



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 January 2017¹

Case C-48/16

ERGO Poist'ovňa, a.s.
v
Alžbeta Barlíková

(Request for a preliminary ruling from the Okresný súd Dunajská Streda (District Court, Dunajská Streda, Slovakia))

(Reference for a preliminary ruling — Self-employed commercial agents — Directive 86/653/EEC — Article 11 — Right to commission — Extinction — Partial non-execution of a contract between the third party and the principal — Meaning of ‘reason for which the principal is not to blame’)

1. The present reference for a preliminary ruling from the Okresný súd Dunajská Streda (District Court, Dunajská Streda, Slovakia) provides the Court with the opportunity to clarify a number of key concepts in Article 11 of Directive 86/653/EEC,² concerning the remuneration of a commercial agent in a situation in which a contract concluded between a principal and a third party is partially not executed.

Legal framework

EU law

2. Article 11 of Directive 86/653 reads as follows:

‘1. The right to commission can be extinguished only if and to the extent that:

- it is established that the contract between the third party and the principal will not be executed, and
- that [fact] is due to a reason for which the principal is not to blame.

2. Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.

3. Agreements to derogate from paragraph 1 to the detriment of the commercial agent shall not be permitted.’

¹ — Original language: English.

² — Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17).

Slovak law

3. Directive 86/853 was transposed into the law of the Slovak Republic by Paragraph 652 et seq. of the Obchodný zákonník (Commercial code) No 513/1991.

4. Pursuant to Paragraph 652(1) and (5):

‘(1) By a contract for commercial agency, a commercial agent as a trader commits himself to carrying on activity for the principal leading to the conclusion of a certain type of contracts (“transactions”) or to negotiate and conclude transactions in the name and on behalf of the principal, and the principal commits himself to paying the commercial agent commission.

...

(5) Unless provided otherwise in this Chapter, the provisions of a mediation agreement shall apply to a contract for commercial agency.’

5. Furthermore, Article 801 of the Občianský zákonník (Civil Code) (zákon č. 40/1964 Zb.) provides as follows:

‘(1) Insurance ceases where the premium for the first insurance period or the one-off premium has not been paid by three months from the date when it was due.

(2) Insurance ceases where the premium for a further period has not been paid by one month from the date of delivery of a call by the insurer for payment, if the premium has not been paid before delivery of that call ...’

Facts, procedure and questions referred

6. On 13 March 2012, ERGO, an insurance company, and Ms Alžbeta Barlíková, respectively applicant and defendant in the main proceedings, concluded a contract entitled ‘Mediation agreement with a tied financial agent’ (‘the contract’).

7. The contract stipulated that Ms Barlíková was to carry on the mediation of insurance as a tied financial agent for ERGO. ‘Mediation’ in the sense of the contract consisted in submitting offers to conclude an insurance contract with a third party (‘the customer’), concluding an insurance contract with the customer, and carrying out other activities leading to the conclusion of an insurance contract with the customer. Ms Barlíková was authorised to conclude and sign insurance contracts in the name of ERGO.

8. The contract furthermore stipulated that the mediation was successful if the customer paid to ERGO the premium for insurance negotiated. Moreover, Ms Barlíková was to actively seek customers, perform analyses and give information to customers.

9. Ms Barlíková was to receive a commission for the conclusion of new insurance contracts, consisting in a certain percentage of the premium amount or the annual premium of such contract. That commission was to be paid to Ms Barlíková in advance, on the date of the conclusion of a new insurance contract, subject to the condition that the insurance contract concerned continued and the premium was paid by the customer for a specified period of three or five years. If the premium was not paid for the first month, the right to commission for the insurance contract in question was to be extinguished. If the customer stopped paying the premium for whatever reason after the expiry of three months of the term of the insurance contract, the commission was reduced proportionately.

10. Ms Barlíková found several customers for ERGO, who concluded insurance contracts with that insurance company. On that basis she was provisionally paid commission in advance. When some of the customers, three to six months after the conclusion of an insurance contract, stopped paying the agreed premium, the insurance contracts ceased by operation of law, after ERGO had unsuccessfully called on the customers for payment. Some of the customers had stopped paying premiums on the ground that they ‘had lost confidence’ in the applicant.

