



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 26 October 2016¹

Case C-507/15

Agro Foreign Trade & Agency Ltd
v
Petersime NV

(Request for a preliminary ruling from the Rechtbank van Koophandel te Gent (Commercial Court, Ghent, Belgium))

(Directive 86/653/EEC — Commercial agent carrying out activity in Turkey — EU-Turkey Association Agreement — Article 14 — Additional Protocol — Article 41(1))

1. In the present case, where a principal is located in the European Union and a commercial agent is based in and carrying out his activities in Turkey, the referring court seeks clarification as to two questions: First, can a Member State transpose Directive 86/653/EEC² in such a way as to limit the application of the provisions of that directive to situations in which the commercial agent carries out his activities in the internal market only.

2. My answer is: ‘yes’.

3. Secondly, would such a limitation be precluded by the provisions of the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1) (‘the Association Agreement’) and the Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60) (‘the Additional Protocol’).

4. My answer is: ‘no’.

¹ — Original language: English.

² — Council Directive 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).

I – Legal framework

A – EU law

1. Directive 86/653

5. The second recital in the preamble of Directive 86/653 states:

‘... the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community 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 agents are established in different Member States’.

6. According to Article 17(1) of Directive 86/653:

‘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. Association Agreement

7. Article 9 of the Association Agreement reads as follows:

‘The Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the European Community.’

8. Pursuant to Article 14 of the Association Agreement:

‘The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them.’

3. Additional Protocol

9. Article 41 of the Additional Protocol reads as follows:

‘1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the [Association Agreement] determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

...’

B – *Belgian law*

10. Article 27 of the wet van betreffende de handelsagentuurovereenkomst (Law on the Commercial Agency Agreement) of 13 April 1995 ('the Handelsagentuurwet'), which transposes Directive 86/653 into Belgian law reads as follows:

'Without prejudice to the application of international treaties which Belgium has concluded, any activity of a commercial agent whose principal place of business is in Belgium is subject to Belgian law and falls within the jurisdiction of the Belgian courts.'

II – Facts, procedure and question referred

11. Agro, the applicant in the main proceedings, is a company established in Ankara (Turkey) and involved in the importation and distribution of agricultural products. Petersime, the defendant in the main proceedings, is a company established in Olsene (Belgium) and involved in the development, production and supply of hatcheries and accessories for the poultry market.

12. On 1 July 1992 Petersime concluded an agreement for the sale of its hatcheries and accessories in Turkey with an individual commercial agent, who was subsequently, by agreement of 1 August 1996, replaced by Agro which was appointed in his place. Pursuant to the contract, Petersime assigned to Agro the exclusive sales-rights of its products in Turkey. The contract, which was initially concluded for a period of 1 year, provided for an automatic extension, every year, for a further 12 months, unless cancelled by either of the parties by registered letter at least 3 months before the end of the 1-year period. The contract furthermore contained a clause, according to which it was subject to Belgian law, with only the courts of Ghent having jurisdiction in case of disputes.

13. By letter of 26 March 2013 Petersime gave notice of the termination of the agreement with effect from 30 June 2013. By letter of 28 October 2013 Agro gave formal notice to Petersime of a claim for non-payment of compensation for termination and claimed a goodwill indemnity, the repossession of the remaining stock as well as the payment of outstanding claims.

14. On 15 January 2015, Agro brought legal proceedings against Petersime before the referring court, claiming compensation for termination of the agreement, a goodwill indemnity, the repossession of the remaining stock as well as the payment of outstanding claims.

15. In support of its application, Agro argues that the provisions of the Handelsagentuurwet apply, because the parties have made a valid choice of Belgian law. Petersime, in turn, argues that only Belgian general law is applicable, because the Handelsagentuurwet only applies to the extent that the commercial agent operates in Belgium, which is not the case in the present situation.

16. In the view of the referring court there has been a clear choice of Belgian law in the contract between Agro and Petersime. Nevertheless, this would not necessarily imply that the Handelsagentuurwet is applicable to the present case. The referring court appears to assume that Article 27 of the Handelsagentuurwet loses its mandatory character in a situation such as the one of the case at issue where a commercial agent is established and carries out his activities outside Belgium.

