

JUDGMENT OF THE COURT (First Chamber)

16 March 2006*

In Case C-3/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank Utrecht (Netherlands), made by decision of 10 December 2003, received at the Court on 5 January 2004, in the proceedings

Poseidon Chartering BV

v

Marianne Zeeschip VOE,

Albert Mooij,

Sjoerdije Sijswerda,

Gerrit Schram,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, K. Lenaerts, E. Juhász and M. Ilešič, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Poseidon Chartering BV, by H. Boonk, advocaat,

- the Commission of the European Communities, by H. Støvlbæk and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2005,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 1(2), 7(1) and 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 (OJ 1986 L 382, p. 17; ‘the Directive’).

- 2 The reference was made in the course of proceedings brought by Poseidon Chartering BV (‘Poseidon’) against Marianne Zeeschip VOF, a company, and Mr Mooij, Mr Schram and Mrs Sijswerda (together referred to as ‘Marianne Zeeschip’), claiming damages, unpaid commission and an indemnity following termination of a contract.

Legal context

Community law

- 3 Article 1(2) of the Directive states that ‘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 Article 7(1) of the Directive on the remuneration of the agent, provides:

'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.'

5 Article 17 of the Directive on the financial consequences for the agent of the termination of the contract 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;
- (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;
- (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

...'

National law

- 6 The Directive was implemented in Netherlands law by Articles 428 to 445 of the Civil Code (Burgerlijk Wetboek). Those articles are essentially the same as the provisions of the Directive, apart from Article 1(2) of the Directive which states that the Directive applies to transactions for 'the sale or the purchase of goods' whereas the Netherlands provisions also apply to transactions for the supply of services. Thus, Article 7:428(1) of the Civil Code, which implements Article 1(2) of the Directive, states:

'An agency contract is a contract in which one party, the principal, confers authority on the other party, the commercial agent, to act as intermediary, for remuneration, whether or not for a fixed period, in the negotiation of contracts which the commercial agent may conclude in the name of and on behalf of the principal, without being subordinated to the principal.'

The main proceedings and the questions referred for a preliminary ruling

- 7 It is clear from the order for reference that Poseidon acted as intermediary in the charter of a ship concluded between Marianne Zeeschip and a company called Maritramp. That charter was extended annually from 1994 to 2000. In that time, Poseidon recorded inter alia the outcome of the annual negotiations on the extension of the charter in an addendum thereto. Between 1994 and 2000, Poseidon received commission in the sum of 2.5% of the charter price.

- 8 After contractual relations between Marianne Zeeschip and Poseidon were terminated, Poseidon brought an action against Marianne Zeeschip claiming damages for breach of the contractual notice period, the payment of the sum of EUR 14 229.89 in respect of unpaid commission and the sum of EUR 14 471.29 as an indemnity for the loss of customers.
- 9 Marianne Zeeschip refused to pay on the ground that Poseidon was not a commercial agent because it had negotiated only one contract and a commercial agency contract is characterised by the fact that the agent acts in more than one contract.
- 10 It is in those circumstances that the Rechtbank Utrecht (Utrecht District Court), before which the main proceedings were brought, ordered that the proceedings be stayed and the following questions referred for a preliminary ruling 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 Directive 86/653 ...?’

(2) If it has to be determined whether an agency contract exists, does it make any difference to the answer to Question 1 that remuneration (commission) of 2.5% of the charter has been paid over many years and/or that Article 7(1) of the

Directive refers to “transactions concluded” and to the existence of an entitlement to (the) 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”?

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

The jurisdiction of the Court

- 11 By letter of 2 September 2004, the Court Registry drew the attention of the referring court to the fact that, as is apparent from Article 1(2) of the Directive, the Directive applies solely to self-employed intermediaries with authority to negotiate contracts for goods and not self-employed intermediaries with authority to negotiate contracts for services (see the order of 6 March 2003 in Case C-449/01 *Abbey Life Assurance*, not published in the ECR). The Court Registry asked whether, in those circumstances, the referring court maintained its reference for a preliminary ruling.
- 12 In reply, the referring court confirmed that it was maintaining its reference. It explained in that respect that, in implementing the Directive in national law, the Netherlands legislature had extended the scope of the term ‘commercial agent’ to contracts for services. The Rechtbank emphasised that it sought, in particular, the interpretation of certain concepts in the Directive such as the term ‘continuing authority’ in Article 1(2) of the Directive, and the concept of ‘indemnity for loss of

customers' referred to in Article 17 of the Directive. The fact that the Netherlands law on the contract of agency, which was based on the Directive, defines that contract more widely than does the Directive does not mean that, in interpreting certain concepts derived from the Directive, a case must necessarily be brought before the referring court dealing with the narrower concept of commercial agent/agency contract.