11. After the insurance contracts came to an end, ERGO invoiced Ms Barlíková a cancellation fee on the basis of the above provisions, amounting to EUR 11421.42, which Ms Barlíková did not pay. ERGO therefore brought legal proceedings.

12. Ms Barlíková submits in her pleadings that the termination of the individual insurance contracts was ERGO’s fault. In her view, ERGO had dealt with customers unreasonably. She stresses that ERGO put many questions to them even after conclusion of a contract, and sent them reminders although the premium had been paid. As a result, customers had lost confidence in ERGO as an insurer and stopped paying the premiums. Customers had made statements to that effect in letters sent to ERGO.

13. The referring court seeks to establish whether, by virtue of Article 11 of Directive 86/653, a commercial agent has a right to keep a commission already paid in a case such as the one before that court.

14. It is in the context of these proceedings that, by order of 23 November 2015, received at the Court on 27 January 2016, the Okresný súd Dunajská Streda (District Court, Dunajská Streda) referred the following questions for a preliminary ruling:

- ‘(1) Must the expression “the contract between the third party and the principal will not be executed” in Article 11 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 (“Directive 86/653”) be interpreted as meaning:
- (a) complete non-execution of the contract, that is, neither the principal nor the third party even partly performs what is provided for in the contract, or
 - (b) even partial non-execution of the contract, that is, the volume of transactions envisaged is not achieved, for example, or the contract will not last for the time envisaged?
- (2) If the interpretation in indent (b) of Question 1 is correct, must Article 11(2) of Directive 86/653 be interpreted as meaning that a provision in a contract for commercial agency under which the agent is obliged to return a proportionate part of his commission if the contract between the principal and the third party is not executed to the extent envisaged, or to the extent defined by the contract for commercial agency, is not a derogation to the detriment of the agent?
- (3) In the cases concerned in the main proceedings, when assessing whether “the principal is to blame” within the meaning of the second indent of Article 11(1) of Directive 86/653,
- (a) may there be taken into consideration only legal reasons leading directly to termination of the contract (for example, the contract ceases as a result of the non-performance of an obligation under it by the third party), or
 - (b) may there also be taken into consideration the question of whether those legal reasons were the result of the conduct of the principal in the context of the legal relationship with that third party which induced the third party to lose confidence in the principal and consequently to breach an obligation under the contract with the principal?’

15. The Slovak and German Governments submitted written observations, as did the European Commission.

Analysis

The Court's jurisdiction

16. Pursuant to Article 1 of Directive 86/653, that directive seeks to harmonise national measures governing the relations between commercial agents and their principals when it comes to negotiating 'the sale or the purchase of *goods*'.³ The case at issue in the main proceedings, however, is not about the sale of goods but that of (insurance) services. Ergo, the provisions of Directive 86/653 do not apply in the present case.

17. One might therefore wonder whether the Court has any jurisdiction to give a preliminary ruling in such a case, given that, clearly, it does not fall into the ambit dealt with by the Union legislature. Indeed, (physical) goods and (immaterial) services are quite a different thing.

18. However, the Court has already addressed this question as regards Directive 86/653. The Court consistently holds that where domestic legislation adopts the same solutions as those adopted in EU law in order, in particular, to avoid discrimination 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.⁴

19. In this respect, with regards to the Belgian law on commercial agency contracts, the Court has expressly specified that 'although the question asked by the referring court refers not to a contract for the sale or purchase of goods but to an agency contract for the operation of a ... service, the fact remains that, when transposing the provisions of that directive into national law, the Belgian legislature decided to apply the same treatment to both types of situation'.⁵

20. As the Slovak Government stresses, the national law at issue was adopted with a view to transposing Directive 86/653. By doing so, the Slovak legislature intended to apply the same treatment to both commercial agents selling goods and those selling services.

21. As a consequence I consider the Court to have jurisdiction to answer the questions posed by the referring court.

Question 1

22. By its first question, the referring court seeks to ascertain whether on a proper construction of Article 11(1) of Directive 86/653, the right to commission of a commercial agent can also be extinguished in case of partial non-execution of a contract.

