



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

23 March 2023*

(Reference for a preliminary ruling – Self-employed commercial agents – Directive 86/653/EEC – Article 17(2)(a) – Termination of the agency contract – Entitlement of the commercial agent to an indemnity – Conditions for granting – Equitable indemnity – Assessment – Concept of ‘commission lost by the commercial agent’ – Commission on future transactions – New customers brought by the commercial agent – Existing customers with whom the commercial agent has significantly increased the volume of business – One-off commission payments)

In Case C-574/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší soud (Supreme Court, Czech Republic), made by decision of 29 June 2021, received at the Court on 20 September 2021, in the proceedings

QT

v

O2 Czech Republic a.s.,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: T. Ćapeta,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2022,

after considering the observations submitted on behalf of:

- QT, by D. Rašovský, advokát,
- O2 Czech Republic a.s., by L. Duffek and M. Olík, advokáti,

* Language of the case: Czech.

- the Czech Government, by T. Machovičová, O. Serdula, M. Smolek and J. Vláčil, acting as Agents,
 - the German Government, by J. Möller, U. Bartl, J. Heitz and M. Hellmann, acting as Agents,
 - the European Commission, by L. Armati, M. Mataija and P. Němečková, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 24 November 2022,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 17(2)(a) 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).
- 2 The request has been made in proceedings between QT, a commercial agent, and the company O2 Czech Republic a.s. concerning a claim for compensation for the termination of the commercial agency contract between that commercial agent and that company.

Legal context

European Union law

- 3 The second and third recitals of Directive 86/653 state as follows:

‘Whereas 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; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States;

Whereas 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; whereas in this regard the rules concerning conflict of laws do not, in the matter of commercial representation, remove the inconsistencies referred to above, nor would they even if they were made uniform, and accordingly the proposed harmonisation is necessary notwithstanding the existence of those rules.’

- 4 Under Article 1 of that directive:

‘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.

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.

...’

5 Article 6 of that directive provides:

‘1. In the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities. If there is no such customary practice a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

2. Any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission within the meaning of this Directive.

3. Articles 7 to 12 shall not apply if the commercial agent is not remunerated wholly or in part by commission.’

6 Article 7 of the directive is worded as follows:

‘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.

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

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

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

7 Article 8 of Directive 86/653 states:

‘A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated:

- (a) if the transaction is mainly attributable to the commercial agent’s efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or
- (b) if, in accordance with the conditions mentioned in Article 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.’

8 Article 17 of that 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.

3. The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent’s activities,
- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal’s advice.

4. Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death.

5. The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

6. The [European] Commission shall submit to the Council [of the European Union], 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.'

9 Article 18 of that directive provides:

'The indemnity or compensation referred to in Article 17 shall not be payable:

- (a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;
- (b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities;
- (c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.'

10 Article 19 of that directive provides:

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

Czech law

11 Paragraph 652(1) of zákon č. 513/1991 Sb., obchodní zákoník (Law No 513/1991 establishing the Commercial Code), in the version applicable to the main proceedings ('the Commercial Code'), provided, in essence, that, by an agency contract, the commercial agent undertook to negotiate and conclude business with customers and to carry out related transactions, in the name of and on behalf of the principal.

- 12 Paragraph 669(1) of that code, transposing Article 17(2)(a) of Directive 86/653 into the Czech legal order, provided:

‘The commercial agent shall be entitled to an indemnity in the event of termination of an agency contract if:

- (a) he or she 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
- (b) the payment of that 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 ...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 13 On 1 January 1998, the applicant in the main proceedings concluded a commercial agency contract with the legal predecessor of O2 Czech Republic (‘O2 Czech Republic’). That contractual relationship ended on 31 March 2010. That contract concerned the offer and sale of telecommunications services provided by that company, the supply and sale of mobile telephones, mobile telephone accessories and, as the case may be, other products and customer support services.
- 14 Under that contract, the applicant in the main proceedings received one-off commission payments for each of the contracts which he concluded for O2 Czech Republic.
- 15 In 2006 and 2007, the applicant in the main proceedings brought new customers to O2 Czech Republic and concluded other contracts with existing customers. In view of the maximum duration of the tariff commitment, those contracts did not go beyond the date of termination of the agency contract at issue in the main proceedings, namely 31 March 2010.
- 16 By contrast, as regards 2008 and 2009, that date was exceeded in respect of a total of 431 subscriptions, including 155 new subscriptions and 276 amendments to existing subscriptions, for which the applicant in the main proceedings received payment of the corresponding commission from O2 Czech Republic.
- 17 Taking the view that that company had not, however, paid it the indemnity due to it under Article 669(1) of the Commercial Code, transposing Article 17(2)(a) of Directive 86/653, the applicant in the main proceedings requested the Obvodní soud pro Prahu 4 (Prague 4 District Court, Czech Republic) to order O2 Czech Republic to pay him the sum of 2 023 799 Czech koruny (CZK) (approximately EUR 82 000).
- 18 That court dismissed that claim on the ground that the applicant in the main proceedings had not shown that, after the end of the agency contract at issue, O2 Czech Republic still retained substantial benefits resulting from business with customers he had brought.
- 19 That decision was upheld on appeal by the Městský soud v Praze (Prague City Court, Czech Republic). By judgment of 27 November 2019, that court pointed out that the one-off commission payments agreed between the parties to that contract had been duly paid to the

applicant in the main proceedings. It found that the argument that the applicant was entitled to the commission which could hypothetically be obtained did not justify his entitlement to an indemnity. It is true that the applicant in the main proceedings brought new customers and increased the volume of business with existing customers from whom O2 Czech Republic could derive benefits after the end of that contract. However, that company paid him commission on that basis under the contract. That court concluded that the payment of an indemnity would not be equitable, within the meaning of Paragraph 669(1)(b) of the Commercial Code, and that the claim had to be dismissed on that ground alone.

- 20 The applicant in the main proceedings brought an appeal on a point of law against that judgment before the Nejvyšší soud (Supreme Court, Czech Republic), the referring court in the present case.
- 21 By his appeal, the applicant in the main proceedings criticises the settled case-law of that court relating to Paragraph 669(1)(b) of the Commercial Code, according to which ‘commission lost by the commercial agent’ is that which he or she would have received on transactions already carried out, that is to say transactions which that agent himself or herself concluded or the volume of which he or she significantly increased. He submits, on the contrary, that that concept should include the commission which that agent would have received hypothetically, in respect of transactions which the principal carried out, after the end of the agency contract at issue, with customers whom that agent had brought or with whom he or she had significantly increased the volume of business during the performance of the contract.
- 22 The referring court notes that its case-law differs from German case-law. According to the latter, the ‘commission lost by the commercial agent’ is the commission corresponding to the transactions which the commercial agent would have concluded on behalf of the principal if the agency contract had hypothetically continued. Moreover, according to that German case-law, if, in the case of one-off commission payments, the commercial agent does not lose any commission, he or she may still be entitled to an indemnity. There is therefore serious doubt regarding the interpretation of Article 17(2)(a) of Directive 86/653.
- 23 In those circumstances, the Nejvyšší soud (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - ‘(1) ‘Must the expression “the commission lost by the commercial agent,” within the meaning of Article 17(2)(a), second indent, of [Directive 86/653], be interpreted to the effect that such commissions include commissions for the conclusion of contracts which a commercial agent would have entered into had the commercial agency [contract] endured, with the customers that he or she brought the principal or with which he or she significantly increased the volume of business?’
 - (2) If so, subject to what conditions does this conclusion apply to ‘one-off commissions’ for the conclusion of a contract?’

The Court’s jurisdiction and the admissibility of the questions referred for a preliminary ruling

- 24 In the first place, as regards the Court’s jurisdiction to answer the questions referred for a preliminary ruling, it should be noted, first, that the commercial agency contract at issue in the main proceedings was concluded on 1 January 1998, that is to say, before the accession of the

Czech Republic to the European Union on 1 May 2004. That contract was binding on the parties to the main proceedings until 31 March 2010, the date on which O2 Czech Republic terminated the contract. Since it is the legal consequences of the termination, which took place after that accession, which are the subject of the dispute in the main proceedings, Directive 86/653 applies *ratione temporis* to that dispute.

