

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 28 April 2005¹

I — Introduction

‘Scope

1. The present case, a preliminary reference from the Rechtbank (District Court) Utrecht, Netherlands, concerns the question whether the Commercial Agency Directive² (hereinafter ‘the Directive’) applies to intermediaries who have negotiated just one contract with a customer, where this contract has been renewed over several years.

Article 1

II — Legal framework

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.

A — Community law

2. Chapter I of the Directive, which sets out its scope, provides,

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.

¹ — Original language: English.

² — 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.

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.

Article 2

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 [a]s 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.'

3. For commercial agency contracts falling within this scope, Chapters II to IV of the Directive contain provisions on the rights, obligations and remuneration of such agents and on the conclusion and termination of such contracts. In particular, Article 7 deals with commission for transactions concluded under the agency contract, providing that,

'1. A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

- (a) where the transaction has been concluded as a result of his action; or

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

4. Also relevant to the present proceedings is Article 17, which deals with indemnification and compensation of the agent following termination of the contract. Article 17(2) (a) provides,

2. A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract:

'2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

— either where he is entrusted with a specific geographical area or group of customers,

— 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

— or where he has an exclusive right to a specific geographical area or group of customers,

and where the transaction has been entered into with a customer belonging to that area or group.

— 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.'

Member States shall include in their legislation one of the possibilities referred to in the above two indents.'

B — *Netherlands law*

5. The Directive is implemented into Netherlands law by Articles 428-445 of the Civil Code (*Burgerlijk Wetboek*). These articles are essentially similar to the Directive's provisions, with an exception being that, while Article 1(2) of the Directive states that it applies to transactions for the 'sale or purchase of goods', the provisions apply also to transactions for the provision of services. Thus Article 7:428, paragraph 1, of the Civil Code, which forms the equivalent of the Directive's Article 1(2), provides,

'An agency contract is a contract by which one party, termed the principal, obliges the other party, termed the commercial agent, to act as an intermediary in the negotiation of contracts, in return for a fee and whether or not for a fixed period, which he may conclude in the name of and on behalf of the principal, though the agent cannot be subordinated to the principal.'

III — **Factual background**

6. According to the order for reference, in 1994 Poseidon Chartering BV ('Poseidon'), a

Dutch company, acted as an intermediary in negotiating a charter contract for a boat. This contract was renewed annually from 1994 to 2000, with the exception of 1999. In particular, during this period Poseidon recorded the result of the annual negotiations on the renewal of the charter between the contractual parties in an addendum to the agreement. From 1994 to 2000, Poseidon was paid a commission of 2.5% of the charter price.

7. The main proceedings concern claims by Poseidon against the shipowners for, inter alia, (1) damages for breach of the contractual notice period; (2) payment of the sum of EUR 14 229.89 unpaid commission; and (3) the sum of EUR 14 471.29 for loss of clientele. These proceedings were stayed by the *Rechtbank Utrecht*, which referred the following questions to the Court:

'(1) Is a self-employed intermediary, who has arranged (not several but) one contract (a charter for a ship) which is renewed every year and pursuant to which, in respect of the renewal of the charter, the annual freight negotiations (except, during the period from 1994 to 2000, in 1999) are conducted between the owner of the ship and a third party and the outcome of those negotiations is recorded by the intermediary in an addendum, to be regarded as a commercial agent within the meaning 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?

(2) If an agency contract must be held to exist, does it make any difference to the answer to Question 1 that an indemnity (commission) of 2.5% of the charter has been paid over many years and/or that Article 7(1) of the Directive refers to “commercial transactions concluded” and to the existence of an entitlement to (the) commission “where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind”?

(3) Does it make any difference to the answer to Question 1 that Article 17 of the Directive refers to “customers” instead of customer?

8. In accordance with Article 23 of the Statute of the Court of Justice, written observations were lodged in the present proceedings by Poseidon Chartering and by the Commission.