17. It is in the context of these proceedings that, by order of 3 September 2015, received at the Court on 24 September 2015, the Rechtbank van Koophandel te Gent (Commercial Court, Ghent) referred the following question for a preliminary ruling:

‘Is the [Handelsagentuurwet], which transposes the [Directive 86/653] into Belgian national law, in accordance with that directive and/or the provisions of the Association Agreement which has as its express aim the accession of Turkey to the European Union and/or the obligations between Turkey and the European Union to eliminate restrictions with regard to the free movement of services between them, when that [Handelsagentuurwet] provides that it only applies to commercial agents whose principal place of business is in Belgium, and does not apply when a principal established in Belgium and an agent established in Turkey have explicitly chosen Belgian law?’

III – Analysis

18. By the first part of its question, the referring court in essence seeks to ascertain whether Directive 86/653 precludes a law of a Member State according to which protection under that directive is only afforded where a commercial agent carries out his activity in that Member State, and not where a principal is established in that Member State and a commercial agent is established in and carries out his activity in Turkey.

19. By the second part of its question, the referring court seeks clarification as to whether the Association Agreement or the Additional Protocol precludes a law of a Member State according to which protection under Directive 86/653 is only afforded where a commercial agent carries out his activity in that Member State, and not where a principal is established in that Member State and a commercial agent is established in and carries out his activity in Turkey.

20. After brief preliminary considerations, I shall analyse this question from the perspective of Directive 86/653 and then of the Association Agreement and the Additional Protocol.

A – Preliminary considerations

1. Interpretation of Article 27 of the Handelsagentuurwet at the national level

21. There is clearly a divergence as to the interpretation of Article 27 of the Handelsagentuurwet between the referring court on the one hand and the Belgian Government on the other.

22. At the hearing, the Belgian Government claimed that the Belgian law in question in the proceedings at the national level, Article 27 of the Handelsagentuurwet, does not have the self-limiting character which the referring court claims it to have. In fact, that provision, according to the Belgian Government, applies also in a situation such as that of the case at issue, meaning that if the parties chose Belgian law to be applicable, activities of the commercial agent outside Belgium, or indeed the European Union, are also covered.

23. The referring court should consider these arguments, since, should that assertion turn out to be correct, the question posed by the referring court would not only be hypothetical, but also redundant.

24. Yet, the preliminary reference procedure being a procedure between *courts*, a dialogue of judges, the Court is bound by the national legal framework as it is described by the national *judge* in the order for reference. In this connection, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to

the Court.³

25. In the present case, it is for the national court, which has determined the intention of the parties and found Belgian law to be applicable to the contract between the parties, to decide precisely which provisions of Belgian law govern the contractual relationship.

26. As a consequence, my analysis is based on the assumption that Article 27 of the *Handelsagentuurwet*, as applied in Belgium, does not apply to a case such as that at issue.

2. On private international law

27. Directive 86/653 does not contain a rule on conflict of laws.⁴

28. It has to be emphasised in the first place that the referring court would not be competent to ask a question on the interpretation of the Rome Convention,⁵ which appears to be applicable, in principle, *ratione temporis*,⁶ given that this right is restricted to national courts of last instance.⁷

29. In any event, both the Rome Convention and the ‘Rome I-Regulation’ provide for the parties making a valid choice of law that governs their contractual relationship.

30. Given that it is beyond doubt, for the referring court, that the parties have made a choice as to Belgian law being applicable, there is no room for considerations of conflict of laws. As I said above, the essential problem for the national court is to decide which provisions of Belgian law are applicable. For this, the national court seeks to ascertain two things. First, whether the Belgian legislator correctly implemented Directive 86/853. Second, whether the Belgian legislation is compatible with the Association Agreement with Turkey.

31. In analysing the question, I shall first deal with Directive 86/853 and then with the Association Agreement.

B – First part of the question: on Directive 86/653

1. Aim and structure

32. Directive 86/653 (‘the directive’) aims to coordinate the laws of the Member States with regard to the legal relationship between the parties to a commercial agency contract.⁸ The Court has, on many occasions, clarified that the directive in particular seeks to protect commercial agents in their relations with their principals and, to that end, establishes, inter alia, rules governing the conclusion and

3 — See, by way of example, judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 28 and case-law cited).

