

## JUDGMENT OF THE COURT (Third Chamber)

13 October 2022 (\*)

(Reference for a preliminary ruling – Directive 86/653/EEC – Article 17(2)(a) – Self-employed commercial agents – Termination of the agency contract by the principal – Compensation of the agent – Goodwill indemnity – Sub-agency – Right of the subagent to a proportion of the goodwill indemnity payable to the main agent corresponding to the customers brought by the subagent)

In Case C-593/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Belgium), made by decision of 10 September 2021, received at the Court on 24 September 2021, in the proceedings

**NY**

v

**Herios SARL,**

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, N. Jääskinen, M. Safjan, N. Piçarra and M. Gavalec, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- NY, by G. Imfeld, Rechtsanwalt and avocat, and J. Oosterbosch, avocate,
- Herios SARL, by B. Geuzaine and B. Hübinger, avocats,
- the Belgian Government, by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents,
- the German Government, by J. Möller, U. Bartl, J. Heitz and M. Hellmann, acting as Agents,
- the European Commission, by L. Armati, C. Auvret and by M. Mataija, acting as Agents,

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

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 NY and Herios SARL concerning a goodwill indemnity claimed by the former from the latter on the basis of turnover that Herios is alleged to have generated in 2016 as a result of the new clients acquired for his benefit by NY.

### **Legal context**

#### ***European Union law***

- 3 Article 1 of Directive 86/653 was worded as follows:

‘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.

...’

- 4 Chapter IV of that directive is entitled ‘Conclusion and termination of the agency contract’. Under that chapter, Article 17 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. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20.

...’

- 5 Under Article 19 of that directive:

‘The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.’

#### ***Belgian law***

- 6 The provisions governing commercial agents’ contracts were introduced into the Code de droit économique (Code of Economic Law) by Article 3 of the loi du 2 avril 2014, portant insertion du livre X ‘Contrats d’agence commerciale, contrats de coopération commerciale et concessions de vente’ dans le Code de droit économique, et portant insertion des définitions propres au livre X, dans le livre 1<sup>er</sup> du Code de droit économique (Law of 2 April 2014 on the introduction of Chapter X ‘Commercial agent contracts, contracts for commercial cooperation and dealership agreements’ into the Code of Economic

Law, and inserting definitions relating to Chapter X into Chapter I of the Code of Economic Law) (*Moniteur belge* of 28 April 2014, p. 35053).

7 Article X.5 of the Code of Economic Law provides:

‘Unless otherwise stipulated, the commercial agent may, for the performance of his or her tasks, have recourse to subagents remunerated by him or her and acting under his or her responsibility, for whom he or she becomes the principal.’

8 Article X.18 of that code provides:

‘After termination of the commercial agency contract, the commercial agent shall be entitled to a goodwill indemnity if he or she has brought the principal new customers or if he or she has significantly increased the volume of business with existing customers, in so far as the principal can continue to derive substantial benefits therefrom.

If the commercial agency contract contains a no-competition clause, the principal shall be deemed, unless it is proved to the contrary, to receive substantial benefits.

...’

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

9 Herios concluded a commercial agency contract with a German company, Poensgen, under which Herios had the exclusive right to sell the Poensgen’s products in Belgium, France and Luxembourg. As is clear from the order for reference, Herios and NY acknowledged that a contract was concluded between them in 2009.

10 In the context of their contractual relationship, Herios became the principal to NY and NY became its commercial agent, with the task of undertaking negotiations in relation to Poensgen’s products on the territory of the abovementioned Member States.

11 At the end of 2015, NY, Herios and Poensgen commenced discussions with a view to NY continuing directly the commercial agency following the cessation of Herios’ business activities. Those discussions were unsuccessful and Poensgen notified Herios, on 8 June 2016, of the termination of the contract between them. Their contractual relationship ended on 31 December 2016, on expiry of a notice period of six months.

12 By letter of 23 February 2017, Herios in turn terminated the contract with NY owing to exceptional circumstances which made any professional cooperation between the principal and the agent impossible in the long term, namely the termination of the main contract concluded between Poensgen and Herios. In the intervening period, NY became, in addition, the commercial agent of Poensgen.

13 On 22 May 2017, Herios and Poensgen agreed inter alia on the payment of a goodwill indemnity to Herios.

14 NY, taking the view that he was also entitled to a goodwill indemnity on account of the new customers which he acquired for Herios and in respect of which Herios was compensated by Poensgen, sued Herios for payment of a goodwill indemnity which, according to him, represents the respondent’s turnover in 2016 resulting from the new customers acquired.

15 The first-instance judgment upheld NY’s claim. However, the cour d’appel de Liège (Court of Appeal, Liège, Belgium) overturned that judgment by a judgment of 16 January 2020, and held that no goodwill indemnity was payable. NY lodged an appeal against that judgment before the Cour de cassation (Court of Cassation, Belgium), which is the referring court.