3 — My emphasis.

4 — With regard to Directive 86/653 in particular, this constitutes settled case-law since the judgment of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraphs 14 to 19). See also judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 30).

5 — See judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 30).

Wording of Article 11(1) of Directive 86/653

23. Article 11(1) of Directive 86/653 stipulates that the right to commission can be extinguished only and to the extent that it is established that the contract between the third party and the principal will not be executed and that fact is due to a reason for which the principal is not to blame.

24. In this connection the Court has previously held that ‘that sole ground for extinguishment, which requires the combination of two sets of circumstances in which express reference is made to the principal, emphasises the importance of his role for the existence of the right to commission’.⁶

25. The expression ‘to the extent that’ indicates that a distinction must be made between complete and partial non-execution of the contract, since otherwise that expression would be redundant.

26. Article 11(1) of Directive 86/653 is phrased in a similar way in the majority of language versions.⁷ However, a few language versions, among them the Slovak one, do not contain the qualification of ‘to the extent that’.⁸

27. Different language versions of EU legislation are equally authentic.⁹ An interpretation of a provision of EU law thus involves a comparison of the different language versions.¹⁰ Moreover, the various language versions of a text of EU law must be given a uniform interpretation.¹¹

28. Given that the vast majority of language versions of Article 11(1) of the directive include the expression ‘to the extent that’, it seems fairly clear to me that this is how the EU legislature intended the provision to be understood. This is all the more so given that all the language versions – with the exception of the Greek one – existing at the time of adoption of Directive 86/653 contain that additional expression.

29. And yet, given the divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.¹²

Purpose and general scheme of Directive 86/653

30. As has been seen, Article 11(1) of Directive 86/653 deals with the extinction of the right to commission. Conversely, Articles 7(1) and 10(1) of Directive 86/653 deal, respectively, with the coming into existence of a right to commission and its being due. These provisions constitute, so to speak, the other side of the coin of the extinction of the right.

31. Article 10(1) of the directive specifies in this connection that the commission is to become due as soon as and to the extent that one of a series of circumstances obtains.¹³ Given that this provision figuratively ‘mirrors’ Article 11(1) of Directive 86/653, both provisions should be interpreted in a parallel way.

6 — See judgment of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 20).

7 — See e.g. the Spanish (‘en la medida’), Danish (‘i det omfang’), German (‘soweit’), Estonian (‘ulatuses’), French (‘dans la mesure où’), Italian (‘nella misura in cui’), Lithuanian (‘tik tiek, kiek’), Maltese (‘sal-limiti li’), Dutch (‘voor zover’), Polish (‘o ile’), Portuguese (‘na medida em que’), and Romanian (‘în măsura în care’) language versions.

8 — See the Czech, Greek, Latvian and Slovak versions.

9 — See judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 18).

10 — Ibid.

11 — See, by way of example, judgments of 30 May 2013, *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, paragraph 38 and the case-law cited), and of 6 September 2012, *Parliament v Council* (C-490/10, EU:C:2012:525, paragraph 68).

12 — See judgment of 14 June 2007, *Euro Tex* (C-56/06, EU:C:2007:347, paragraph 27 and the case-law cited).

13 — The principal has or should have, according to his agreement with the third party, executed the transaction, or the third party has executed the transaction.

32. Furthermore, Article 17(2)(a) of Directive 86/653 stipulates that a commercial agent is entitled to an indemnity if and *to the extent that* a number of conditions are fulfilled.

33. This right to indemnity is closely linked to the right to commission in that it serves to reward the commercial agent for the goodwill he has brought to the principal and continuing financial benefit from the commercial agent's actions.

