



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV

delivered on 17 December 2020¹

Case C-410/19

The Software Incubator Ltd

v

Computer Associates UK Ltd

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling – Self-employed commercial agents – Directive 86/653/EEC – Article 1(2) – Definition of commercial agent – Concepts of ‘sale’ and ‘goods’ – Supply of computer software to a principal’s customers by electronic means accompanied by the grant of a perpetual licence)

I. Introduction

1. This request for a preliminary ruling submitted by the Supreme Court of the United Kingdom relates to the interpretation of Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.²

2. Article 1(2) of Directive 86/653 defines a commercial agent as a self-employed intermediary whose activities involve in particular the sale or purchase of goods on behalf of another person known as the principal. The main issue arising in the present case concerns whether the supply of computer software to a principal’s customers by electronic means accompanied by the grant of a perpetual licence can be characterised as the ‘sale’ of ‘goods’ within the meaning of that provision.

3. Consequently, this case presents the Court with the first occasion to give a ruling on the interpretation of the concepts of ‘sale’ and ‘goods’ under Article 1(2) of Directive 86/653. In the main proceedings, this is required in order to determine whether Directive 86/653 applies to an agent engaged to promote the computer software in question, so that the claim for compensation based on that directive can succeed.

¹ Original language: English.

² OJ 1986 L 382, p. 17.

II. Legal framework

A. *EU law*

4. Article 1(2) of Directive 86/653 provides:

‘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.’

B. *United Kingdom law*

5. Directive 86/653 was implemented in United Kingdom law by the Commercial Agents (Council Directive) Regulations 1993 (Statutory Instruments 1993/3053), as amended (‘the Regulations’).³ Regulation 2(1) of those regulations states:

‘In these Regulations—

“commercial agent” means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal; ...’

III. Facts, main proceedings and questions referred

6. According to the order for reference, Computer Associates UK Ltd (‘Computer Associates’) is a company that markets a kind of computer software known as application release automation software (‘the software’). The software is complex, expensive and non-bespoke, meaning that it is not custom-made for a particular customer. The purpose of the software is to coordinate and implement automatically the deployment of and upgrades for other software applications across different operational environments in large organisations, such as banks and insurance companies, so that the underlying applications are fully integrated with the software operating environment.

7. The Software Incubator Ltd (‘The Software Incubator’) is a company owned by Mr Scott Dainty.

8. On 25 March 2013, Computer Associates and The Software Incubator entered into a written agreement (‘the agreement’).

9. Under clause 2.1 of the agreement, The Software Incubator, through Mr Dainty, agreed to act on behalf of Computer Associates to approach potential customers in Ireland and the United Kingdom ‘for the purpose of promoting, marketing and selling the Product’. The ‘Product’

³ There is separate implementing legislation for Northern Ireland (Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 (Northern Ireland Statutory Rules 1993/483)), which is not pertinent to these proceedings.

denoted the software, as indicated by the first recital of the agreement. Accordingly, for the purpose of the agreement, Computer Associates was the principal and The Software Incubator was the agent.

10. As indicated by the order for reference, the main characteristics of the supply of the software in the main proceedings were as follows. First, Computer Associates supplied the software to its customers electronically via an email containing a link to an online portal from which they downloaded it. While the possibility of supplying the software by a tangible medium existed, it was not used in practice.

11. Moreover, under clause 4.1 of the agreement, Computer Associates had the exclusive right to determine the terms and conditions in connection with the licensing of the software to customers and, according to clause 6.1 thereof, Computer Associates charged and collected all fees due from customers associated with the use of the software. The Software Incubator's authority as agent was therefore concerned with the promotion of grants by Computer Associates to its customers of licences to use the software. The Software Incubator did not have any authority to transfer title or property in the software.

12. In that regard, pursuant to the agreements between Computer Associates and its customers,⁴ the customer was granted a licence to use the software, which in most situations was perpetual, meaning that it was for an unlimited period. The licence allowed the customer, inter alia, to install and deploy the software in the specified territory up to the authorised number of end users and to permit the authorised end users access to the software. It was also subject to the customer's compliance with obligations, in particular, not to access or use any unauthorised portion of the software, nor to de-compile, modify or reverse-engineer it, and not to rent, assign, transfer or sub-license it. Computer Associates and related entities retained all rights, title, copyright, patent, trade mark, trade secret and all other proprietary interests in and to the software. Either party could terminate the relevant agreement for material breach or the other party's insolvency, in which case the licence was revoked and the customer had to return any copies of the software or destroy them.

