

# COURT OF JUSTICE\*

Judgement of 21 November 2018

In Case C-452/17\*\*

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de commerce de Liège (Commercial Court, Liège, Belgium), made by decision of 20 July 2017, received at the Court on 27 July 2017, in the proceedings

**Zako SPRL**

v

**Sanidel SA,**

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe (Rapporteur), C. Lycourgos, E. Juhász and C. Vajda, Judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2018,

after considering the observations submitted on behalf of:

- Sanidel SA, by H. Deckers, avocat,
- the German Government, by T. Henze, M. Hellmann and E. Lanckenau, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Garofoli, avvocato dello Stato,
- the European Commission, by J. Hottiaux and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

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\* This is an unofficial text published on the European Court of Justice website. Please note that only the versions published in the Reports of Cases before the Court of Justice and the Court of First Instance or in the Official Journal of the European Union are authentic.

\*\* Language of the case: French.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(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).
- 2 That request has been made in proceedings between Zako SPRL and Sanidel SA concerning the payment for services and commission following the breach of an agreement between the two companies.

### Legal context

#### European Union 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 agent 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 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 is to 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.’

5 Article 2 of that directive reads as follows:

‘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, or
- 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.’

6 Article 3 of the Directive states:

‘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;
- (b) communicate to his principal all the necessary information available to him;
- (c) comply with reasonable instructions given by his principal.’

### ***Belgian law***

7 Directive 86/653 was transposed into Belgian law by the loi relative aux contrats d’agence commerciale (Law on commercial agency agreements) of 13 April 1995 (*Moniteur belge* of 2 June 1995, p. 15621, ‘the Law of 1995’). The Law of 1995, which was in force at the material time, defined a commercial agency contract in Article 1 thereof as follows:

‘A commercial agency contract is a contract by which one of the parties, the commercial agent, has the continuing authority, in return for remuneration, of the other party, the principal, without being subject to the control of the latter, to negotiate and possibly conclude transactions on behalf of and in the name of the principal. The commercial agent organises his business as he sees fit and is free to manage his own time.’

8 Article 26 of the Law of 1995 provides:

'The right to bring an action based on an agency contract shall expire one year after the termination of that agreement or five years after the events giving rise to the action, but that period shall not exceed one year after the termination of the contract.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 9 Zako, whose objects include the purchase and sale of furniture, machinery, equipment, computer hardware and household appliances, was bound by an unwritten agreement from the end of 2007 to Sanidel which operates a business selling bathrooms and fitted kitchens. The manager of Zako was responsible for the fitted kitchen department from that date.
- 10 On 30 October 2012, Sanidel informed Zako that it was terminating that agreement without compensation or contractual notice.
- 11 Zako requested Sanidel to pay an indemnity in lieu of notice, a goodwill indemnity, two invoices and commission, relying on the Law of 1995. Sanidel refused to make that payment on the ground that the contractual relationship between it and Zako was not a commercial agency contract but a contract for work.
- 12 Zako's manager sued Sanidel for compensation and commission arrears before the tribunal du travail de Marche-en-Famenne (Employment Tribunal, Marche-en-Famenne, Belgium). By judgment of 21 February 2014, that court held that the request was admissible but unfounded, on the ground that the contract between the parties could not be considered to be a 'contract for services as a sales representative', but rather was a 'contract for work'. That ruling was confirmed on appeal by the judgment of 9 September 2015 of the cour du travail de Liège (Labour Court, Liège, Belgium).
- 13 Zako then brought an appeal before the referring court, this time in support of its application, relying on the existence of a contract for work. Before that court, Sanidel argues that the agreement between the parties must be classified as a 'commercial agency contract', so that Zako's action is inadmissible as it was brought after the expiry of the one-year time limit laid down by national law.
- 14 The referring court has doubts as to the classification of the agreement at issue in the main proceedings. It states that Zako carried out the following tasks on behalf of Sanidel: selection of products and suppliers, determination of commercial strategy, meeting clients, drafting kitchen plans, calculating quotes, negotiating prices, signing for orders, taking measurements off-site, settling disputes, managing staff in the department (secretary, salespeople and fitters); creating and managing of website for online sales; developing sales to distributors, real estate developers and contractors; negotiating and finalising subcontracts on behalf of Sanidel. Zako received a monthly lump sum of EUR 5 500 plus travel expenses and an annual commission whose amount varied between EUR 5 197.53 and EUR 30 574.19 in the period at issue in the main proceedings. Zako's representative had a permanent work station with a direct telephone line and email address at Sanidel's premises. It is common ground that that representative performed his tasks with complete independence.