9. By letter, the Registry of the Court asked the Rechtbank to confirm whether it wished to maintain its request for a preliminary ruling in view of the Order of the Court of 6 March 2003 in Case C-449/01 *Abbey Life*, in which the Court held that there could be no

reasonable doubt that the Directive does not apply to independent intermediaries charged with negotiating service contracts.³

10. In response, the Rechtbank confirmed its request for interpretation of certain concepts present in the Directive, explaining that Netherlands law had, in transposing the Directive into national law, decided to extend the scope of the term ‘commercial agent’ to service contracts. In its view, however, ‘the fact that the Directive served as a model for the Netherlands legislation, which used a wider concept of agency contract, did not mean that, for the interpretation of certain of the Directive’s concepts, it was necessary that the referring court’s case concerned only the narrow concept of commercial agent/agency agreement.’

IV — Analysis

A — Preliminary remarks

11. The first matter to be considered is the admissibility of the present request, given the fact that, while the Directive as such clearly

³ — Order of the Court of 6 March 2003 in Case C-449/01 *Abbey Life*, not published in the ECR.

only applies to transactions concerning the sale or purchase of goods,⁴ the contract at issue in the main proceedings concerns a contract for the provision of services (that is, a contract to charter a boat).

transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law.’⁶

12. As I have noted above, it is common ground that the relevant Netherlands legislation on commercial agency has a broader scope than that of the Directive, in that it applies to transactions concerning both goods and services.

14. The Court was careful to distinguish situations such as that in issue in *Kleinwort Benson*,⁷ where the Community law rule was not as such binding on the national court in applying its national legislation; indeed, the relevant national legislation made express provision for the Member State’s authorities to adopt modifications ‘designed to produce divergence’ between this legislation and the Community law rules (in that case, the Brussels Convention).

13. In my view, the Court should indeed respond to the questions referred. Of evident relevance in this regard is the Court’s jurisprudence in cases such as *Leur-Bloem*, *Giloy*, *Kofisa* and *BIAO*, which concerned preliminary references not directly covered by Community law, but where the Member State had chosen to align its domestic legislation with Community law.⁵ Thus in *Leur-Bloem*, the Court held that, ‘... the Court of Justice has jurisdiction under Article [234] of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in

15. It is clear that, in these cases, the decisive factor for the admissibility of the preliminary reference was whether the main proceedings would in fact be settled by the application of the rule of Community law at issue. If this was the case, uniform interpretation of the relevant Community concepts via the preliminary reference procedure was ‘clearly in the Community interest ... to forestall future differences of interpretation’.⁸ It was, however, for the national court to assess the proper scope of the

4 — See Article 1(2) of the Directive and the Court’s Order in Case C-449/01, cited in footnote 3.

5 — Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, Case C-130/95 *Giloy* [1997] ECR I-4291, Case C-1/99 *Kofisa* [2001] ECR I-207, and Case C-306/99 *BIAO* [2003] ECR I-1.

6 — *Leur-Bloem*, cited in footnote 5, paragraph 34.

7 — Case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

8 — *Leur-Bloem*, cited in footnote 5, paragraph 32.

reference in the light of the limits which the national legislature may have placed on the application of Community law to purely internal situations.⁹

17. I note in addition that each of the parties who presented written submissions to the Court, namely Poseidon and the Commission, has asked the Court to respond to the Rechtbank's questions.

18. In the interest of the uniform interpretation of Community law, therefore, the Court should in my view respond to the questions referred by the national court.

16. This reasoning applies, in my view, at least as strongly to the instant case. As explained in the order for reference and in subsequent correspondence with the Rechtbank, although the Netherlands legislation at issue has a broader scope than the Directive in that it also applies to transactions for the provision of services, it was intended to, and does, implement and mirror the Directive's provisions. Further, the case clearly concerns the interpretation of a Community law concept, namely that of 'continuing authority'. Whilst in theory the Netherlands courts could adopt a different interpretation of this concept for agency contracts concerning goods and services, the Rechtbank has indicated in its correspondence with the Court that it wishes to avoid divergences between the two areas. It is also relevant that, in extending the scope of its commercial agency legislation to services, the Netherlands legislature was motivated by the wish to avoid a situation in which two 'similar [i.e., but not identical] regulations would exist beside each other', which could lead to confusion.¹⁰