13. By letter dated 9 October 2013, Computer Associates terminated the agreement with The Software Incubator.

14. The Software Incubator brought an action against Computer Associates before the High Court of Justice (England & Wales), Queen's Bench Division (United Kingdom), claiming in particular compensation pursuant to the provisions of the Regulations implementing Article 17 of Directive 86/653. Computer Associates denied any liability on the ground, inter alia, that the Regulations did not apply because the supply of the software promoted by The Software Incubator did not constitute the 'sale of goods' for the purpose of the definition of commercial agent contained in Regulation 2(1) of those regulations implementing Article 1(2) of Directive 86/653.

⁴ As indicated by the order for reference, the licence to use the software was granted by a related entity, CA Europe SARL, pursuant to the relevant agreement between Computer Associates and the customer. The terms of the licence were set out in the Software Module pursuant to the Framework Agreement in the case of new customers, and in the Master Agreement in the case of existing customers, those terms being materially similar. According to those agreements, annexed to Computer Associates' observations, the customer was generally required to pay the fee for the software within 30 days of receipt of Computer Associates' invoice. Customers also completed an order form for purchase of the software.

15. By its judgment of 1 July 2016,⁵ the High Court of Justice (England & Wales), Queen’s Bench Division, held that the supply of the software electronically accompanied by a perpetual licence amounted to the ‘sale of goods’ under Regulation 2(1) of the Regulations and awarded The Software Incubator, inter alia, 475 000 pounds sterling (GBP) (approximately EUR 531 100) as compensation pursuant to those regulations. According to that court, the ‘sale of goods’ should have an autonomous definition for the purpose of the Regulations, which did not exclude the supply of the software as a ‘good’ because it is not tangible or as a ‘sale’ because the ownership of the intellectual property rights therein will not usually be transferred absolutely.

16. Computer Associates lodged an appeal against that judgment before the Court of Appeal (England & Wales) (Civil Division) (United Kingdom).

17. By its judgment of 19 March 2018,⁶ the Court of Appeal (England & Wales) (Civil Division) held that the supply of the software electronically, and not on any tangible medium, did not constitute ‘goods’ within the meaning of Regulation 2(1) of the Regulations. According to that court, the weight of authority compelled that finding, despite concerns that its approach might appear to be outmoded in light of technological advances, and thus it did not proceed to examine whether the grant of licences of the software to Computer Associates’ customers qualified as a ‘sale’ under that provision. As a result, it concluded that The Software Incubator was not a commercial agent for the purpose of the Regulations and dismissed its claim for compensation thereunder.

18. By order of 28 March 2019, the Supreme Court of the United Kingdom granted The Software Incubator permission to appeal against the decision of the Court of Appeal (England & Wales) (Civil Division).

19. The referring court has indicated that it is not clear whether the definition of commercial agent contained in Article 1(2) of Directive 86/653, which is confined to the ‘sale of goods’, applies to the situation in the main proceedings.

20. It was in those circumstances that the Supreme Court of the United Kingdom decided to stay the main proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Where a copy of computer software is supplied to a principal’s customers electronically, and not on any tangible medium, does it constitute “goods” within the meaning of that term as it appears in the definition of commercial agent in Article 1(2) of Council Directive 86/653/EEC of [18] December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents ...?
- (2) Where computer software is supplied to a principal’s customers by way of the grant to the customer of a perpetual licence to use a copy of the computer software, does that constitute a “sale of goods” within the meaning of that term as it appears in the definition of commercial agent in Article 1(2) of the [Directive 86/653]?’

⁵ *The Software Incubator Ltd v Computer Associates UK Ltd* [2016] EWHC 1587 (QB), paragraphs 35 to 69.

⁶ *Computer Associates Ltd v The Software Incubator Ltd* [2018] EWCA Civ 518, paragraphs 13, 17 to 69.

IV. Procedure before the Court

21. Written observations were submitted to the Court by The Software Incubator, Computer Associates, the German Government and the European Commission. The Software Incubator, Computer Associates and the Commission also replied to written questions put to them by the Court pursuant to Article 62(1) of its Rules of Procedure.

22. While this case was pending before the Court, the United Kingdom left the European Union on 31 January 2020. According to Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,⁷ the Court continues to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period, which, as defined in Article 126 thereof, is in principle on 31 December 2020. In addition, under Article 89(1) of that agreement, the judgment of the Court, whether handed down before the end of that transition period or at a future date, will have binding force in its entirety on and in the United Kingdom.

23. Consequently, given that the present request for a preliminary ruling was made on 28 May 2019, the Court retains jurisdiction to rule on that request, and the Supreme Court of the United Kingdom is bound by the judgment to be handed down by the Court in the present proceedings.

V. Summary of the observations of the parties

24. The Software Incubator submits that the first question should be answered in the affirmative. In its view, the concept of ‘goods’ in Article 1(2) of Directive 86/653 includes the software regardless of whether it is supplied by tangible or intangible means. It argues that there is no distinction between tangible and intangible goods in the wording of that provision, and that, having regard to its origins, the EU legislature intended to exclude only ‘services’, and not intangible goods, from the scope of that directive.