- 25 As regards, secondly, the material scope of that directive, it is apparent from Article 1(2) thereof that it applies only to the sale or purchase of goods and not to the provision of services. The purpose of the commercial agency contract at issue in the main proceedings is the sale of goods and the provision of services. It therefore falls only partially within that material scope.
- 26 However, it appears that, by Paragraph 652 of the Commercial Code, the Czech legislature decided, when transposing Directive 86/653 into Czech law, to include all the business that a commercial agent may transact and thus intended to apply the provisions of that directive both to purchase and sales transactions and to the provision of services.
- 27 According to the Court's settled case-law, where domestic legislation adopts the same solutions as those adopted in EU law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 17 and the case-law cited).
- 28 It follows that the fact that the contract at issue in the main proceedings concerns both goods and services does not preclude the Court from answering the questions referred for a preliminary ruling by the referring court.
- 29 It thus follows from the foregoing considerations that the Court has jurisdiction to answer those questions.
- 30 In the second place, O2 Czech Republic submits that those questions are inadmissible because they are not relevant to the resolution of the dispute in the main proceedings.
- 31 It should be recalled that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, 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. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 56 and the case-law cited).
- 32 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 14 July 2022, *Volkswagen*, C-134/20, EU:C:2022:571, paragraph 57 and the case-law cited).

- 33 In the present case, the referring court has sufficiently set out, in its request for a preliminary ruling, not only the reasons which led it to ask the Court about the interpretation of the provisions of Directive 86/653, but also the reasons why that interpretation appears to it to be necessary for the resolution of the dispute in the main proceedings.
- 34 In those circumstances, the questions referred for a preliminary ruling are admissible.

Consideration of the questions referred

The first question

- 35 As a preliminary point, it should be recalled that the interpretation of Article 17 of Directive 86/653, to which the first question relates, must be considered in the light of the objective pursued by that directive and the system it establishes. That objective is to coordinate the laws of the Member States as regards the legal relationship between the parties to a commercial agency contract (see, to that effect, judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraphs 21 and 22 and the case-law cited).
- 36 As is clear from the second and third recitals in the preamble, Directive 86/653 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 (judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 23 and the case-law cited).
- 37 As regards, in particular, the termination of commercial agency contracts, Article 17 of Directive 86/653 requires Member States to put in place a mechanism for providing compensation to the commercial agent, allowing them to choose between two options: either an indemnity determined according to the criteria set out in Article 17(2), namely, the system of indemnity in respect of customers, or compensation according to the criteria set out in Article 17(3), namely the system of compensation for damage (judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 24 and the case-law cited).
- 38 According to the request for a preliminary ruling, the Czech Republic opted for the system of indemnity in respect of customers, provided for in Article 17(2) of Directive 86/653.
- 39 That system of indemnity in respect of customers is broken down into three stages. The aim of the first of those stages is, first of all, to quantify the benefits accruing to the principal as a result of the volume of business with customers brought by the commercial agent, in accordance with the criteria laid down in the first indent of Article 17(2)(a) of the directive. The aim of the second stage is to check, in accordance with the second indent of Article 17(2)(a), whether the amount of the indemnity calculated on the basis of the abovementioned criteria is equitable, having regard to all the circumstances of the case and, in particular, to the commission lost by the commercial agent. Finally, in the third stage, that amount is subject to the maximum limit laid down in Article 17(2)(b), which applies only if that amount exceeds that maximum limit (see, to that effect, judgment of 3 December 2015, *Quenon K.*, (C-338/14, EU:C:2015:795, paragraph 28 and the case-law cited).