16 In his appeal, NY criticises the judgment of the cour d’appel de Liège (Court of Appeal, Liège), for refusing him a goodwill indemnity on the ground that the one obtained by Herios was not a ‘substantial benefit’ within the meaning of Article X.18, first subparagraph, of the Code of Economic Law, which

transposes Article 17(2)(a) of Directive 86/653. According to the cour d'appel de Liège (Court of Appeal, Liège), it cannot be a benefit because, first, the indemnity received by Herios is not a future benefit, but an indemnity payable by operation of the law and, second, NY would continue to work and to benefit from the customer base established with the former main principal.

17 The referring court considers that the assessment of the plea relied on by NY in support of his appeal requires the interpretation of Article 17(2)(a), first indent, of Directive 86/653 in order to determine whether the goodwill indemnity received by Herios constitutes a 'substantial benefit' within the meaning of that provision. If that is the case, NY would therefore have the possibility of demanding from Herios, in accordance with that provision, the payment of a goodwill indemnity owing to the termination of the commercial agency contract between them.

18 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 17(2)(a), first indent, of [Directive 86/653] be interpreted as meaning that, in a situation such as that in the present case, the goodwill indemnity payable to the main agent by reference to the number of customers brought in by the subagent does not provide "a substantial benefit" to the main agent?'

### **Consideration of the question referred**

19 As a preliminary point, it should be borne in mind that, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may not only have to reformulate the question referred to it, but also to consider provisions of EU law which the national court has not referred to in its questions (see, to that effect, judgment of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, paragraph 32 and the case-law cited).

20 In the present case, as the Court is asked about the scope of the first indent of Article 17(2)(a) of Directive 86/653 in the specific circumstances where a commercial agent has received a goodwill indemnity after the subagent that it had itself engaged became, following the cessation of the main agency contract, the commercial agent of the main principal, the question referred must be understood as asking, in essence, whether Article 17(2)(a), first and second indents, of Directive 86/653 must be interpreted as meaning that a goodwill indemnity received by the main agent in respect of the customer base brought by the subagent is capable of constituting, for the main agent, a substantial benefit where that subagent has become the main agent of the principal.

21 Having made that observation, in order to interpret a provision of EU law, in this case Article 17(2)(a) of Directive 86/653, it is necessary to take into account not only the wording of that provision, but also its context and the objectives pursued by the rules of which it is part.

22 Under the terms of the first indent of that provision, the commercial agent has the right to an indemnity, after termination of the agency contract, if and to the extent that he or she 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.

23 It follows from the use of the words 'continues' and 'substantial', and also from the indication that the advantages that the principal receives must be derived from business with the clients brought by the agent or which were significantly increased by him or her, that the principal must benefit from, after the termination of the contract, an advantage which is, first of a certain significance and, second, connected with the services provided previously by the agent. By contrast, the wording of the provision does not provide any clarification as to the nature of that benefit.

24 It follows that the concept of 'substantial benefits' referred to in the first indent of Article 17(2)(a) of Directive 86/653 is capable of encompassing all of the benefits that the principal derives from an

agent's efforts, after the termination of the contract, including the goodwill indemnity that it has received from its own principal.

25 That conclusion is corroborated by the objectives pursued by that directive.

26 Directive 86/653 seeks, inter alia, to protect the commercial agent in his relations with the principal (judgment of 19 April 2018, *CMR*, C-645/16, EU:C:2018:262, paragraph 33).

27 In that regard, the Court held that Article 17 of that directive is of crucial importance. It is therefore necessary to interpret the wording of Article 17(2) in a manner which contributes to the protection of the commercial agent and which takes full account of the merits of the latter in carrying out the transactions assigned to him or her (see, to that effect, judgment of 7 April 2016, *Marchon Germany*, C-315/14, EU:C:2016:211, paragraph 33). Any interpretation of Article 17 which may prove to be detrimental to the commercial agent is not permissible (see, to that effect, judgments of 26 March 2009, *Semen*, C-348/07, EU:C:2009:195, paragraph 21, and of 19 April 2018, *CMR*, C-645/16, EU:C:2018:262, paragraph 35).

28 An interpretation according to which the concept of 'substantial benefits', within the meaning of the first indent of Article 17(2)(a) of Directive 86/653 does not include, in particular, a goodwill indemnity that the principal received in respect of the customer base brought by the commercial agent and for which he or she is no longer remunerated would be likely to prejudice that agent.