25. The Software Incubator claims that the concept of ‘goods’ in other fields of EU law is of limited assistance, since it depends on the context and objectives of the provisions of EU law at issue. Still, it points out that computer software is treated as ‘goods’ in EU measures concerning, for example, trade marks⁸ and medical devices,⁹ and that the software falls within the definition of ‘goods’ in the Court’s case-law on the free movement of goods,¹⁰ as is the case with electricity. It is irrelevant, in its view, that recent EU consumer measures, including Directive 2011/83¹¹ and

⁷ OJ 2020 L 29, p. 7. According to Article 86(3) of that agreement, requests for preliminary rulings are considered as having been made at the moment at which the document initiating the proceedings has been registered by the Court’s Registry. In the present case, the request for a preliminary ruling from the UK Supreme Court was registered by the Court’s Registry on 28 May 2019.

⁸ The Software Incubator refers in particular to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, concluded at the Nice Diplomatic Conference on 15 June 1957, last revised in Geneva on 13 May 1977 and amended on 28 September 1979 (*United Nations Treaty Series*, vol. 1154, No I 18200, p. 89).

⁹ The Software Incubator refers in particular to the judgment of 22 November 2012, *Brain Products* (C-219/11, EU:C:2012:742).

¹⁰ The Software Incubator refers in particular to the judgments of 10 December 1968, *Commission v Italy* (7/68, EU:C:1968:51); of 21 October 1999, *Jägerskiöld* (C-97/98, EU:C:1999:515); and of 26 October 2006, *Commission v Greece* (C-65/05, EU:C:2006:673).

¹¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

Directive 2019/770,¹² make a distinction between contracts for the sale of goods and contracts for the supply of digital content, such as computer software, as this reflects the specific objectives of those directives and, in any event, Directive 2019/770 provides the same protection for consumers regardless of whether the digital content is supplied on a tangible or an intangible medium.

26. The Software Incubator argues that its position is in line with the objectives pursued by Directive 86/653, since a commercial agent who sells computer software supplied electronically is in need of the same protection as one who sells it on a tangible medium, and these are in substance the same ‘activities of intermediaries in commerce’, as mentioned in the first recital of Directive 86/653. As computer software can only operate in a tangible environment by being loaded onto computer hardware, it is artificial, in its view, to classify it as ‘goods’ if supplied on a disc, but not by download. Such a distinction also leads to distortions of competition in the internal market, as a principal could evade his obligations under Directive 86/653 by supplying his products in electronic form. It also asserts that, as the commercial agent’s role is to negotiate transactions and the method of supply of computer software might not be determined at the negotiation stage, the applicability of Directive 86/653 should not depend on what the principal decides to do after the commercial agent performs his role.

27. The Software Incubator submits that the second question should also be answered in the affirmative, as the concept of the ‘sale of goods’ in Article 1(2) of Directive 86/653 includes the supply of the software pursuant to a perpetual licence. It argues that, following from the order of 10 February 2004, *Mavrona*,¹³ in interpreting that provision, the focus is on the substance of the contractual relationship between the commercial agent and the principal, the activity carried out by that agent and that agent’s interests and need for protection, all of which are the same regardless of whether the software is supplied by tangible or intangible means pursuant to a sales contract or a perpetual licence. It underlines that the restrictions on use of the software relating to intellectual property rights are irrelevant, since they do not differ in substance from those imposed by the owners of intellectual property rights in products sold under sales contracts. It also contends that its position is supported by the judgment of 3 July 2012, *UsedSoft*,¹⁴ in which the Court considered the supply of a computer program pursuant to a perpetual licence as a ‘sale’ in a situation similar to this case, in which the customer paid Computer Associates a fee and received the software which that customer could use indefinitely without payment of any further fee, but in respect of which there were restrictions on its use because of the intellectual property rights in the software.

28. Computer Associates submits that the first question should be answered in the negative, as electronically supplied computer software does not constitute ‘goods’ under Article 1(2) of Directive 86/653. In its view, the ordinary meaning of ‘goods’ in that provision refers only to tangible and moveable items, as indicated by other language versions,¹⁵ and thus does not apply to intangible items, such as the software supplied by intangible means. It argues that, when Directive 86/653 was adopted, the Internet, computer software and downloads did not exist in their current form, so the concept of ‘goods’ could not have been understood as applying to

¹² Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ 2019 L 136, p. 1). Pursuant to Article 24 of that directive, Member States are required to adopt measures transposing that directive by 1 July 2021 and apply those measures from 1 January 2022.

¹³ C-85/03, EU:C:2004:83.

¹⁴ C-128/11, EU:C:2012:407 (‘the judgment in *UsedSoft*’).

