision

1 By an order of 21 March 1980 which as received at the Court on 11 June 1980 the Bundesgerichtshof [Federal Court of Justice] referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention") two questions concerning the interpretation of Article 5 (5) of that Convention.

2 According to that provision, which derogates from the general rule of *forum domicilii* set out in Article 2 of the Convention, a defendant domiciled in a Contracting State may be sued in another Contracting State "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts of the place in which the branch, agency or other establishment is situated".

3 Blanckaert & Willems, a Belgian furniture manufacturer and the defendant in the main action (hereinafter referred to as "Blanckaert") has according to its own statements had a business association since 1960 with the German undertaking Hermann Bey (hereinafter referred to as "Bey"), a furniture agency (Möbelagentur), which it made responsible for the establishment in the Federal Republic of Germany of a sales network for the furniture which Blanckaert manufactured. In performance of that obligation Bey, acting on behalf of Blanckaert, entered into a commercial agency with Trost, the plaintiff in the main action, for the Rhine and Ruhr, Eifel and South Westphalia area. Under the terms of that contract Trost was to work as the direct representative of Blanckaert and receive from the latter a commission of 5 %. The contract stipulated that Trost was to transmit the orders she obtained for Blanckaert through Bey at Aachen. On any such orders transmitted to it through Bey Blanckaert would pay the latter the extra commission customarily given to commercial agents who are responsible for supervising other commerical agents of an undertaking.

4 In December 1976 Blanckaert terminated its contract with Trost, leading to an action by the latter for payment of commission and agent's adjustment fees. Trost brought the action before the Landgericht [Regional Court] Aachen, on the ground that Bey was an agency or branch of Blanckaert and therefore the dispute could be brought before the court of the place in which that agency or branch was established.

5 The Landgericht Aachen did not accept that view and declined jurisdiction but the Oberlandesgericht Köln [Higher Regional Court, Cologne], hearing the appeal, held that the conditions for the international jurisdiction of the Landgericht Aachen were fulfilled because Bey was an agency of Blanckaert's within the meaning of Article 5 of the Convention and because the amounts claimed were attributable to the operation of that agency.

6 Hearing the appeal on a point of law the Bundesgerichtshof held that the Oberlandesgericht Köln had rightly established that both Bey and Trost had worked for Blanckaert "as a commercial agent [Handelsvertreter] and more specifically as a business negotiator [Vermittlungsvertreter], that is to say, both were charged on a permanent basis with negotiating business on behalf of an undertaking, namely the defendant, as independent businessmen within the meaning of the first paragraph in Article 84 of the German Commercial Code [Handelsgesetzbuch]", and ruled that the question whether the

operations of an agency or other establishment within the meaning of Article 5 (5) of the Convention include the activities of a commercial agent, and more particularly those of a business negotiator within the meaning of the above-quoted provision of German law, had yet to be decided by the Court of Justice.

7 Considering therefore that the dispute raised questions concerning the interpretation of the Convention the Bundesgerichtshof referred two questions to the Court of Justice for a preliminary ruling on the interpretation of Article 5 (5) of that Convention.

First question

8 The first question asks in substance whether a commercial agent [Handelsvertreter] who is a business negotiator [Vermittlungsvertreter] within the meaning of Article 84 et seq. of the German Commercial Code is to be considered as an "agency" or "other establishment" within the meaning of Article 5 (5) of the Convention.

9 As the national court correctly observes, the Court stated in its judgment of 6 October 1976 (Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497) that one of the essential characteristics of the concept of a branch or agency is the fact of being subject of the direction and control of the parent body.

10 The Court did not have occasion in that decision to identify the factors enabling it to be determined whether or not an undertaking or other business concern is subject to the direction and control of a parent body, because the main dispute concerned the relationship between the grantor and the grantee of an exclusive sales concession, and the national court had stated that the grantee was not subject to either the direction or the control of the grantor.

11 Furthermore, in its judgment of 22 November 1978 (Case 33/78 *Somafer* [1978] ECR 2183), the Court stated that "the concept of a branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the

parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension".

12 From the grounds given in those two judgments, and especially from the rule that a "branch, agency or other establishment" within the meaning of Article 5 (5) must appear to third parties as an easily discernible extension of the parent body, it is clear that the dependency on the direction and control of that parent body is not established when the representative of the parent body is "basically free to organize his own work and hours of work" (Article 84 (1), last sentence, of the German Commercial Code) without being subject to instructions from the parent body in that regard; when he is free to represent at the same time several rival firms producing or marketing identical or similar products and, lastly, when he does not effectively participate in the completion and execution of transactions but is restricted in principle to transmitting orders to the undertaking he represents. Those three factors preclude a concern having all those characteristics from being considered as the place of business having the appearance of permanency as an extension of the parent body.

13 The reply to the first question must therefore be that an independent commercial agent who merely negotiates business [Handelsvertreter (Vermittlungsvertreter)], inasmuch as his legal status leaves him basically free to arrange his own work and decide what proportion of his time to devote to the interests of the undertaking which he agrees to represent and whom that undertaking may not prevent from representing at the same time several firms competing in the same manufacturing or marketing sector, and who, moreover, merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch, agency or other establishment within the meaning of Article 5 (5) of the Convention.

Second question

14 The second question is asked only if the reply to the first question should be in the affirmative. A reply to it is therefore not required.

Costs

15 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber)

in answer to the questions referred to it by the Bundesgerichtshof by an order of 21 March 1980 hereby rules:

An independent commercial agent who merely negotiates business [Handelsvertreter (Vermittlungsvertreter)], inasmuch as his legal status leaves him basically free to arrange his own work and decide what proportion of his time to devote to the interests of the undertaking which he agrees to represent and whom that undertaking may not prevent from representing at the same time several firms competing in the same manufacturing or marketing sector, and who, moreover, merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch, agency or other establishment within the meaning of Article 5 (5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Mertens de Wilmars Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 18 March 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President