JUDGMENT OF THE COURT (First Chamber)

23 March 2006 *

In Case C-465/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 11 June 2004, received at the Court on 3 November 2004, in the proceedings

Honyvem Informazioni Commerciali Srl

v

Mariella De Zotti,

THE COURT (First Chamber),

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

* Language of the case: Italian.

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Honyvem Informazioni Commerciali Srl, by G. Prosperetti and C. del Pennino, avvocati,

— M. De Zotti, by F. Toffoletto, avvocato,

— the Commission of the European Communities, by E. Traversa, acting as Agent, and G. Belotti, avvocato,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 October 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 17 and 19 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 between Honyvem informazioni commerciali Srl ('Honyvem') and Ms De Zotti, concerning the amount of the indemnity for termination of contract due to Ms De Zotti on account of the termination of her agency contract by Honyvem.

Legal background

Community law

3 Article 17 of the Directive 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.

...

6. The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this article, and shall if necessary submit to it proposals for amendments.'

4 Article 19 of the Directive provides:

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

National legislation

5 Articles 17 and 19 of the Directive were transposed into national law by Article 1751 of the Italian Civil Code ('the Civil Code'). Following the adoption of Legislative Decree No 303 of 10 September 1991 (GURI No 221, of 20 September 1991, Ordinary Supplement), the wording of that national provision was amended and is now based on that of Articles 17 and 19 of the Directive. Like Article 17 of the Directive, the wording reflects a 'meritocratic' approach to the calculation of the indemnity to which the commercial agent is entitled after termination of his agency contract.

6 On 27 November 1992, Confcommercio (an organisation representing undertakings in the distribution, tourism and service sectors) and FNAARC (an organisation representing commercial agents and representatives) concluded a collective agreement ('the 1992 agreement') which provides as follows:

'I.

With reference to Article 1751 of the Civil Code, as amended by Article 4 of Legislative Decree No 303 of 10 September 1991, and in particular to the principle of equity, in all cases of termination of contract the agent or representative shall be paid an indemnity, the amount of which shall be equal to 1% of the total amount of commission accruing and paid during the validity of the contract.

[That sum] shall be supplemented as follows:

A. Agents and representatives bound to a single firm by an exclusivity clause:

— 3% of the commissions up to ITL 24 000 000 a year;

— 1% of the commissions between ITL 24 000 001 and ITL 36 000 000 a year.

B. Agents and representatives not bound to a single firm by an exclusivity clause:

— 3% of the commissions up to ITL 12 000 000 a year;

— 1% of the commissions between ITL 12 000 001 and ITL 18 000 000 a year.

...

The parties give each other notice that by means of the foregoing they consider that the criterion of equity set out in Article 1751 cited above has been satisfied.

II.

Likewise in accordance with Article 1751 of the Civil Code, in addition to the sum described in paragraph I of this agreement, a further amount shall be paid ... calculated as follows:

— 3% of the commissions accruing in the first three years of the agency contract;

— 3.5% of the commissions accruing from the fourth to the sixth year;

— 4% of the commissions accruing in subsequent years.

...

Declaration for the record

The parties confirm that these collective provisions regarding remuneration upon termination of the agency contract in application of Article 1751 of the Civil Code together constitute better treatment than that provided for by law. They are interdependent and inseparable one from another and may not be cumulated with any other scheme.

...'

7 According to the 1992 agreement, the calculation of the indemnity to which the commercial agent is entitled after termination of his agency contract is therefore based, contrary to the criteria laid down in Article 17 of the Directive and Article 1751 of the Civil Code in the version amended by Legislative Decree No 303 of 10 September 1991 ('Article 1751 of the Civil Code'), on fixed percentages of the commission received by the commercial agent and on the length of the agency contract.

The main proceedings and the questions referred for a preliminary ruling

8 Honyvem terminated the agency contract concluded with Ms De Zotti with effect from 30 June 1998. Pursuant to clause 10 of that contract, the latter is 'governed by the provisions of the Civil Code, special laws concerning the commercial agent mandate, and collective agreements in the distribution sector ...'.

9 Taking the view that the calculation of the indemnity for termination of contract should be based on the 1992 agreement, Honyvem offered to pay Ms De Zotti the sum of ITL 78 880 276 in respect of that indemnity.

10 Since she regarded that sum to be insufficient, Ms De Zotti brought an action before the Tribunale di Milano (District Court, Milan) on 12 April 1999, seeking an order directing Honyvem to pay her the sum of ITL 181 889 420, in accordance with the criteria laid down in Article 1751 of the Civil Code.