¹⁵ Computer Associates refers in that regard to the Danish (‘salg eller køb af varer’), Dutch (‘de verkoop of de aankoop van goederen’), French (‘la vente ou l’achat de marchandises’), German (‘den Verkauf oder den Ankauf von Waren’), Greek (‘εμπορευμάτων’), Italian (‘la vendita o l’acquisto di merci’), Portuguese (‘a venda ou a compra de mercadorias’) and Spanish (‘la venta o la compra de mercancías’) language versions of Article 1(2) of Directive 86/653.

intangibles and it has remained unchanged since then. It also asserts that, as regards the origins of Directive 86/653, the EU legislature intentionally limited the scope of that directive to ‘goods’ and the possible application to a wider category of agents including those for ‘products’ was not taken up.

29. Computer Associates claims that the effect and position of Article 1(2) of Directive 86/653 provides contextual support for its position, since it is the central provision that delineates the scope of that directive. It points out that, based on the order of 10 February 2004, *Mavrona*,¹⁶ the Court gives effect to the wording used in Article 1(2) of Directive 86/653 and, even if further harmonisation is desirable, it cannot be introduced by judicial decision. It contends that the concept of ‘goods’ in other fields of EU law, including the free movement of goods,¹⁷ customs¹⁸ and value added tax (‘VAT’),¹⁹ concerns only tangible items and that there is no necessary relation between the meaning of ‘goods’ in Directive 86/653 and in the classification system for registering trade marks. It also emphasises that recent EU consumer measures, including Directives 2011/83 and 2019/770, along with Directive 2019/771,²⁰ are relevant, especially as they demonstrate that where the EU legislature intends an EU measure to apply to computer software without any tangible medium, such as that at issue, it does so expressly, and not by using the term ‘goods’.

30. According to Computer Associates, its position is in line with the objectives of Directive 86/653, since that directive, as is apparent from its second recital, aims to achieve single market conditions for ‘trade in goods’ and, pursuant to Articles 1 and 2 thereof, its harmonisation objective is necessarily limited to that ‘trade in goods’. It underlines that the fact that computer software supplied on a tangible medium is ‘goods’ under Directive 86/653, but not when supplied by intangible means is not arbitrary, particularly as it follows from the scope of that directive and, as shown by Directives 2011/83, 2019/770 and 2019/771, reflects differences between goods and digital content.

31. Computer Associates submits that if the first question is answered in the negative, there is no need to address the second question and, alternatively, that the concept of the ‘sale of goods’ does not include the grant of a licence to use a copy of the software. It claims that the ordinary meaning of the words ‘the sale or the purchase of goods’ in Article 1(2) of Directive 86/653 denotes a transfer of ownership of or title to the goods from the buyer to the seller, as is apparent from other language versions.²¹ However, in its view, the grant of a perpetual licence in the circumstances of this case does not involve a transfer of ownership of or title to the software. Indeed, Computer Associates’ agreements with its customers excluded such a transfer because title to the software remains with Computer Associates and related entities, and no other ownership rights in respect of the software were transferred to customers. Such a licence is thus not a ‘sale of goods’ in the conventional sense, but a temporary permission to use the software, which may come to an end in cases of breach or insolvency. It also argues that the judgment in

¹⁶ C-85/03, EU:C:2004:83.

¹⁷ Computer Associates refers in particular to the judgments of 30 April 1974, *Sacchi* (155/73, EU:C:1974:40), and of 21 October 1999, *Jägerskiöld* (C-97/98, EU:C:1999:515).

¹⁸ Computer Associates refers in that regard to the judgment of 18 April 1991, *Brown Boveri* (C-79/89, EU:C:1991:153).

¹⁹ Computer Associates refers in that regard to the judgments of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649), and of 5 March 2015, *Commission v Luxembourg* (C-502/13, EU:C:2015:143).

²⁰ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ 2019 L 136, p. 28). Pursuant to Article 24 of that directive, Member States are required to adopt measures transposing that directive by 1 July 2021 and apply those measures from 1 January 2022.

²¹ Computer Associates refers in that regard to the language versions of Article 1(2) of Directive 86/653 set out in footnote 15 of this Opinion.

*UsedSoft*²² is not relevant because of the specific wording and context of the EU legislation at issue, as reinforced by recent case-law.²³ In any event, the finding in that judgment that ‘sale’ denotes a transfer of ownership militates against interpreting the ‘sale of goods’ in Directive 86/653 as applying to the grant of a licence to use the software.

32. The German Government submits that the two questions should be answered together to the effect that there is a ‘sale of goods’ within the meaning of Article 1(2) of Directive 86/653 where a perpetual licence to use a copy of computer software is supplied to a principal’s customer only electronically and not via a tangible storage medium. It points out that the German language version of Article 1(2) of Directive 86/653 militates against a restriction of the scope of that directive to tangible objects, since the natural meaning of the noun ‘*Ware*’ (goods) also includes intangible objects.