- 15 The referring court points out, however, that the negotiations and the conclusion of contracts were carried out exclusively from Sanidel's business premises. Furthermore, that court notes that Zako was responsible for assignments abroad for the negotiation and conclusion of contracts on behalf of Sanidel, specifically the management of staff in the fitted kitchens department, contact with all the suppliers and contractors, not only with clients, and the drawing-up of plans, quotes and the measurement of kitchens, not solely purchase orders.
- 16 In that connection, the referring court states that the duties comprising the negotiation for the sale or the purchase of products for the principal and the negotiation and conclusion of those transactions, on one hand, and the tasks which were not included within the scope of that activity, on the other hand, were of the same importance. It states that the payments and commission received by Zako were calculated for all the services, without any distinction being made between the two kinds of activities.
- 17 In those circumstances, the tribunal de commerce de Liège (Commercial Court, Liège, Belgium) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to seek and visit customers or suppliers outside of the business premises of the principal?
- (2) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out no tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal?
- (3) If the second question is answered in the negative, must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal, or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal, only secondarily?'

## **Consideration of the questions referred**

### ***Preliminary observations***

- 18 The referring court is unsure as to the classification to be given to the agreement at issue in the main proceedings in national law and asks, in particular, whether it falls within the definition of 'commercial agency agreement' or that of 'contract for work' within the meaning of that law.
- 19 In that connection, it is solely for the referring court to rule on that classification in accordance with the factual and legal circumstances of the case in the main proceedings. The fact remains that the Court has jurisdiction to interpret the relevant provisions of Directive 86/653, in the present case Article 1(2) thereof, and to provide that court with useful information to enable it to classify that agreement in the light of that directive.

### ***The first question***

- 20 By its first question, the referring court asks essentially whether Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person who has continuing authority either to negotiate the sale or purchase of goods for another person, or to negotiate and conclude those transactions on behalf of and in the name of that person, performs his activities from the latter's business premises precludes him from being classified as a 'commercial agent' within the meaning of that provision.
- 21 In that connection, Article 1(2) of Directive 86/653 defines a commercial agent, for the purposes of that directive, 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'.
- 22 In the first place, it must be noted, as all the parties and interested parties which have lodged observations before the Court argue, that neither that provision nor any other provision of that directive expressly makes the classification of 'commercial agent' subject to the condition that the person concerned must perform his economic activity away from the principal's business premises.
- 23 Article 1(2) of Directive 86/653 lays down the three necessary and sufficient conditions for a person to be classified as a 'commercial agent'. First, that person must be a self-employed intermediary. Second, the contractual relationship must be of a continuing character. Third, he must exercise, on behalf of and in the name of the principal, an activity which may consist either simply in being an intermediary for the sale or purchase of goods or in both acting as intermediary and concluding sales or purchases of goods.
- 24 Therefore, it is sufficient that a person satisfies those three conditions to be classified as a 'commercial agent' within the meaning of Article 1(2) of Directive 86/653, regardless of the arrangements under which he performs his activities, and provided that he does not fall within one of the exclusions laid down by Article 1(3) and Article 2 of that directive.
- 25 In the second place, the directive aims to coordinate the laws of the Member States as regards the legal relationship between the parties to a commercial agency contract (judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 22 and the case-law cited).
- 26 As is clear from the second and third recitals, that directive seeks to protect commercial agents in their relations with their principals, to promote the security of commercial transactions, and to facilitate trade in goods between Member States by harmonising their legal systems within the area of commercial representation (judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 23 and the case-law cited).
- 27 As the Advocate General observed, in point 23 of his Opinion, to make the classification of 'commercial agent' and therefore the applicability of Directive 86/653 subject to conditions additional to those laid down by Article 1(2) thereof, such as conditions relating to the places or arrangements for the performance of that activity, would limit the scope of that protection and, therefore, jeopardise the achievement of the objective pursued by that directive.