B — *On the first question*

19. By its first question, the national court seeks to know whether the concept of commercial agent, as defined by Article 1 (2) of the Directive, extends to an independent intermediary who acted in the conclusion of a single boat charter contract (and not several contracts), which was renewed yearly from 1994 to 2000 (with the exception of 1999) following negotiations between the owner of the boat and a third party, the results of which negotiations were set down in writing by the intermediary in an annex to the contract.

20. It is clear from the order for reference that the national court in essence wishes to know whether the fact that an agent has

9 — *Leur-Bloem*, cited in footnote 5, paragraph 33.

10 — See, F.M. Smit, *De Agentuurovereenkomst tussen handelsonderneemster en principaal*, p. 26, footnote 31.

acted in the conclusion of only one contract is sufficient in order for the Directive to apply.

21. The answer to this question evidently depends on the interpretation of Article 1(2) of the Directive, and in particular of the notion of ‘continuing authority’ (in Dutch, ‘permanent is belast’; in French, ‘chargé de façon permanente’).

22. In interpreting this concept, it is in my view important to distinguish between a situation in which an independent agent has been tasked by its principal to negotiate just one contract, and a situation in which such an agent has been tasked by its principal to negotiate a contract as well as numerous renewals of the contract.

23. It is clear that the former situation cannot sensibly be interpreted as ‘continuing authority’. If an agent responsible for the negotiation of a single contract were to fall within this concept, it would deprive the notion of ‘continuing’ of all meaning.

24. In contrast, in my view the latter situation — that is, where an agent is responsible for negotiation of a contract

and its renewal — must, as a matter of logic, fall within the concept. To my mind, the idea of ‘continuing’ authority requires simply that the agent be responsible either for negotiating more than one type of contract, or for (re-)negotiating the same contract on more than one occasion. This follows from the nature of ‘authority’ itself, which essentially denotes the power to affect a principal’s legal position by acting on his behalf. As an agent with responsibility for renewing or renegotiating a contract has the power to affect a principal’s legal position on more than one occasion, it seems to me logical that this constitutes ‘continuing authority’.

25. This literal interpretation is, moreover, supported by the aim of the Directive, which is the approximation of Member States’ rules governing commercial agency to the extent required for the proper functioning of the common market, in order in particular to ‘ensure a minimum level of social protection for commercial agents’,¹¹ to ensure the security of commercial transactions, and to remove obstacles to cross-border commercial agency arrangements.¹² If, in a case of contractual renewal where the principal had the option to choose another contractual party instead of the original party, the agent were only subject to the Directive’s rules if the contract were renegotiated with a

11 — See the Opinion of Advocate General Léger in Case C-381/98 *Ingmar* [2000] ECR I-9305, paragraph 50, and Case C-215/97 *Bellone* [1998] ECR I-2191, paragraph 13.

12 — Preamble to the Directive, paragraph 3.

different party, but not if the principal decided to remain with the same party, this would risk arbitrarily compromising the aim of social protection of agents.

26. It bears mention in this regard that the Commission's original proposal stated that the Directive would not apply to intermediaries whose task was confined to the negotiation or conclusion of one or more determinate transactions in the name of just one principal.¹³ It is noteworthy that this provision was removed by the Council from the final version.

27. I also note that the Court has, in its judgments holding that entry on a register cannot be a condition for an agency contract to fall within the Directive's scope, emphasised that only those requirements expressly referred to in Article 1(2) qualified as conditions for application of, and protection under, the Directive.¹⁴

28. I would add that, while use of the words 'customer' and 'contract' (and equivalent terms) varies throughout the Directive

between singular and plural, none of these references is to my mind decisive for the interpretation of the concept of continuing authority. These references appear not in the chapter of the Directive intended to define its scope, but in provisions of the Directive dealing with, for example, the rights and obligations of commercial agents, and the commission due to such agents. There is no indication that they were intended to influence the scope of the Directive. In any event, the very fact that such references are divided between single and plural uses indicates that they do not point to one conclusive response to the present question.¹⁵

29. For these reasons, the answer to the national court's first question should in my estimation be that the concept of a commercial agent extends to intermediaries given continuing authority to negotiate a contract and its renewals.