33. The German Government contends that the Court should not rely on the distinction in primary EU law regarding the free movement of goods and services, since the subject matter of Directive 86/653 is the harmonisation of the activity of commercial agents, and thus its scope must be determined functionally against that background, such that the interpretation most favourable to the commercial agent should, as far as possible, be made. It emphasises that a narrow interpretation of ‘sale of goods’ in Article 1(2) of Directive 86/653 as covering only tangible goods undermines the objective of protecting commercial agents pursued by that directive, as a significant part of the traditional field of activity of commercial agents in Germany would no longer fall within the scope of that directive.

34. According to the German Government, such a narrow interpretation leads to unfair results, since a commercial agent who markets a product in tangible form is protected by Directive 86/653, but not if he markets the same product in digital form. It also allows a principal to avoid the mandatory provisions of that directive by choosing an arrangement in which the subject of the transaction is not a tangible object. It considers that, while the marketing of computer software was not foreseeable when Directive 86/653 was drawn up, the EU legislature’s intention was not to make the protection of commercial agents contingent on chance technological developments.

35. The Commission submits that the two questions should be answered together to the effect that Article 1(2) of Directive 86/653 includes the supply of a copy of computer software to a principal’s customers electronically, and not on any tangible medium. It asserts that the ‘sale of goods’ in Directive 86/653 is an autonomous concept of EU law and should be interpreted in a dynamic manner, taking into account technological developments. It also proposes to treat the questions in reverse order.

36. The Commission claims that the judgment in *UsedSoft*²⁴ supports the finding that the grant of a perpetual licence to use the software qualifies as a ‘sale’ under Directive 86/653. Similar to that judgment, here the customer acquires a permanent right to use the software in return for payment of a fee, and it makes no difference to the nature of the transaction whether the software is made available by download or a tangible medium, as reiterated in subsequent case-law.²⁵

²² Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

²³ Computer Associates refers in that regard to the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111).

²⁴ Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

²⁵ The Commission refers in that regard to the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111).

37. The Commission considers that, as regards the concept of ‘goods’, the case-law in other fields of EU law is not conclusive, since it depends on the applicable legislation and the particular circumstances. In its view, computer software marketed as an intangible item qualifies as ‘goods’ *sensu lato* under Directive 86/653 and was not intended to be excluded from the scope of that directive when it was amended to exclude ‘services’ in the decision-making process. It emphasises that EU legislation has evolved from the traditional emphasis on tangible property and the dichotomy between goods and services in connection with computer software, as illustrated by Directives 2011/83 and 2019/770. According to the Commission, a broad approach is in line with the objective of Directive 86/653 to provide protection for commercial agents. Indeed, it would run counter to that objective if the same commercial agent working for the same principal on the same terms were deprived of protection simply because of technological developments or a customer’s preference as to how he wishes computer software to be supplied. It also submits that, by analogy with the judgment in *UsedSoft*,²⁶ the effectiveness of Directive 86/653 would be undermined if a principal could escape his obligations under that directive by supplying his products electronically, especially as that form of marketing is used extensively for computer software.

VI. Analysis

38. By its two questions, the referring court asks the Court, in substance, first, if computer software, such as that at issue, which is supplied to a principal’s customers by electronic means, and not on any tangible medium, qualifies as ‘goods’ and, second, if the supply of such software pursuant to a perpetual licence, granting customers a right to use a copy of that software for an unlimited period in return for payment of a fee, qualifies as a ‘sale’, for the purposes of the definition of commercial agent set out in Article 1(2) of Directive 86/653.

39. Those two questions arise from the fact that, as is apparent from the observations submitted by The Software Incubator, Computer Associates and the Commission, traditionally, under the law of the United Kingdom and elsewhere, the concept of ‘goods’ has been confined to things that are tangible and moveable, that is to say, things that are generally capable of being physically touched and moved, and the concept of ‘sale’ has been associated with a transfer of ownership, which implies the acquisition of the thing being sold and the right to dispose of it, thus intersecting with related concepts of property and possession. However, those concepts have been challenged by computer software,²⁷ which generically denotes a set of computer programs that enable a computer to operate and perform tasks.²⁸ This is so, especially nowadays where computer software is commonly supplied by download, rather than on a tangible medium such as a CD or DVD, and takes place together with the grant of a licence, usually perpetual, to

²⁶ Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

²⁷ For an overview of the different approaches to the legal classification of computer software in the Member States, the United Kingdom and other jurisdictions, see, for example, Clark, R., ‘The Legal Status of Software: Part 1’, *Commercial Law Practitioner*, vol. 23, 2016, pp. 48-56; Clark, R., ‘The Legal Status of Software: Part 2’, *Commercial Law Practitioner*, vol. 23, 2016, pp. 78-86; von Bar, C. and Clive, E. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition, vol. 2, Sellier, 2009, pp. 1217-1218.