34. On a more general level, Directive 86/653 aims to coordinate the laws of the Member States with regard to the legal relationship between the parties to a commercial agency contract.¹⁴ It follows from the second recital of the directive that its intention is, *inter alia*, to make the conditions of competition within the EU uniform, to eliminate restrictions on the carrying-on of the activities of the commercial agents and to increase the security of commercial transactions.¹⁵

35. Moreover, the Court has, on many occasions, clarified that the directive in particular seeks to protect commercial agents in their relations with their principals and, to that end, establishes, *inter alia*, rules governing the conclusion and termination of agency contracts (Articles 13 to 20 of the directive).¹⁶ With respect to Articles 17 to 19 of Directive 86/653, the Court has held that the directive establishes mandatory¹⁷ rules which provide for minimum protection requirements for the commercial agent.¹⁸

36. Moreover, I understand the initial logic of the directive to have been to create a level playing field for principals carrying out their activities in the internal market by resorting to commercial agents: in order to invest and carry out business, principals need to know what rules they are subject to as regards the compensation and remuneration of the commercial agents which they use.¹⁹

37. To this end Directive 86/653 establishes a system that seeks to equitably balance the interests both of the principal and of the commercial agent.

38. Let us take a closer look at the system of remuneration established in Chapter III²⁰ of the directive.

39. Pursuant to Article 6(1) of Directive 86/653, 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 is 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 out his activities.

40. Article 6(2) of Directive 86/653 stipulates that any part of the remuneration which varies with the number or value of business transactions is deemed to be commission within the meaning of the directive.

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

15 — See judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 17); of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 23); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 19); and of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 37).

16 — See judgments of 30 April 1998, *Bellone* (C-215/97, EU:C:1998:189, paragraph 13); of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraphs 20 and 21); of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraphs 19 and 22); of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 22); and of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 14).

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

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

19 — See my Opinion in *Agro* (C-507/15, EU:C:2016:809, point 56).

20 — Articles 6 to 12 of Directive 86/653.

41. According to Article 7(1)(a) of the directive, a commercial agent is entitled to commission on commercial transactions concluded during the period covered by the agency contract where the transaction has been concluded as a result of his action.

42. Article 10 of the directive establishes the circumstances which give rise to the commission.²¹ Its first paragraph stipulates that the commission becomes due as soon as and to the extent that the principal or the third party have, or the principal should have, executed the transaction.

43. Finally, it should be borne in mind that the case at issue concerns a continuing obligation between the principal and the third parties. This is in the very nature of an insurance contract. In such a situation it would not, in my view, be feasible to require full non-execution as this would mean that in case of a continuing obligation, a principal would systematically and without exception bear the risk if the contract were not executed as was intended. This is not in line with the balance of the interests between the commercial agent and the principal, as established by Directive 86/653.

Proposed reply to Question 1

44. On the basis of the above, on a proper construction of Article 11(1) of Directive 86/653, the right to commission of a commercial agent can be extinguished also in case of partial non-execution of a contract.

Question 2

45. By its second question, the referring Court seeks clarification as to the question whether a clause of the commercial agency contract, according to which the agent is obliged to return a proportionate part of his commission if the contract between the principal and the third party is not executed to the extent envisaged, or to the extent defined by the contract for commercial agency, is precluded by Article 11(2) and (3) of Directive 86/653.

46. Pursuant to Article 11(2) of the directive any commission which the commercial agent has already received is to be refunded if the right to it is extinguished.

47. Naturally, this can only apply to the extent that the right is extinguished.

48. Article 11(3) of the directive in turn stipulates that agreements that derogate from Article 11(1) to the detriment of the commercial agent are not permitted.

49. I understand this to imply that as long as the parties have not derogated from the clear principles established in Article 11(1) of the directive, namely that the right to commission is extinguished only if and to the extent that (1) it is established that the contract between the third party and the principal will not be executed and (2) that fact is due to a reason for which the principal is not to blame, then there is no breach of Article 11(3) of the directive.

50. The reply to the second question should therefore be that Article 11(2) and (3) of Directive 86/653 do not preclude a clause of a commercial agency contract, according to which the agent is obliged to return a proportionate part of his commission if the contract between the principal and the third party is not executed to the extent envisaged, or to the extent defined by the contract for commercial agency. Such a clause may not lead to the result that the conditions stemming from Article 11(1) of the directive are interpreted to the detriment of the commercial agent.

21 — See judgment of 17 January 2008, *Chevassus-Marche* (C-19/07, EU:C:2008:23, paragraph 18).