- 28 In that context, in the absence of any provision in that directive requiring that the commercial agent perform his activity in an itinerant manner external to the principal's premises, it must be held that the benefit of the protection conferred by that directive must also be extended to persons who, as in the case in the main proceedings, perform their activity from within that establishment (see, by analogy, judgment of 30 April 1998, *Bellone*, C-215/97, EU:C:1998:189, paragraph 13).
- 29 As the Advocate General observed, in point 25 of his Opinion, that interpretation is all the more appropriate since an interpretation of Article 1(2) of Directive 86/653 to the contrary would exclude from that benefit persons performing, with the help of modern technology, tasks comparable to those performed by commercial agents who travel around, in particular, for the purposes of client acquisition and direct marketing.
- 30 However, it must be observed that the scope of Directive 86/653 cannot be extended to cover persons who do not satisfy the conditions set out in paragraph 23 of the present judgment and that a person must meet in order to be classified as a 'commercial agent' within the meaning of Article 1(2) of that directive.
- 31 Thus, in a situation such as that at issue in the main proceedings, it is for the referring court to ascertain in its assessment of all the elements characterising the contractual relationship concerned, whether those conditions are satisfied.
- 32 In the course of that assessment, while the fact that the agent's activity is performed within the principal's premises cannot, in itself, justify his exclusion from the definition of 'commercial agent' within the meaning of Article 1(2) of Directive 86/653, that must not affect the independence of that agent with regard to the principal. As the Advocate General observed, in point 34 of his Opinion, the independence of the commercial agent may be challenged not only by his subordination to the principal's instructions but also by the methods by which he performs his duties.
- 33 Thus, on one hand, by his close proximity to the principal, resulting from his presence at the principal's business premises, that agent may be subject to the principal's instructions. On the other hand, by enjoying the material advantages deriving from his presence there, such as the provision of a work station or access to the organisational facilities of that establishment, it is possible that that agent is in fact placed in a position which prevents him from pursuing his activity independently, whether as regards the organisation of that activity or with respect to the economic risks associated with it. With regard to the latter, it must be stated that the benefit of such advantages may reduce the operating costs borne by the agent concerned and decrease the economic risks associated with the performance of his activity so long as the reduction of those costs is not recouped from the amount of commission paid by the principal to the agent.
- 34 In the present case, the referring court points out that Zako's representative occupied a work station with a direct telephone line and email address within Sanidel's business premises. That court also notes that it is common ground that that agent enjoyed complete independence and performed his tasks with full autonomy, in particular with regard to clients, suppliers and contractors.
- 35 In those circumstances, subject to verification by the referring court, the fact that Zako performed its activities from within Sanidel's establishment does not appear to have led to a loss of independence.

36 In light of the foregoing, the answer to the first question is that Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that person, performs his activities from the latter's business premises does not prevent him from being classified as a 'commercial agent' within the meaning of that provision, provided that that fact does not prevent that person from performing his activities in an independent manner, which is for the referring court to ascertain.

***The second and third questions***

37 By its second and third questions, which it is appropriate to examine together, the referring court asks essentially whether Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person performs not only activities consisting either in negotiating the sale or purchase of goods for another person or negotiating and concluding such transactions on behalf of and in the name of that person, but also other kinds of activities for the same person, without those other activities being secondary to the first type of activities, precludes that person from being classified as a commercial agent.

38 It should be observed, from the outset, that it does not follow from the wording of that provision, as set out in paragraph 21 of the present judgment, that a person who, in addition to the tasks expressly referred to by that provision, performs other tasks, cannot be regarded as a commercial agent within the meaning of that provision.

39 In those circumstances, the general scheme and purpose of Directive 86/653 must be taken into account in order to determine whether that directive precludes a commercial agent from performing tasks other than those expressly set out in Article 1(2) thereof.