²⁸ See, for example, Moon, K., ‘The nature of computer programs: tangible? goods? personal property? intellectual property?’, *European Intellectual Property Review*, vol. 31, 2009, pp. 396-407; Saidov, D. and Green, S., ‘Software as goods’, *Journal of Business Law*, 2007, pp. 161-181.

control its use, as illustrated by the present case. Consequently, the legal classification of computer software has prompted considerable debate in the EU and other jurisdictions in various contexts,²⁹ such as the EU consumer measures discussed below.³⁰

40. It cannot be denied that the concepts of ‘sale’ and ‘goods’ may be interpreted differently in national law and EU law. In particular, they are core concepts in national private law and in many fields of primary and secondary EU law. That said, this case invites the Court to interpret those concepts in the specific context of Directive 86/653 and in particular in light of the essential features of the commercial agent within the meaning of Article 1(2) of that directive.

41. In that regard, I observe that the questions raised by the present case have not yet been considered by the Court.³¹ With a view to answering those questions, it is first necessary to provide some preliminary observations on Directive 86/653 and the definition of commercial agent, along with the judgment of 3 July 2012, *UsedSoft*³² (section A). I will then consider the interpretation of the concept of ‘goods’ in Article 1(2) of Directive 86/653 as mentioned by the first question (section B). Finally, I will address the interpretation of the concept of ‘sale’ in that provision as posed by the second question (section C).³³

42. On the basis of that analysis, I have reached the conclusion that electronically supplied computer software accompanied by a perpetual licence, such as that at issue, qualifies as the ‘sale’ of ‘goods’ under Article 1(2) of Directive 86/653 and that that directive is therefore applicable to the situation in the main proceedings.

A. Preliminary observations

1. Directive 86/653 and the definition of commercial agent

43. It should be borne in mind that Directive 86/653 is a key legal instrument governing commercial agency in the EU.³⁴ As the Court has recognised, the objectives of that directive, as is clear from its second and third recitals, are 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 approximating their legal systems in the field of commercial representation.³⁵ To that end, Directive 86/653 establishes harmonised rules on the rights and obligations of commercial agents and their principals, the remuneration of commercial agents

²⁹ It is worth noting, for instance, that there has been discussion regarding the possible revision of the concept of ‘product’ in Article 2 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29) in light of new technologies; see, in that regard, Commission, Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics, COM(2020) 64 final, 19 February 2020, pp. 13-14.

³⁰ See points 70 to 72 of this Opinion.

³¹ See point 45 of this Opinion.

³² C-128/11, EU:C:2012:407.

³³ In that regard, it seems to me that, while some overlap is unavoidable, the two questions should be dealt with separately, especially on account of the various arguments raised in respect of each question, and that there is no reason to depart from the order of those questions made by the referring court.

³⁴ See, for example, Commission Staff Working Document, Evaluation of Directive 86/653 (REFIT Evaluation), SWD(2015) 146 final, 16 July 2015. For a detailed discussion, see, for example, Saintier, S., ‘Commercial agency in European Union private law’, in Twigg-Flesner, C. (ed.), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, 2010, pp. 273-285; with a focus on the United Kingdom context, see also, for example, Randolph, F. and Davey, J., *The European Law of Commercial Agency*, Third Edition, Hart, 2010; Singleton, S., *Commercial Agency Agreements: Law and Practice*, Fifth Edition, Bloomsbury Professional, 2020.

³⁵ See, for example, judgment of 4 June 2020, *Trendsetteuse* (C-828/18, EU:C:2020:438, paragraph 36).

and the conclusion and termination of commercial agency contracts, including in particular the indemnity or compensation due to commercial agents in the case of contract termination, which is mandatory in nature.³⁶

44. Article 1(2) of Directive 86/653 is the gateway to the protection offered by that directive to commercial agents, in so far as a person must meet the conditions in the definition of commercial agent set out in that article in order to fall within the scope of that directive. As the Court has held, Article 1(2) of Directive 86/653 lays down three necessary and sufficient conditions for a person to be classified as a commercial agent under that directive: first, that person must be a self-employed intermediary; second, the contractual relationship must be of a continuing character; and, third, that person must be engaged in an activity consisting either in negotiating the sale or purchase of goods for the principal or in negotiating and concluding such transactions in the name and on behalf of the principal,³⁷ which is at issue here.