4 — See also, in this connection, Basedow, J., ‘Europäisches Internationales Privatrecht’, in *Neue Juristische Wochenschrift*, 1996, pp. 1921-1929, at p. 1925, who points to the difficulties arising from this as regards the treatment of situations involving third countries.

5 — Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

6 — With respect to contracts concluded after 17 December 2009, the Rome Convention has been replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6), see Article 28 of that regulation.

7 — Under Article 1 of the first protocol of 19 December 1988 on the interpretation of the Rome Convention by the Court of Justice (OJ 1998 C 27, p. 47), which entered into force on 1 August 2004, the Court has jurisdiction to give rulings on requests for a preliminary ruling concerning the interpretation of the provisions of that convention. The referring court does not figure in the list contained in Article 2(a) of that protocol as a court competent to request the Court to give a preliminary ruling (in Belgium only the Cour de cassation and the Conseil d’État have such competence).

8 — See judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 10); of 13 July 2000, *Centrosteeel* (C-456/98, EU:C:2000:402, paragraph 13); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 18); of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 14); and of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 36). See also, for instance, Fock, T., *Die europäische Handelsvertreter-Richtlinie*, Nomos Verlagsgesellschaft, Baden-Baden, 2001, p. 25.

termination of agency contracts (Articles 13 to 20 of the directive).⁹ The directive establishes mandatory¹⁰ rules which provide for minimum protection requirements for the commercial agent.¹¹ Hence, the rules for the provision of compensation to commercial agents upon the termination of the contractual relationship with the principal, enshrined in Article 17 of the directive, must be understood to serve the aim of protecting commercial agents.¹²

33. What the directive stays silent about is its territorial scope. It neither sets out whether the principal needs to be based somewhere in particular, nor does it state where the commercial agent is to carry out his activities for the provisions of the directive to apply. The question which arises, therefore, is whether the directive is intended to have only intra-Union effects, within the internal market, or whether its effects extend beyond the frontiers of the internal market.¹³

34. The directive aims to harmonise private law of the Member States. It contains some of the essential provisions of an agency contract. The law applicable to the agency contract is to be determined by the conflict-of-law rules applicable in the State of the competent court. The applicable law can be designated either – as in the case at issue – by the parties' choice of law clause or by the choice of law rules applicable in the absence of a choice made by the parties.

35. As a consequence, in principle, if the law applicable to the agency contract is the law of a Member State, national provisions implementing the directive apply. This does not mean, however, that a national legislature is totally precluded from restricting the territorial scope of the application of provisions implementing that directive. Yet, in doing so, the national legislature has to bear in mind in what kind of situations the application of the directive is mandatory.

36. What does it mean to say that the application of the directive is mandatory? Here, one should distinguish two situations. First, the 'mandatory nature' may refer to the provisions defining the substantive rights and obligations of the parties to the agency contract. For this, the directive uses several methods to describe the 'mandatory nature' of its provisions. In some instances it states that 'the parties may not derogate' at all from some provisions.¹⁴ In other instances it stipulates that 'the parties may not derogate' from some provisions 'to the detriment of an agent'¹⁵ or that some provisions apply 'in the absence of any agreement on this matter between the parties'.¹⁶ Finally, the directive sometimes restricts the contractual autonomy of the parties in other – more specific – ways.¹⁷

9 — See judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 13); of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraphs 20 and 21); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraphs 19 and 22); of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 22), and of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 14). See also Macgregor, L., 'Case Comment Compensation for commercial agents: an end to plucking figures from the air?', in *Edinburgh Law Review* 2008, pp. 86-93, at p. 87.

10 — See judgments of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraphs 21 and 22); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraphs 22 and 34), and of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 40).

11 — See judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 52). See also Rott-Pietrzyk, E., *Agent Handlowy — Regulacje Polskie i Europejskie*, C.H. Beck, Warsaw, 2006, p. 68.

12 — See judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 24).

13 — Since the Single European Act, the Treaty, now in Article 26(2) TFEU defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.' In the present Opinion, in particular when EU legislation and case-law is cited, the terms 'internal market', 'common market' and 'single market' are used interchangeably.

14 — See Article 5 of Directive 86/653.