C — On the second question

30. By its second question, the national court seeks to know whether the response to Question 1 is affected by the fact that a fee

¹³ — Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, COM/76/670 final, OJ 1977 C 13, p. 2, Article 3(3).

¹⁴ — See, for example, Case C-215/97 *Bellone*, cited in footnote 11, paragraph 13 and, by analogy, the order of the Court of 10 February 2004 in Case C-85/03 *Mavrona* [2004] ECR I-1573, paragraph 15.

¹⁵ — See, for example, Article 3(2) ('transactions'), Article 7(1) ('transaction concluded'), Article 7(2) ('transactions concluded'), Article 17(2) ('customers').

(commission) was paid amounting to 2.5% of the value of the charter, and/or by the fact that Article 7(1) of the Directive speaks of a 'transaction ... concluded' and of the existence of a right to commission 'where the transaction is concluded with a third party whom [the intermediary] has previously acquired as a customer for transactions of the same kind'.

31. First, as regards the relevance of the payment of a commission, Article 2(1) of the Directive states that commercial agents whose activities are unpaid do not fall within its scope. Payment in some form is therefore a condition precedent for the application of the Directive. It is, however, evident from the wording of Articles 1 and 2 that the requirement of continuing authority, within the sense described in my response to the first question, is an independent and separate condition necessary for an agent to come within the Directive's scope.

32. It follows that I am not convinced by the argument of Poseidon, which seems to imply that the mere fact that a commission has been paid indicates the existence of an agency contract. The fact that commission has been paid does not, in itself, affect the separate question whether continuing authority exists.

33. Second, as regards the relevance of the references at Article 7(1) of the Directive to a 'transaction ... concluded' and to the existence of a right to commission 'where the transaction is concluded with a third party whom [the intermediary] has previously acquired as a customer for transactions of the same kind', for the reasons I have already explained at paragraph 27, I do not find these references determinative in answering the first question. In particular, the use of the singular form at this point follows naturally from the meaning of the paragraph as a whole, which is essentially that a commercial agent shall be entitled to commission on those transactions concluded within the contractual period either (1) as a result of his action or (2) with a third party whom he has previously acquired as a customer for similar transactions. It does not, in my view, indicate any view of the Community legislature on the issue raised in the first question.

34. The answer to the second question should therefore be that the response to the first question is not affected by the fact that a fee (commission) was paid amounting to 2.5% of the value of the charter, or by the fact that Article 7(1) of the Directive speaks of a 'transaction ... concluded' and of the existence of a right to commission 'where the transaction is concluded with a third party whom [the intermediary] has previously acquired as a customer for transactions of the same kind'.

D — *On the third question*

35. By its third question, the national court seeks to know whether the response to the first question is affected by the fact that Article 17 — and, in particular, Article 17(2) (a) — of the Directive speaks of ‘customers’ in the plural and not in the singular.

36. For the reasons explained in paragraph 27 above, I would answer this question in the negative. I would add that the references in Article 17(2)(a) to ‘customers’ are in any event purely hypothetical, describing the circumstances in which a commercial agent falling within the scope of the Directive shall be entitled to an indemnity. As a result, these references do not affect the response to the first question.

V — **Conclusion**

37. I am therefore of the opinion that the Court should give the following answer to the questions referred by the Rechtbank Utrecht:

‘The concept of a “commercial agent” within Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents extends to intermediaries given continuing authority to negotiate a contract and its renewals, regardless of the fact that Article 7(1) of this Directive refers to a “transaction ... concluded” and that Article 17(2)(a) of this Directive refers to “customers” in the plural. Appraisal of the existence of continuing authority is independent of the question whether commission has been paid.’