Question 3

51. By its third question, the referring court seeks clarification of whether the expression ‘the principal is not to blame’ within the meaning of Article 11(1) of Directive 86/653, only relates to legal reasons leading directly to the termination of the contract or also to conduct of the principal in the legal relationship with that third party.

52. It appears that by virtue of Slovak law, non-payment of the agreed premium is just a way of terminating a contract. This is why the referring court needs to ascertain to what extent the behaviour of a principal becomes relevant in this respect.

53. The wording of Article 11(1) of the directive is not conclusive, in that there is no clear indication in the expression ‘not to blame’ for what exactly the principal is not to be blamed.²² Moreover, that expression is not defined in more detail in the directive.

54. In accordance with settled case-law, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation.²³

55. If one compares the wording of Article 11(1) of Directive 86/653 with that of Article 18 of the directive, a slightly different picture emerges.

56. Article 18 determines in which instances an indemnity or compensation to which a commercial agent is entitled after the termination of the agency contract, are not payable. In this respect it stipulates in its paragraph a) that such indemnity or compensation are not payable ‘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*’.²⁴

57. While one may wonder whether ‘default’ is more far-reaching than ‘blame’ or not,²⁵ what appears crucial to me is the connection made with national law. Such a connection does not appear in Article 11(1) of the directive which is why the term ‘blame’ should, regarding the principal, receive a wider meaning in that provision than does the term ‘default’ in Article 18(a) of the directive, regarding the commercial agent.

58. Moreover, we must again examine Article 11(1) of the directive in the light of the aims pursued by the directive and the system it establishes.²⁶ In this connection, the concept of ‘blame’ should be interpreted in an autonomous manner.

59. National laws of contract which underlie the commercial agency contract in general differ widely. In some instances, it may suffice for a party to merely stop paying an agreed premium for the contract to be terminated. In establishing the meaning of blame, one must therefore take into account elements which go beyond the legal reasons leading directly to the termination of the contract, as often those reasons do not give any indication as to the possible blame.

22 — Quite apart from this, it appears that some of the language versions of Article 11(1) of Directive 86/653 leave open whether some sort of culpable behaviour is to be required of the principal. Where this appears to me to be fairly clear as regards the English version (‘blame’), this cannot be said of, for instance, the French one, which rather refers to the question of whether responsibility can be attributed to the principal (‘l’inexécution n’est pas due à des circonstances imputables au commettant’). It appears also that the Slovak language version is close to the English one in that it contains an element of ‘blame’.

23 — See judgment of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraph 45 and the case-law cited).

24 — My emphasis.

25 — And, again, language versions differ. By way of example, the German language version speaks of culpable behaviour (‘wegen eines schuldhaften Verhaltens’), whereas the French one resorts, again, to the notion of ‘attribution of responsibility’ (‘un manquement imputable’).

26 — See, as regards Article 17 of Directive 86/653, judgment of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraph 21 and the case-law cited).

60. A principal is to blame for risks originating within his sphere of influence. This can and should be determined by taking into account all factual elements of the case at issue. In carrying out such an assessment, the national court should take relevant commercial custom into account.

61. The answer to the third question should therefore be that the expression ‘the principal is not to blame’ within the meaning of Article 11(1) of Directive 86/653, not only relates to legal reasons leading directly to the termination of the contract, but also to conduct of the principal in the context of the legal relationship with that third party.

Conclusion

62. On the basis of the considerations above, I propose to reply to the questions of the Okresný súd Dunajská Streda (District Court, Dunajská Streda, Slovakia) as follows:

On a proper construction of Article 11(1) 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, the right to commission of a commercial agent can be extinguished also in case of partial non-execution of a contract.

Article 11(2) and (3) of Directive 86/653 does not preclude a clause of a commercial agency contract, according to which the agent is obliged to return a proportionate part of his commission if the contract between the principal and the third party is not executed to the extent envisaged, or to the extent defined by the contract for commercial agency. Such a clause may not lead to the result that the conditions stemming from Article 11(1) of the directive are interpreted to the detriment of the commercial agent.

The expression ‘the principal is not to blame’ within the meaning of Article 11(1) of Directive 86/653, not only relates to legal reasons leading directly to the termination of the contract, but also to conduct of the principal in the context of the legal relationship with that third party.