15 — See Articles 10(4), 11(3), 12(3) or 19 of Directive 86/653.

16 — See Article 6(1) of Directive 86/653.

17 — See Articles 13(1) and 15(3) of Directive 86/653.

37. Second, the ‘mandatory nature’ may also refer to the territorial scope of the protection stemming from the directive. The question arises, therefore, whether it was the intention of the Community legislature to ensure that the protection of the directive is mandatory in all agency contracts concluded all over the world, each time the law of a Member State is applicable in accordance with the choice of laws rules (including of course the choice of law made by the parties). As I will show in the subsequent analysis, my answer is ‘no’.

38. The problem in the case at issue is the following: Is the protection of Articles 17 and 18 of the directive mandatory, if a principal is established in a Member State and the agent is established and carries out its activities in a third country?

2. Case-law

39. The Court has held in *Centrosteel* that ‘the directive is intended to harmonise the laws of the Member States governing the legal relationship between the parties to a commercial agency contract, irrespective of any cross-border elements’.¹⁸ I understand this statement to merely refer to an *intra-EU situation*, and this for two reasons. First, the context of this statement was the coordination of the laws of the *Member States*. Secondly, the Court went on to say that the directive’s scope was ‘therefore broader than the fundamental freedoms laid down by the [TFE Treaty]’.¹⁹ In my understanding, all the Court wanted to stress is the fairly commonplace assertion that a harmonisation measure, such as Directive 86/653, can go further than the four freedoms in that it is not confined to transnational situations and that a cross-border element is not necessary.

40. For the case at issue, therefore, *Centrosteel* does not provide an adequate answer.

41. In *Ingmar*, the Court held a provision such as Article 17 of Directive 86/653 to be applicable even though a contract is governed by the law of a third State.²⁰ The Court did so since the commercial agent was carrying out his activities within the internal market. In particular, the Court held that ‘the purpose served by [Articles 17 and 18 of the directive] requires that they are applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed’.²¹

42. Yet, *Ingmar* concerned a situation diametrically opposed to the case at issue. It was the principal who was located outside the Union and the commercial agent who carried out his activities within the Union, whereas in the present case the principal is located in the Union and the commercial agent carries out his activities outside the Union.

43. In *Unamar*²² the Court held, *obiter dicta*, that ‘Articles 17 and 18 of the directive are of crucial importance, as they define the level of protection which the European Union legislature considered reasonable to grant commercial agents *in the course of the creation of the single market*’.²³

18 — See judgment of 13 July 2000, *Centrosteel* (C-456/98, EU:C:2000:402, paragraph 13).

19 — See judgment of 13 July 2000, *Centrosteel* (C-456/98, EU:C:2000:402, paragraph 13).

20 — See judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 26).

21 — See judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 25).

22 — *Unamar* dealt with an intra-EU situation which was about applying the correct (civil) law of one of two Member States, both of which had correctly transposed Directive 86/653: see judgment of 17 October 2013 (C-184/12, EU:C:2013:663, paragraph 51).

23 — See judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 39). My emphasis.

44. I therefore understand *Ingmar* and *Unamar* to imply that Articles 17 and 18 of Directive 86/653 are to be considered mandatory in the sense that whenever a commercial agent carries out his activities within the internal market, the protection of Articles 17 and 18 of Directive 86/653 is granted, irrespective of the law applicable to the contract between the parties. *A contrario*, Articles 17 and 18 are not mandatory if a commercial agent carries out his activities outside the internal market. This suggests, therefore, that a Member State may restrict the territorial scope of protection of Articles 17 and 18 to commercial agents carrying out their activities within the internal market.

3. Wording

45. Pursuant to the second recital of the directive, ‘the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity *within the Community* and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions’.²⁴ That same recital goes on to state that ‘those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where *principal and commercial agents* are established in different Member States’.²⁵

46. Likewise, the third recital of the directive states that ‘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*’.²⁶

47. Such wording is, in my view, an indication that Directive 86/653 is confined to situations within the internal market, as opposed to situations outside.²⁷

4. Legislative history

48. The initial Commission proposal contained a reference to commercial agents carrying out their activity outside the Union. The draft Article 35(1) stated that where the parties derogate, to the detriment of the agent, from a whole range of directive provisions which are then specified, such stipulations would be void. Article 35(2) then goes on to state that ‘in addition to the cases of derogation permitted under Article 21(4) and Article 33, the parties may derogate from the compulsory provisions specified in the foregoing paragraph in relation to those activities which the commercial agent carries on outside the Community’.²⁸

49. Directive 86/653 does not contain a provision such as Article 35(2) in its initial draft. This could imply that the Council, at the time, did not want to confine the directive to the internal market.