40 First, Article 1(3) and Article 2 of Directive 86/653 provide for certain well defined exclusions from the definition of 'commercial agent' and the scope of that directive. Apart from Article 2(2) thereof, none of those provisions envisages the situation in which the commercial agent performs tasks for the principal other than those referred to in Article 1(2) thereof.

41 Thus, Article 2(2) of the directive confers on each of the Member States the right to provide that the directive is not to apply to those persons whose activities as commercial agents are considered secondary by the law of those Member States.

42 As the Advocate General observes in substance in points 49 to 51 of his Opinion, in principle, that directive does not preclude the commercial agent's activities from being combined with activities of another kind, including a situation in which the person concerned performs the first kind of activities as subsidiary activities or where, as in the present case, those activities have the same importance as the other tasks he performs, as such a combination is not excluded by any provision of that directive.

43 Therefore, apart from the case in which, pursuant to Article 2(2) of Directive 86/653, a Member State chooses to exclude from the scope of that directive persons whose activities as commercial agents are subsidiary, which, moreover, does not appear to be the case in the main proceedings, persons performing activities as commercial

agents must be regarded as falling within the scope of that directive, even if those activities are combined with activities of another kind.

- 44 Second, an interpretation of Article 1(2) of Directive 86/653 as meaning that that provision excludes persons who combine their activities as commercial agents with activities of another kind would be contrary to the purpose of that directive, set out in paragraph 26 of the present judgment, which consists in protecting the commercial agent in his relationship with his principal.
- 45 In that connection, first, it must be stated that the commercial agent cannot be excluded from the benefit of that protection on the ground that the contract which binds him to the principal provides for the performance of tasks other than those related to the activities of a commercial agent. The contrary interpretation would allow the principal to circumvent the mandatory provisions of Directive 86/653, in particular, those relating to its obligations with regard to the commercial agent, by providing in the contract for tasks other than those related to the activities of commercial agents.
- 46 Second, the performance of the duties of commercial agent referred to in Article 1(2) of Directive 86/653, consisting either in negotiating the sale or purchase of goods, or negotiating and concluding those transactions in the name of and on behalf of the principal may, depending on the particularities of the sector concerned, be accompanied by services performed by the commercial agent which, although they do not fall strictly within the activities of negotiation or concluding contracts for the principal, support those activities.
- 47 Thus, an interpretation of Article 1(2) of Directive 86/653 as meaning that the status of commercial agent cannot apply to persons who combine the activities of a commercial agent with one of more kind of activities of another nature may lead to the exclusion from the scope of that provision of a large number of persons, thereby depriving that directive of part of its effectiveness.
- 48 Therefore, it must be held that Directive 86/653 does not, in principle, preclude a commercial agent, within the meaning of that provision, from performing tasks for the principal other than those expressly mentioned in Article 1(2) of Directive 86/653.
- 49 However, in light of the conditions set out in paragraph 23 of the present judgment, it must be stated that the combination, by the same person, of the activities of a commercial agent with activities of another nature must not affect his status as an independent intermediary.
- 50 Thus, in the present case, the referring court must ascertain whether the fact that the applicant in the main proceedings performs, for the same person, his activities as a commercial agent together with other activities having the same importance has the effect, taking account of all of the circumstances of the case, such as the nature of the tasks performed, the manner in which they are carried out, the proportion those tasks represent with regard to the overall activities of the person concerned, the method of calculating the remuneration, or the reality of the financial risk incurred, of preventing him from performing the first kind of activities in an independent manner.
- 51 In the light of the foregoing, the answer to the second and third questions is that Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a

person not only performs activities consisting in the negotiation of the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities, does not preclude that person from being classified as a 'commercial agent' within the meaning of that provision, provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.

## **Costs**

- 52 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:

- 1. Article 1(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 must be interpreted as meaning that the fact that a person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that person, performs his activities from the latter's business premises does not prevent him from being classified as a 'commercial agent' within the meaning of that provision, provided that that fact does not prevent that person from performing his activities in an independent manner, which is for the referring court to ascertain.**
- 2. Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person not only performs activities consisting in the negotiation of the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities, does not preclude that person from being classified as a 'commercial agent' within the meaning of that provision, provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.**