- 40 In the present case, the first question specifically concerns the meaning of the expression ‘commission lost by the commercial agent’, used in the second indent of Article 17(2)(a) of Directive 86/653, which formally corresponds to the second stage of that indemnity system for customers. It is nevertheless apparent from the order for reference that the issue raised by the referring court is more general and that it does not concern only that second stage. It also concerns the factors to be taken into account in assessing the benefits which the principal retains after the termination of the commercial agency contract, which falls within the first stage of that system, and not solely the calculation of the corresponding indemnity with a view to making it equitable.
- 41 It must therefore be held that, by its first question, that court asks, in essence, whether Article 17(2)(a) of Directive 86/653 must be interpreted as meaning that the commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract, in respect of transactions which would have been concluded after the termination of that agency contract with new customers which he or she transferred to the principal before that termination, or with customers with whom he or she significantly increased the volume of business before that termination, must be taken into account in determining the indemnity provided for in Article 17(2) of that directive.
- 42 In the first place, Article 17(2)(a) of the directive, read in conjunction with Article 17(1) thereof, lays down the conditions under which a commercial agent is entitled to an indemnity after termination of the agency contract and contains details of the method of calculating that indemnity. Thus, the commercial agent’s entitlement to indemnity laid down in that provision is subject to the termination of his or her contractual relationship with the principal (see, to that effect, judgment of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraph 23).
- 43 In that regard, as the Advocate General observed in point 53 of her Opinion, the first indent of Article 17(2)(a) of Directive 86/653 states that the commercial agent is entitled to an indemnity if two cumulative conditions are met. First, the commercial agent must have brought the principal new customers or significantly increased the volume of business with existing customers. Secondly, the principal must still derive substantial benefits from the business with those customers.
- 44 However, both the use of the adverbs ‘*encore*’, ‘*noch*’, ‘*fortsat*’, ‘*nadále*’, ‘*todavía*’, ‘*ancora*’, ‘*nadal*’, ‘*ainda*’, ‘*nog*’, ‘*nadálej*’ in the French, German, Danish, Czech, Spanish, Italian, Polish, Portuguese, Dutch and Slovak language-versions, respectively, of that provision and the use of the verb forms ‘*продължава*’, ‘*jätkuvalt*’, ‘*διατηρεί*’, ‘to derive from’, ‘*továbbra is ... tesz szert*’, ‘*continuuă*’, ‘*jatkuvasti*’, ‘*fortsätter*’ in the Bulgarian, Estonian, Greek, English, Hungarian, Romanian, Finnish and Swedish language-versions, respectively, of that provision, clearly indicate that those advantages are those which persist after the termination of the agency contract and which therefore relate to the business transacted with those customers after that termination. In other words, those benefits correspond to those which the principal continues to derive, after that termination, from the commercial relations established or developed by the commercial agent during the performance of that contract.
- 45 From that point of view, the second indent of Article 17(2)(a) of Directive 86/653 states, in essence, that the calculation of the indemnity to which the commercial agent is entitled following termination of the agency contract must, in order to be equitable, take account of all the circumstances surrounding that agency contract, in particular the commission lost by the commercial agent as a result of the business transacted with those customers. Those

commissions correspond to the advantages referred to in the first indent of Article 17(2)(a), in so far as they result, like those benefits, from business transacted with customers referred to in the latter provision after termination of the contract.

- 46 Thus, the ‘commission lost by the commercial agent’, within the meaning of the second indent of Article 17(2)(a) of Directive 86/653, is that which the commercial agent should have received if the agency contract had continued and correspond to the benefits accruing to the principal which persist after termination of the agency contract and which result from commercial relations established or developed significantly by that commercial agent before the termination.
- 47 It therefore follows from the wording of Article 17(2)(a) of Directive 86/653 that the commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract, in respect of transactions which would have been concluded after the termination of that agency contract with new customers which that agent brought to the principal before that termination, or with customers with whom he or she significantly increased the volume of business before that termination, must be taken into account in determining the indemnity provided for in Article 17(2).
- 48 In the second place, that interpretation is supported by the context of Article 17(2)(a) of that directive.
- 49 First, as has been pointed out in paragraph 37 of the present judgment, Article 17 of that directive leaves to the Member States the choice, in order to ensure that the commercial agent is compensated in the event of termination of the agency contract, between two systems, provided for in paragraphs 2 and 3, respectively, of that article. In so far as they both seek to ensure such compensation, those systems must be understood as covering identical premisses, namely losses corresponding to the period after the termination of the agency contract (see, to that effect, judgment of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraph 28).
- 50 The Court has previously held, as regards Article 17(3) of Directive 86/653, that the commercial agent is entitled to compensation for damage suffered, in particular where such damage is deemed to occur when the termination of the contractual relations with the principal takes place in circumstances depriving that commercial agent of the commission which performance of the contract would have procured him or her whilst providing the principal with substantial benefits linked to that commercial agent’s activities and/or in circumstances which have not enabled the commercial agent to amortise the costs and expenses that he or she incurred for the performance of the contract on the principal’s advice (judgment of 19 April 2018, *CMR*, C-645/16, EU:C:2018:262, paragraph 27). Article 17(3) therefore does indeed cover the case of future commissions which would have been obtained if the agency contract had not been terminated.
- 51 It follows that Article 17(2) of Directive 86/653 must also cover that situation and that the indemnity that it provides must take account, under certain conditions which it lays down, of the commission which the commercial agent would have received in the event of the hypothetical continuation of the agency contract.
- 52 Secondly, a reading of that provision in the light of Articles 7 and 8 of that directive also confirms that interpretation. Article 7 provides that the commercial agent is to be entitled to commission for any commercial transaction concluded during the period covered by the agency contract under certain conditions set out in Article 7. Article 8 of that directive adds that the commercial