24 — My emphasis.

25 — My emphasis.

26 — My emphasis

27 — Seen from such a perspective, *Centrosteeel*, referred to above, is in no contradiction to my finding.

28 — See Commission proposal for a Council directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, submitted by the Commission to the Council on 17 December 1976 (OJ 1977 C 13, p. 2).

50. This is not, however, the reading of the directive that I would propose to the Court. As far as I can ascertain, the full wording of the draft Article 35 was given up during the legislative process, because the Parliament had considered that the list of provisions in draft Article 35, *paragraph 1*, was too rigid.²⁹ What the Parliament did not criticise was the reference to the ‘activities which the commercial agent carries on outside the Community’. I infer from this that the Parliament endorsed this territorial demarcation.

51. In a similar vein, the Economic and Social Committee had certain remarks concerning Article 35 of the draft which were, as I understand it, also limited to the definition of the scope of the mandatory provisions.³⁰

52. As a consequence, the revised draft of the Commission substantially changed the first paragraph of draft Article 35, but left the second paragraph unchanged.³¹

53. When Directive 86/653 was adopted by the Council, several years later, the draft was substantially modified. Contrary to the proposal, the directive no longer sought to regulate all legal questions surrounding commercial agents’ contracts. Around half of the proposed provisions were abandoned.³² In this connection, there is no longer a provision such as Article 35 of the draft. The closest which comes to that originally proposed provision is Article 19 of Directive 86/653, according to which the parties may not derogate from Articles 17³³ and 18³⁴ to the detriment of the commercial agent before the agency contract expires.

54. Therefore, even though one might be inclined to see, as a consequence of the above, the territorial scope of the directive being limited to commercial agents’ activity within the internal market, the legislative history is rather inconclusive as regards the territorial scope of the directive. One can neither clearly infer that the directive is confined to the internal market, nor that it is not.

5. Internal-market objective

55. EU private law rules such as the ones of Directive 86/653 should be evaluated with regard to the context and system of the internal market.³⁵

29 — See resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (OJ 1978 C 239, p. 20), point 17: ‘... feels that the long list of provisions contained in Article 35 makes the directive too inflexible and therefore requests the Commission to submit a revised version of this Article’.

30 — See Opinion on the proposal for a Council directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (OJ 1978 C 59, p. 31), point 2.9.10: ‘The Committee proposes that the reference to Article 21(4) in Article 35(2) be deleted and takes Article 35(2) to mean that it is the parties to the contract that have the right to derogate from the compulsory provisions specified in Article 35(1).’

31 — See Commission Amendment to the proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (Submitted by the Commission to the Council pursuant to Article 149(2) EEC on 29 January 1979) (OJ 1979 C 56, p. 21).

32 — See Fock, T., *Die europäische Handelsvertreter-Richtlinie*, Nomos Verlagsgesellschaft, Baden-Baden, 2001, p. 19.

33 — On indemnity or compensation or compensation of the commercial agent after termination of the agency contract.

34 — On exceptions to indemnity or compensation referred to in Article 17 of Directive 86/653.

35 — See in this connection also Müller-Graff, P.-Chr., ‘Allgemeines Gemeinschaftsprivatrecht’, in Gebauer, M./Teichmann, Chr. (eds.), *Europäisches Privat- und Unternehmensrecht (Enzyklopädie Europarecht, Band 6)*, Nomos, Baden-Baden, 2014, pp. 69-151, at point 43 et seq.

56. Adopted in 1986 on the basis of what are now Articles 53(1)³⁶ and 115 TFEU,³⁷ the initial logic of the directive was to create a level playing field for principals carrying out their activities in the internal market by resorting to commercial agents: in order to invest and carry out business, principals need to know what rules they are subject to as regards the compensation and remuneration of the commercial agents which they use.