45. As regards that third condition, the Court has interpreted Article 1(2) of Directive 86/653 in particular as excluding commercial agents involved in the sale or purchase of services rather than goods.³⁸ Yet, until now, the Court had not been called upon to elucidate the concepts of ‘sale’ and ‘goods’ under that provision. This may in part be explained by the fact that several cases were concerned with national legislation which contained a wide definition of commercial agents,³⁹ thus making it unnecessary to delve further into the matter.⁴⁰

2. *The judgment of 3 July 2012, UsedSoft*

46. It should also be pointed out that the judgment of 3 July 2012, *UsedSoft*⁴¹ is pertinent to the present case, even if it is situated in a different context. It was based on a reference for a preliminary ruling made by a German court on the interpretation of Articles 4(2) and 5(1) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.⁴² One of the key issues arising in that case concerned

³⁶ See, for example, judgment of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262, paragraph 34).

³⁷ See, for example, judgment of 21 November 2018, *Zako* (C-452/17, EU:C:2018:935, paragraph 23). Thus, as the Court held in paragraph 24 of that judgment, it is sufficient that a person satisfies those three conditions to be classified as a commercial agent under Article 1(2) of Directive 86/653, regardless of the arrangements under which he performs his activities, and provided that he does not fall within one of the exclusions in Articles 1(3) and 2(1) thereof.

³⁸ See, for example, order of 6 March 2003, *Abbey Life Assurance* (C-449/01, not published, EU:C:2003:133) (concerning an agent involved in the conclusion of contracts for life insurance, annuities and savings); see also citations in next footnote.

³⁹ In that regard, while national legislation covering commercial agents outside the sale or purchase of goods does not fall within the scope of Directive 86/653, the Court has considered that it has jurisdiction to give a ruling in such instances: see judgments of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraphs 7, 11 to 19) (charter contract for a ship); of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraphs 23 to 28) (dealership agreement); of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraphs 30 and 31) (contract for the operation of a shipping service); of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraphs 16 to 19) (contract for the sale of banking services and insurance); and of 17 May 2017, *ERGO Poist'ovňa* (C-48/16, EU:C:2017:377, paragraphs 26 to 32) (contract for the sale of insurance services); see further Opinion of Advocate General Wahl in *Unamar* (C-184/12, EU:C:2013:301, point 48 footnote 26).

⁴⁰ For example, it is worth noting that there was no discussion by the Court (or the Advocate General) of the definition of commercial agent in the judgments of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199) (concerning an agent promoting business information services), and of 19 April 2018, *CMR* (C-645/16, EU:C:2018:262) (concerning an agent promoting the sale of individual houses).

⁴¹ C-128/11, EU:C:2012:407. For a detailed discussion, see, for example, Charleton, P. and Kelly, S., ‘The Oracle Speaks. C-128/11’, *The Bar Review*, vol. 18, 2013, pp. 33-44; for a critical perspective, see also, for example, Moon, K., ‘Revisiting *UsedSoft v. Oracle*. Is Software Property and Can It Be Sold?’, *Computer Law Review International*, 2017, pp. 113-119.

⁴² OJ 2009 L 111, p. 16.

whether the supply of a copy of a computer program by download pursuant to a perpetual licence qualified as ‘the first sale or other transfer of ownership’ which exhausted the right to distribute that copy under Article 4(2) of Directive 2009/24.⁴³

47. In that judgment, the Court held that the term ‘sale’ in that provision must be regarded as an autonomous concept of EU law and, according to a commonly accepted definition, denoted an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.⁴⁴ On that basis, the Court ruled that the supply of a copy of a computer program accompanied by the grant of a perpetual licence involved the transfer of the right of ownership of that copy and thus a ‘sale’ under Article 4(2) of Directive 2009/24.⁴⁵ In reaching that conclusion, it found that it made no difference whether the copy of the computer program was made available to the customer by means of a download or a material medium.⁴⁶ It also reasoned that if the term ‘sale’ was not given a broad interpretation, as encompassing all forms of product marketing characterised by the grant of a right to use a copy of a computer program for an unlimited period in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor, the effectiveness of Article 4(2) of Directive 2009/24 would be undermined, since suppliers could simply call the contract a ‘licence’, instead of a ‘sale’, to circumvent the rule of exhaustion.⁴⁷

48. The Court further held that the exhaustion of the distribution right referred to in Article 4(2) of Directive 2009/24 related to tangible as well as intangible copies of computer programs.⁴⁸ In particular, it noted that the wording of that provision made no distinction in that regard.⁴⁹ It also considered that, from an economic point of view, the sale of a computer program on a material medium and by download were similar, since the online transmission method was the functional equivalent of the supply of a material medium. Thus, interpreting Article 4(2) of Directive 2009/24 in light of the principle of equal treatment justified treating those methods in the same way.⁵⁰

49. The Court’s approach in the judgment in *UsedSoft* has been reiterated in subsequent case-law.⁵¹ As illustrated by the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*,⁵² the fact that the Court has distinguished its findings in the judgment in *UsedSoft* from circumstances arising in other situations highlights the special nature of computer programs, especially as regards the assimilation of tangible and intangible forms of supply, in comparison with other digital products.