agent is also entitled to receive commission on a commercial transaction even though that transaction is concluded after the termination of the contract where, in essence, that transaction was about to be completed on the date of termination.

- 53 In that context, Article 17(2) of Directive 86/653 must be interpreted, in order to ensure its effectiveness, as covering a different situation from those already covered by Articles 7 and 8 of that directive. Article 17(2) cannot therefore cover situations in which the commercial agent has not received all the commission payable to him or her, since those situations fall within the scope of Article 7 of that directive. Similarly, it cannot be interpreted as applying to transactions which were about to be concluded before the termination of the contract and which were concluded after that termination, which fall within the scope of Article 8 of that directive. The commissions referred to in Articles 7 and 8 of Directive 86/653 are, by their nature, acquired rights and are not subject to the specific limitations and to the requirements laid down in Articles 17 and 18 of that directive.
- 54 Thus, the indemnity provided for in Article 17(2) of Directive 86/653 necessarily refers to the commission which the commercial agent would have received in the event of hypothetical continuation of the agency contract, on the basis of transactions concluded with new customers which that agent has brought to the principal or with customers with whom he or she has significantly increased the volume of business.
- 55 Thirdly, reference should be made to 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, submitted by the Commission on 23 July 1996 (COM (96) 364 final), in accordance with Article 17(6) of Directive 86/653, which provides detailed information on the actual calculation of the indemnity provided for in Article 17(2) of that directive and is intended to facilitate a more uniform interpretation of Article 17 (see, to that effect, judgment of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 22 and the case-law cited). That report states that that indemnity corresponds to the benefits which the principal continues to derive from the activity of the commercial agent after termination of the agency contract. It is stated that it is a matter of compensating the goodwill generated for the principal. It follows from those explanations that that indemnity must also cover the commission which the commercial agent would have received in the event of a hypothetical continuation of that agency contract, in respect of transactions concluded with new customers which that agent has brought to the principal or with customers with whom he or she has significantly increased the volume of business during the performance of that contract.
- 56 In the third place, the objectives pursued by Directive 86/653 also support that interpretation of Article 17(2)(a) of that directive. As noted in paragraph 36 of the present judgment, that 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.
- 57 In that context, the Court has held that the objective of Articles 17 to 19 of Directive 86/653 is to protect the commercial agent after termination of the commercial agency contract and that the regime established for that purpose by that directive is mandatory in nature. The Court inferred from this that any interpretation of Article 17 of that directive which may prove to be detrimental to the commercial agent is not permissible (judgment of 19 April 2018, *CMR*, C-645/16, EU:C:2018:262, paragraphs 34 and 35 and the case-law cited). It has also held, more specifically, that Article 17(2) of that directive must be interpreted in a manner which

contributes to the protection of that commercial agent and takes full account of the merits of the latter in carrying out the transactions assigned to him or her (see, to that effect, judgment of 7 April 2016, *Marchon Germany*, C-315/14, EU:C:2016:211, paragraph 33).