13 In those circumstances, Poseidon and the Commission invited the Court to reply to the questions referred.

14 It should be noted as a preliminary point in that connection that, within the framework of the cooperation between the Court and national courts and tribunals established by Article 234 EC, it is solely for the national court 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. The Court can refuse a request submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is general or hypothetical (see, inter alia, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraphs 59 to 61; Case C-369/95 *Somalfruit and Camar* [1997] ECR I-6619, paragraphs 40 and 41; Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20; Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 88; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 34).

15 Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling. Neither the wording of Article 234 EC nor the aim of the procedure established by that article indicates that the framers of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a

Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State (Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 21, and Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 21).

- 16 Where domestic legislation adopts the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 32; *Giloy*, paragraph 28; and *Kofisa Italia*, paragraph 32).
- 17 In the present case, although the questions concern a contract concluded with an intermediary with authority to negotiate a contract for services and not a contract for the sale or purchase of goods and the Directive does not therefore directly govern the situation in issue, the fact remains that, in implementing the provisions of the Directive in national law, the national legislature decided to treat those two situations in the same way.
- 18 Furthermore, there is nothing in the file to indicate that the national court is empowered to depart from the interpretation of the provisions of the Directive that the Court shall give.
- 19 In those circumstances, and as Advocate General Geelhoed proposed in points 13 to 16 of his Opinion, the Court should reply to the questions referred.

The questions referred for a preliminary ruling

- 20 By its questions, which should be considered together, the referring court asks essentially whether a self-employed intermediary with authority to conclude a single charter for a ship, subsequently extended over several years, is a commercial agent for the purposes of the Directive.
- 21 The applicant in the main proceedings and the Commission submit that the peculiarity of there being a single contract is not decisive where the intermediary has continuing authority. In the present case, given the renewal of the contract over several years, there can be no doubt that the intermediary had continuing authority.
- 22 The Commission also points out that, in the proposal for a Council directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, which it submitted on 17 December 1976 (OJ 1977 C 13, p. 2), the definition of commercial agent set out in Article 2 of that proposal expressly included ‘an unlimited number’ of commercial transactions, a condition which was not taken up in the final version of Article 1(2) of the Directive.
- 23 The Commission adds that Article 3 of that proposal provided that the directive would not apply ‘to intermediaries appointed to negotiate or to conclude in the name of the principal a specified transaction or a number of specified transactions only’. That provision does not appear in the final version of the Directive, which means that the Community legislature deliberately chose not to adopt the proposed restriction.

- 24 It should be noted in this connection that, as is clear from Article 1(2) of the Directive, a commercial agency contract is characterised in particular by the fact that the agent, defined as a self-employed intermediary, is invested by the principal with continuing authority to negotiate. That is clear from several provisions of the Directive especially Articles 3 and 4 on the obligations upon the parties to act dutifully and in good faith towards each other, Article 6 et seq. on the remuneration of the agent during the period of contractual relations, and Article 17 et seq. on the rights of the agent after termination of the contract.
- 25 The number of transactions concluded by the intermediary for and on behalf of the principal is normally an indicator of that continuing authority. As the referring court has pointed out, Article 17(2)(a) of the Directive uses the term 'customers' in the plural. However, as Advocate General Geelhoed stressed in point 24 of his Opinion, the number of transactions is not the sole determining factor in assessing whether the principal conferred continuing authority on the intermediary.
- 26 Where an intermediary has authority to conclude, for and on behalf of the principal, a single contract which is subsequently extended over several years, the condition laid down by Article 1(2) of the Directive that the authority be continuing requires that the principal confer continuing authority on the intermediary to negotiate successive extensions to that contract, unless there are other factors indicating that there is continuing authority to negotiate. It is for the national court to make the requisite findings in that regard. The mere fact that the intermediary maintained relations with the principal throughout the contractual period is, in itself, insufficient to demonstrate such authority.
- 27 The answer to the questions referred is therefore that Article 1(2) of the Directive is to be interpreted as meaning that, where a self-employed intermediary had authority to conclude a single contract, subsequently extended over several years, the

condition laid down by that provision that the authority be continuing requires that the principal should have conferred continuing authority on that intermediary to negotiate successive extensions to that contract.

Costs

- 28 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 (First Chamber) hereby rules:

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 is to be interpreted as meaning that, where a self-employed intermediary had authority to conclude a single contract, subsequently extended over several years, the condition laid down by that provision that the authority be continuing requires that the principal should have conferred continuing authority on that intermediary to negotiate successive extensions to that contract.

[Signatures]