29 As NY states in his written observations, in a situation where the termination of a contract is the consequence, inter alia, of a transfer of an undertaking or the sale of the principal's business assets, and where the price depends on the size of the customer base, a restrictive interpretation of the first indent of Article 17(2)(a) of Directive 86/653 would deprive the commercial agent of compensation relating to the added value that he or she brought to the principal.

30 Consequently, it must be held that an interpretation according to which the concept of 'substantial benefits', within the meaning of the first indent of Article 17(2)(a) of Directive 86/653 does not include a goodwill indemnity that the principal received in respect of the customer base brought by the commercial agent and for which he or she is no longer remunerated would be contrary to the objective of the protection of the commercial agent pursued by Directive 86/653.

31 It follows from all the foregoing considerations that the first indent of Article 17(2)(a) of Directive 86/653 must be interpreted as meaning that the goodwill indemnity which has been paid by the principal to the main agent in respect of the customer base brought by the subagent is capable of constituting, for the main agent, a substantial benefit.

32 However, in order to provide the referring court with a complete answer, it is necessary also to determine whether the fact that the subagent has himself or herself become the agent of the main principal has any effect as regards his or her entitlement to receive a goodwill indemnity provided for under that provision.

33 In that regard, it should be recalled that the commercial agent's conduct is a factor which may be taken into account in the assessment made to determine the fairness of the goodwill indemnity (see, to that effect, judgment of 28 October 2010, *Volvo Car Germany*, C-203/09, EU:C:2010:647, paragraph 44), as to whether the goodwill payment is equitable being the *sine qua non* of the payment of that indemnity under Article 17(2)(a), second indent, of Directive 86/653.

34 In accordance with that provision, the commercial agent has the right to a goodwill indemnity if and to the extent that the payment of that indemnity is equitable, having regard to all the circumstances and, inter alia, the commissions that the commercial agent loses and which are the result of transactions with the clients that he or she brought to the principal or with whom he or she has significantly increased the volume of business.

35 In those circumstances, the customer base that the agent could benefit from, whether on his or her own account or for the benefit of another principal, is necessarily included amongst the 'circumstances'

referred to in Article 17(2)(a), second indent, of Directive 86/653 and which must be taken into account for the purposes of the payment of the indemnity provided for in that provision.

36 The entitlement to an indemnity provided for in Article 17(2) of Directive 86/653 serves an essentially remunerative purpose from the point of view of the agent. That indemnity thus serves to remunerate the agent for his or her past efforts, in so far as the principal continues to benefit from the economic advantages resulting from those efforts even after the agency contract has been terminated (see, to that effect, Opinion of Advocate General Wahl in *Quenon K.*, C-338/14, EU:C:2015:503, points 35 and 36).

37 While that provision cannot be interpreted restrictively, as has been held in paragraph 35 of this judgment, in order not to deprive the commercial agent of compensation relating to the added value that he or she brought to the principal, the indemnity laid down in that provision cannot, however, cover the damages which were not directly connected to the loss of the customer base for the agent.

38 As indicated in the report on the application of Article 17 of Directive 86/653, presented by the Commission on 23 July 1996, (COM(96) 364 final), if the agent continues to meet the needs of the same clients for the same products, but for a different principal, payment of an indemnity would be unfair as the specific loss that it is intended to compensate does not exist, as the agent has not lost the benefit of his or her customer base.

39 Therefore, where the subagent continues his or her commercial agency business in relation to the same clients and for the same products, but in the context of a direct relationship with the main principal, who has thus replaced the main agent that had previously engaged him or her, that subagent does not suffer, a fortiori, any negative consequence from the termination of his or her commercial agency contract with that main agent.

40 It is therefore for the national court to assess whether the payment of the goodwill indemnity is equitable having regard to all the circumstance of the case before it.

41 It follows from all of the foregoing considerations that the answer to the question referred is that Article 17(2)(a) of Directive 86/653 must be interpreted as meaning that the goodwill indemnity which has been paid by the principal to the main agent in respect of the customer base brought by the subagent is capable of constituting, for the main agent, a substantial benefit. However, the payment of a goodwill indemnity to the subagent may be regarded as not being equitable, within the meaning of that provision, where the subagent continues his or her commercial agency business in relation to the same clients and for the same products but in the context of a direct relationship with the main principal, which replaced the main agent that had previously engaged him or her.

### **Costs**

42 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 (Third Chamber) hereby rules:

**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 the goodwill indemnity which has been paid by the principal to the main agent in respect of the customer base brought by the subagent is capable of constituting, for the main agent, a substantial benefit.**

**However, the payment of a goodwill indemnity to the subagent may be regarded as not being equitable, within the meaning of that provision, where the subagent continues his or her commercial agency business in relation to the same clients and for the same products but in the**

**context of a direct relationship with the main principal, which replaced the main agent that had previously engaged him or her.**

[Signatures]

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\* Language of the case: French.