- 58 As the Advocate General observed, in essence, in point 73 of her Opinion, limiting the scope of the concept of ‘commission lost by the commercial agent’ to transactions that were already carried out before the termination of the agency contract would risk depriving the commercial agent of a considerable share of the profits earned by the principal following termination on the basis of the work carried out by that commercial agent.
- 59 Thus, an interpretation of Article 17(2)(a) of Directive 86/653 which excludes from the determination of the indemnity any commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract, in respect of transactions concluded after the termination of that contract with new customers which that agent brought to the principal before that termination, or in respect of transactions which were concluded after that termination with customers with whom he or she significantly increased the volume of business before that termination, would be contrary to the objectives of that directive.
- 60 In the light of the foregoing, the answer to the first question is that Article 17(2)(a) of Directive 86/653 is to be interpreted as meaning that the commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract, in respect of transactions which would have been concluded after the termination of that agency contract with new customers which he or she brought to the principal before that termination, or with customers with which he or she significantly increased the volume of business before that termination, must be taken into account in determining the indemnity provided for in Article 17(2) of that directive.

The second question

- 61 By its second question, the referring court asks, in essence, whether Article 17(2)(a) of Directive 86/653 must be interpreted as meaning that the payment of one-off commissions excludes from the calculation of the indemnity, provided for in Article 17(2), the commission lost by the commercial agent resulting from transactions carried out by the principal, after the termination of the commercial agency contract, with new customers which that agent brought to the principal before that termination, or with customers with whom he or she significantly increased the volume of business before that termination.
- 62 In that regard, as has been pointed out in paragraph 39 of the present judgment, the second indent of Article 17(2)(a) of that directive requires, in essence, that the amount of the indemnity be calculated equitably taking into account all the circumstances of the case and, in particular, the commission lost by the commercial agent.
- 63 It follows that the ‘commission lost by the commercial agent’, within the meaning of that provision, is only one factor among others to be taken into account in assessing the equitable nature of the indemnity. The choice of a certain type of commission, such as, for example, one-off commission payments, cannot therefore call into question the right to indemnity provided for in that provision. If that were not the case, there would be a risk of circumvention of the mandatory nature of that right to indemnity provided for in Article 19 of that directive.

- 64 In the present case, the file before the Court contains very few details on what was covered by the one-off commission payments received by the applicant in the main proceedings under the commercial agency contract between him and O2 Czech Republic. At the hearing, O2 Czech Republic nevertheless stated that the one-off commission payments at issue in the main proceedings corresponded to flat-rate remuneration under any new contract concluded with new customers or with existing customers, through the applicant in the main proceedings.
- 65 If that were the case, which it is for the referring court to ascertain, the customer base created or developed by the applicant in the main proceedings would be likely to generate goodwill by means of new transactions which would have given rise to a right to payment of commission if the agency contract had not been terminated. In such circumstances, as the Advocate General noted, in essence, in point 89 of her Opinion, such one-off commission payments do not cover the commission that the commercial agent loses and which results from the business transacted with those customers by the principal after the termination of the commercial agency contract.
- 66 In the light of the foregoing, the answer to the second question is that Article 17(2)(a) of Directive 86/653 is to be interpreted as meaning that the payment of one-off commissions does not exclude from the calculation of the indemnity, provided for in Article 17(2), the commission lost by the commercial agent resulting from transactions carried out by the principal, after the termination of the commercial agency contract, with new customers which he or she brought to the principal before that termination, or with customers with which he or she significantly increased the volume of business before that termination, where those commissions correspond to flat-rate remuneration under any new contract concluded with those new customers or with existing customers of the principal, through the commercial agent.

Costs

- 67 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 (Third Chamber) hereby rules:

- 1. Article 17(2)(a) 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 the commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract, in respect of transactions which would have been concluded after the termination of that agency contract with new customers which he or she brought to the principal before that termination, or with customers with which he or she significantly increased the volume of business before that termination, must be taken into account in determining the indemnity provided for in Article 17(2) of that directive.

- 2. Article 17(2)(a) of Directive 86/653**

is to be interpreted as meaning that the payment of one-off commissions does not exclude from the calculation of the indemnity, provided for in Article 17(2), the

commission lost by the commercial agent resulting from transactions carried out by the principal, after the termination of the commercial agency contract, with new customers which he or she brought to the principal before that termination, or with customers with which he or she significantly increased the volume of business before that termination, where those commissions correspond to flat-rate remuneration under any new contract concluded with those new customers or with existing customers of the principal, through the commercial agent.

[Signatures]