

WORKSHOP 2: NEW PLAYERS IN ONLINE DISTRIBUTION

Panel: can new modalities of negotiations fall under the notion of commercial agency?

The traditional picture: face-to-face-negotiation

But what about:

- acquiring customers through databases and/or
- without submitting orders to the principal?
- „distance marketing“?

The definition of a commercial agent (Art 1 of the Directive)

„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.“

- For the first panel, we have to focus on the highlighted points.

Understanding under different legislations:

- Wide understanding for example under German and Austrian law according to the German translation („*vermitteln*“):
 - It is sufficient to cause concrete contracts (for example: simply keeping a petrol station open is considered to be an intermediary service).
- Similar under the Norwegian and Danish-language version („*formidle*“).
- Different understanding regarding French or English text (*negocier/negotiate*):

Decisions from EU/EFTA court:

- *Trendsetteuse (C-828/18)*:
 - Not necessary to negotiate prices
- Norep-case (E-2/21, EFTA):
 - Protection of agents prevents a restrictive interpretation of the term „negotiate“
- Zako (C-452/17):
 - To perform other activities does not preclude that person from being classified as a ‘commercial agent’ 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.

Mediation through databases

The intermediary uses leads/contacts/prospects provided by the principal.

- No relevance as long as the lead becomes a customer through the agent's activity.
- Our issue, namely the specific structure of this activity, is independent of whether he has been provided with a contact.

No forwarding of orders

- Norep-case:
 - «Negotiate» does not necessarily presuppose the agent's direct involvement with the placing of orders or exclude a scenario in which orders go directly from customers to principal
- The fact that the order does not go through the intermediary or the intermediary is not directly involved does not exclude the Directive from applying

„Distance-marketing“

European Court-*trendsetteuse*:

It is apparent from a combined reading of Articles 4(3) and 17(2)(a) of Directive 86/653 that the commercial agent's main tasks are to bring the principal new customers and to increase the volume of business with existing customers.

An interesting aspect: Art 4(3) reads as follows:

A principal must, in addition, inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has **procured** for the principal.

It is not a contradiction to „negotiate“ because of the different context.

Information, advice, discussions

Furthermore in trendsetteuse:

*34 However, as was highlighted, in essence, by the Austrian Government in its written observations, it is possible for the commercial agent to accomplish those tasks by **providing information and advice as well as through discussions, aimed at facilitating the conclusion** of the transaction for the sale of goods on behalf of the principal, without the commercial agent having the power to change the prices of those goods*

- Of course, we could say those examples should only make clear that it is not necessary to negotiate prices.
- On the other hand, the ECJ obviously has a certain picture of the agent´s activity.
- Similar in the norep-case:
The agent must act as an intermediary, as a „link“ between customer and principal, appearing as the principal´s representative. Sales-related or promotional services will not in itself entail that this person acts as a commercial agent.

Relevant questions

So, regarding any „distance marketing“ the following points arise:

- is there such a function as a link/representative?
- is there any individual information, advice / ***discussion, answering of questions etc.*** necessary in order to distinguish between „general marketing“ from acting as an intermediary?
- in any case the activity has to focus on certain contracts mediated for the principal

Thank you !