11 After the Tribunale di Milano dismissed the action and accepted Honyvem's argument, Ms De Zotti brought an appeal before the Corte d'appello di Milano (Court of Appeal, Milan). The latter upheld the appeal and declared that she was entitled to an additional sum of ITL 57 000 000 pursuant to Article 1751 of the Civil Code.

12 Honyvem appealed to the Corte suprema di cassazione (Supreme Court of Cassation) against the decision of the Corte d'appello di Milano. Honyvem argued, inter alia, that reference to the principle of the independent will of the parties and, consequently, to collective agreements is expressly permitted by Article 1751 of the Civil Code where those agreements provide for more favourable conditions for the commercial agent than those resulting from the application of the regime prescribed by law. The question whether the indemnity provided for by the contractual rules is more favourable is to be determined *ex ante*. Given that the regime established by the collective agreement guarantees the payment of an indemnity to the commercial agent in all circumstances, it must be concluded that that regime is more favourable to her than that established by Article 1751 of the Civil Code.

13 Ms De Zotti brought a cross-appeal on the ground that the indemnity for termination of contract which is owing to her should correspond, in accordance with the criteria laid down in Article 1751 of the Civil Code, to an indemnity whose amount is close to that claimed at first instance.

14 It is clear from the order for reference that neither the case-law nor Italian legal opinion has reached unanimity as regards the legality of the 1992 agreement.

15 In those circumstances the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Given the tenor and purpose of Article 17 of the Directive and, where applicable, the criteria it offers for calculating the indemnity for which it

provides, can Article 19 be interpreted as meaning that the national legislation implementing the Directive can permit that a collective agreement (that is binding on the parties to certain contracts) provides not for an indemnity owed to the agent in the set of circumstances set out in Article 17(2) and payable in accordance with criteria that can be deduced therefrom, but for an indemnity which, firstly, is owed to the agent without regard to the conditions set out in the two indents of Article 17(2)(a) (and for part of the indemnity whatever the reason for termination of the contract), and, secondly, is calculated not in accordance with the criteria to be found in the directive (and, where applicable, at the maximum amount specified therein) but in accordance with the criteria set in the collective economic agreement, that is to say an indemnity determined (without any specific reference to the increase in business generated by the agent) on the basis of predetermined percentages of the remuneration received by the agent in the course of the relationship, with the result that, even if the requirements of the directive for entitlement to the indemnity are met fully or to a high degree, in many cases the level of the indemnity to be paid would have to be lower (sometimes much lower) than the ceiling provided for in the Directive and, in any event, lower than could have been decided in specific terms by the court if it were not bound by the calculation parameters laid down in the collective agreement rather than the principles and criteria of the Directive?

(2) Should the indemnity be calculated individually by estimating the further commissions that the agent could presumably have earned in the years following termination of the contract on the basis of the new customers he has brought or the substantial growth in business with existing customers that he has generated, and only then applying any adjustments to the amount, having in mind the criterion of equity and the ceiling laid down in the Directive; or are other methods of calculation permitted, in particular composite methods that evaluate the criterion of equity more broadly and take the ceiling specified in the Directive as their point of departure?'

The questions

The first question

16 By its first question, the national court asks essentially whether Article 19 of the Directive must be interpreted as meaning that the indemnity for termination of contract provided for in Article 17(2) of the Directive may be replaced, pursuant to a collective agreement, by an indemnity determined according to criteria other than those laid down by Article 17(2).

17 It must be observed, as a preliminary point, that the interpretation of Articles 17 and 19 of the Directive must be considered in the light of the aims pursued by the Directive and the system it establishes (see, to that effect, Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 6, and Case C-104/95 *Kontogeorgas* [1996] ECR I-6643, paragraph 25).

18 In that connection, it is common ground that the Directive aims to coordinate the laws of the Member States as regards the legal relationship between the parties to a commercial agency contract (Case C-215/97 *Bellone* [1998] ECR I-2191, paragraph 10, and Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraph 13).

19 As is clear from the second and third recitals in the preamble, the Directive seeks to protect commercial agents in their relations with their principals, to promote the security of commercial transactions, and to facilitate trade in goods between Member States by harmonising their legal systems within the area of commercial representation. To those ends, the Directive establishes, inter alia, rules governing the conclusion and termination of agency contracts, in Articles 13 to 20 (Case C-485/01 *Caprini* [2003] ECR I-2371, paragraph 4).

20 As regards termination of contracts, Article 17(1) of the Directive institutes a system enabling Member States to choose between two approaches. The Member States must take the measures necessary to guarantee the commercial agent, after termination of the contract, either an indemnity determined according to the criteria set out in Article 17(2) or compensation according to the criteria set out in Article 17(3).