57. This internal-market logic is not, in my view, put into question by subsequent and consistent case-law of the Court, according to which the directive establishes mandatory³⁸ rules which provide for *minimum* protection requirements for the commercial agent,³⁹ that the directive in particular seeks to *protect* commercial agents in their relations with their principals.⁴⁰

58. I infer from the above that the directive is merely aimed at situations in which the commercial agent carries out his activities in the internal market. The decisive factor is, therefore the activity of the agent and not the establishment of the principal.⁴¹

59. In interpreting Article 27 of the Handelsagentuurwet, the national judge should therefore consider the following: Directive 86/653 requires such a provision to cover situations in which an agent carries out his activities in Belgium or elsewhere in the internal market. Directive 86/653 does not, however, require such a provision to include a situation going beyond the internal market. Thus, whether or not the Belgian authorities consider Article 27 of the Handelsagentuurwet to cover situations beyond the internal market, it is not a question which the directive was intended to address.

6. Proposed reply

60. My reply to the first part of the question is therefore that Article 17 of Directive 86/653 requires mandatory protection of a commercial agent who carries out his activity in the internal market. It does not preclude a law of a Member State according to which such protection is not afforded for a commercial agent who carries out his activity outside the internal market.

C – Second part of question - on the Association Agreement and the Additional Protocol

61. I understand the ‘provisions of the Association Agreement’ which the referring court alludes to in its question to mean Article 14 of the Association Agreement and Article 41 of the Additional Protocol.

62. Agro, moreover, in their written observations refer to Article 9 of the Association Agreement.

36 — Then Article 57(2) EEC.

37 — Then Article 100 EEC. This provision requires vote by unanimity in Council. The directive's adoption preceded the Single European Act, which entered into force on 1 July 1987 and which inserted a new provision, Article 100a EEC (now Article 114 TFEU).

38 — See judgments of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraphs 21 and 22); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraphs 22 and 34), and of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 40).

39 — See judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 52). See also Rott-Pietrzyk, E., *Agent Handlowy — Regulacje Polskie i Europejskie*, C.H. Beck, Warsaw, 2006, p. 68.

40 — And, to that end, establishes, inter alia, rules governing the conclusion and termination of agency contracts (Articles 13 to 20 of the directive). See judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 13); of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraphs 20 and 21); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraphs 19 and 22); of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 22), and of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 14).

41 — As a consequence, should the commercial agent exercise his activities not only in Turkey, but also, say, in Greece, then we would be in an internal-market situation.

1. Articles 14 of the Association Agreement and Article 41(1) of the Additional Protocol

63. Article 14 of the Association Agreement stipulates that the Contracting Parties ‘agree to be guided by Articles 55, 56 and 58 to 65 [FEU Treaty] for the purpose of abolishing restrictions on freedom to provide services between them’. Article 41(1) of the Additional Protocol contains what is known as a ‘stand-still clause’ when it declares that the Contracting Parties ‘shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services’.

64. Agro claims that there is restriction on the freedom of a Turkish commercial agent engaged by a Belgian firm to provide services, as that commercial agent does not receive the same protection under Directive 86/653 as a commercial agent operating within the internal market.

65. In this respect, the following remarks are called for.

66. A commercial agent such as Agro cannot rely on a subjective right to freedom to provide services under the Association Agreement or the Additional Protocol in a way comparable to Article 56 TFEU.

67. Article 14 of the Association Agreement and Article 41 of the Additional Protocol do not simply transpose Article 56 to an EU-Turkey situation. Article 56 TFEU provides for a more developed and deeper level of integration within the internal market between the EU’s Member States which goes far beyond the level established by the provisions of the Association Agreement and its Additional Protocol.

68. As regards Articles 12⁴² and 13⁴³ of the Association Agreement, the Court has already held that neither of these provisions confers a direct effect, since they are not sufficiently precise and unconditional.⁴⁴ No other view can be taken of Article 14 of the Association Agreement, which is worded almost identically to Articles 12 and 13. Moreover, as the Court has held in *Demirkan*, the use in Article 14 of the Association Agreement of the verb ‘to be guided by’ indicates that the Contracting Parties are not obliged to apply the provisions of the Treaty on freedom to provide services or indeed those adopted for the implementation of those provisions but simply to consider them as a source of guidance for the measures to be adopted in order to implement the objectives laid down in that agreement.⁴⁵

69. As for Article 41(1) of the Additional Protocol, here, while the Court holds that this provision is, in principle, directly applicable,⁴⁶ it has only done so in situations in which Turkish nationals sought to establish themselves or provide services *in the European Union*. This is not the case here, as we have seen above. Moreover, with respect to the ‘standstill’ clause in Article 41(1) of the Additional Protocol, the Court – by resorting to consistent case-law – found in *Demirkan* that the interpretation given to the provisions of EU law, including Treaty provisions, cannot be automatically applied by analogy to the interpretation of an agreement by the EU with a non-Member State, unless there are express provisions to that effect laid down in the agreement itself.⁴⁷

42 — On free movement of workers.

43 — On freedom of establishment.

44 — See, as regards Article 12 of the Association Agreement, judgment of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 23) and, as regards Article 13 of the Association Agreement, judgment of 11 May 2000, *Savas* (C-37/98, EU:C:2000:224, paragraphs 42 and 45).

45 — See judgment of 24 September 2013, *Demirkan* (C-221/11, EU:C:2013:583, paragraph 45).

46 — See judgments of 11 May 2000, *Savas* (C-37/98, EU:C:2000:224, paragraph 54), and of 21 October 2003, *Abatay and Others* (C-317/01 and C-369/01, EU:C:2003:572, paragraph 58).

47 — This is consistent case-law since the judgment of 9 February 1982, *Polydor and RSO Records* (270/80, EU:C:1982:43, paragraph 16). See also judgment of 24 September 2013, *Demirkan* (C-221/11, EU:C:2013:583, paragraph 44 and the case-law cited).

70. The Court noted in *Demirkan* that ‘the objective of Article 41(1) of the Additional Protocol and the context of that provision are fundamentally different from those of Article 56 TFEU.’⁴⁸ *Demirkan*, it is true, concerned the somewhat extreme situation of a Turkish national who wanted to rely on the passive freedom of provision of services in order to escape the requirement for a visa. Not surprisingly, the Court found that the freedom of provision of services in the context of Article 41(1) of the Additional Protocol did not include the passive freedom of provision of services pursuant to the *Luisi and Carbone*⁴⁹ case-law.⁵⁰ Yet, obviously, the general findings from *Demirkan* referred to above also apply to the case at issue.

2. Article 9 of the Association Agreement

71. According to Article 9 of the Association Agreement, the ‘Contracting Parties recognise that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on ground of nationality shall be prohibited in accordance with the principle laid down in [Article 18 TFEU].’

72. The wording of this provision is very clear. One must be ‘within the scope of this Agreement’. Precisely this, however, cannot be said of the case at issue. There is no question of free movement of services and, moreover, Directive 86/653 does not apply.

73. As a consequence, like Article 18 TFEU, Article 9 of the Association Agreement cannot be relied upon on its own.

3. Proposed reply

74. I therefore propose to reply to the second part of the question that neither the Association Agreement nor the Additional Protocol preclude a law of a Member State according to which protection under Directive 86/653 is only afforded where a commercial agent carries out his activity in that Member State, and not where a principal is established in that Member State and a commercial agent is established in and carries out his activity in Turkey.

IV – Conclusion

75. In the light of the foregoing considerations, I propose that the Court answer the question referred by the *Rechtbank van Koophandel* (Commercial Court, Gent) as follows:

Article 17 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 requires mandatory protection of a commercial agent who carries out his activity in the internal market. It does not preclude a law of a Member State according to which such protection is not afforded for a commercial agent who carries out his activity outside the internal market.

Neither the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 nor the Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December

48 — See judgment of 24 September 2013, *Demirkan* (C-221/11, EU:C:2013:583, paragraph 49).

49 — See judgment of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35, paragraph 10).

50 — See judgment of 24 September 2013, *Demirkan* (C-221/11, EU:C:2013:583, paragraph 62).

1972 preclude a law of a Member State according to which protection under Directive 86/653 is only afforded where a commercial agent carries out his activity in that Member State and not where a principal is established in that Member State and a commercial agent is established in and carries out his activity in Turkey.