21 The Italian Republic, whose national provisions were based previously to a large extent on collective agreements, has chosen the solution laid down in Article 17(2).

22 According to settled case-law, the system established by Articles 17 to 19 of the Directive concerning, in particular, the protection of the commercial agent after termination of the contract is mandatory in nature (Case C-381/98 *Ingmar* [2000] ECR I-9305, paragraph 21).

23 The Court thus concluded that a principal cannot evade those provisions by the simple expedient of a choice-of-law clause without consideration as to whether or not that choice operates to the detriment of the commercial agent (*Ingmar*, paragraph 25).

24 As regards Article 19 of the Directive, it must be recalled, first of all, that, according to settled case-law, the terms used to establish exceptions to a general principle laid down by Community law, such as that resulting from the indemnity scheme provided for by Article 17 of the Directive, are to be interpreted strictly (Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25).

25 Next, it must be observed that Article 19 of the Directive provides for the parties to be able to derogate from the provisions of Article 17 before the contract expires, provided that that derogation is not unfavourable to the commercial agent. It is clear, therefore, that the issue of whether or not that derogation is unfavourable must be determined at the time the parties contemplate it. The latter cannot agree on a derogation if they do not know whether at the end of the contract it will prove to be favourable or detrimental to the commercial agent.

26 That interpretation is also supported by the aim and the character of the system established by Articles 17 and 19 of the Directive, as set out in paragraphs 19 and 22 of this judgment.

27 Therefore, it must be concluded from the foregoing considerations that Article 19 of the Directive must be understood as meaning that a derogation from the provisions of Article 17 may be accepted only if, *ex ante*, there is no possibility that at the end of the contract that derogation will prove to be detrimental to the commercial agent.

28 That would be the case, as regards the 1992 agreement, if it could be established that the application of that agreement is never unfavourable to the commercial agent since it systematically guarantees the latter, with respect to all the legal relationships likely to be established between the parties to a commercial agency contract, an indemnity greater or at least equal to that resulting from the application of Article 17 of the Directive.

29 The mere fact that that agreement may be favourable to the commercial agent if he is entitled, in accordance with the criteria laid down in Article 17(2) of the Directive, to only a very small indemnity or even to nothing at all, is not sufficient to establish that that agreement does not derogate from the provisions of Articles 17 and 18 of the Directive to the detriment of the commercial agent.

30 It is for the national court to make the necessary investigations for that purpose.

31 Finally, it must be observed that it is only if the 1992 agreement allowed cumulation, even partial, of the indemnity calculated according to the provisions of that agreement with the indemnity provided for by the system established by the Directive that it could be treated as favourable to the commercial agent. That possibility is, however, expressly excluded by the declaration for the record made by the parties who signed that agreement.

32 In the light of all of those considerations, the answer to the first question must be that Article 19 of the Directive must be interpreted as meaning that the indemnity for termination of contract which results from the application of Article 17(2) cannot be replaced, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17, unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from the application of Article 17.

The second question

33 By its second question, the national court asks essentially whether the calculation of the indemnity for termination of contract must be carried out individually, as

provided for by Article 17(2) of the Directive, or whether other methods of calculation, which attach, inter alia, more importance to the criterion of equity, are permitted.

34 In that connection, it must be observed that although the system established by Article 17 of the Directive is mandatory and prescribes a framework (*Ingmar*, paragraph 21), it does not give any detailed indications as regards the method of calculation of the indemnity for termination of contract.

35 The Court thus held that, within that framework, the Member States may exercise their discretion as to the choice of methods for calculating the indemnity (*Ingmar*, paragraph 21). The Commission has submitted to the Council the Report on the application of Article 17 of the Council Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (COM(1996) 364 final), as it was required to do in accordance with Article 17(6) of the Directive. That report provides detailed information as regards the actual calculation of the indemnity and is intended to facilitate a more uniform interpretation of Article 17.

36 Therefore, the answer to the second question must be that, within the framework prescribed by Article 17(2) of the Directive, the Member States enjoy a margin of discretion which they may exercise, in particular, in relation to the criterion of equity.

Costs

37 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:

1. **Article 19 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 indemnity for termination of contract which results from the application of Article 17(2) of the Directive cannot be replaced, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17, unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from the application of Article 17.**

2. **Within the framework prescribed by Article 17(2) of Directive 86/653, the Member States enjoy a margin of discretion which they may exercise, in particular, in relation to the criterion of equity.**

[Signatures]