50. Consequently, it follows from the judgment in *UsedSoft* that, from a functional and economic perspective, the supply of computer software electronically accompanied by the grant of a perpetual licence can be the subject of a ‘sale’ and that the methods of transmission by a tangible

⁴³ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraphs 20 to 35).

⁴⁴ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraphs 40 and 42).

⁴⁵ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraphs 44 to 46 and 48).

⁴⁶ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 47).

⁴⁷ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 49).

⁴⁸ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 59).

⁴⁹ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 55).

⁵⁰ See judgment of 3 July 2012, *UsedSoft* (C-128/11, EU:C:2012:407, paragraph 61).

⁵¹ See, for example, judgments of 23 January 2014, *Nintendo and Others* (C-355/12, EU:C:2014:25, paragraph 23), and of 12 October 2016, *Ranks and Vasilevičs* (C-166/15, EU:C:2016:762, paragraphs 28, 30, 35, 36, 49, 50 and 53 to 55); see also Opinion of Advocate General Saugmandsgaard Øe in *Ranks and Vasilevičs* (C-166/15, EU:C:2016:384, points 69 to 80).

⁵² C-263/18, EU:C:2019:1111, paragraphs 53 to 58. See also Opinion of Advocate General Szpunar in *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:697, points 52 to 67).

and an intangible medium give rise to similar effects. That judgment therefore lends support to the view that the supply of the software in the circumstances of the present case qualifies as the ‘sale’ of ‘goods’ under Article 1(2) of Directive 86/653. I will return to that judgment later in my analysis (see points 74, 85 and 87 of this Opinion).

B. Question 1

51. As mentioned in point 38 of this Opinion, the first question before the Court is whether electronically supplied computer software, such as that at issue, qualifies as ‘goods’ under Article 1(2) of Directive 86/653.

52. According to the arguments advanced by Computer Associates, only tangible items fall within the concept of ‘goods’ in Article 1(2) of Directive 86/653, thus excluding computer software supplied by intangible means, such as that at issue. The Software Incubator, the German Government and the Commission disagree.

53. As seen in point 4 of this Opinion, Article 1(2) of Directive 86/653 makes no reference to national law. Thus, according to settled case-law,⁵³ the terms contained in that provision and in particular the term ‘goods’ must be given an autonomous and uniform interpretation throughout the EU, which is independent of national legislation.⁵⁴ That interpretation must take into account the wording of that provision, its context and the objectives pursued by the rules of which it forms part.⁵⁵ Its origins may also provide information relevant to its interpretation.⁵⁶

54. It is on that basis that I have come to the conclusion that electronically supplied computer software, such as that at issue, falls within the concept of ‘goods’ for the purposes of Article 1(2) of Directive 86/653. My reasons for reaching that conclusion are as follows.

55. As regards the wording of Directive 86/653, the term ‘goods’ is used not only in Article 1(2) of that directive, but also in Articles 4(2)(a), 6(1) and 20(2)(b) thereof. However, none of those provisions specifies the meaning or scope of that term. In reference to the arguments submitted by Computer Associates, the words used in other language versions of Article 1(2) of Directive 86/653 do not appear to attest to an interpretation of that provision as limited to tangible items.⁵⁷ For example, according to the German Government, the German language version would support an interpretation of ‘goods’ covering intangible items (see point 32 of this Opinion). Moreover, those language versions do not seem to indicate that ‘goods’ is necessarily limited to tangible items.

56. In that regard, it should be noted that the circumstances of this case differ from those giving rise to the order of 10 February 2004, *Mavrona*.⁵⁸ In that order, the Court rejected the possibility of extending the scope of Directive 86/653 to commission agents, who act on behalf of the

⁵³ See, for example, judgment of 4 June 2020, *Trendsetteuse* (C-828/18, EU:C:2020:438, paragraph 25).

⁵⁴ It is worth noting that this has been recognised in previous United Kingdom case-law (see, for example, *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch), in particular paragraphs 74, 86 and 93) and government documents (see Department of Trade and Industry, *Guidance Notes on the Commercial Agents (Council Directive) Regulations 1993*, 1994, Regulation 2 Interpretation, fourth paragraph). See further, in that regard, Tosato, A., ‘An exploration of the European dimension of the Commercial Agents Regulations’, *Lloyd’s Maritime and Commercial Law Quarterly*, 2013, pp. 544-565.

⁵⁵ See, for example, judgment of 8 September 2020, *Recorded Artists Actors Performers* (C-265/19, EU:C:2020:677, paragraph 46).

⁵⁶ See, for example, judgment of 1 October 2019, *Planet49* (C-673/17, EU:C:2019:801, paragraph 48).

⁵⁷ See footnote 15 of this Opinion.

⁵⁸ C-85/03, EU:C:2004:83, paragraphs 15 to 21.

principal but in their own name, on the grounds, *inter alia*, that this contradicted the express wording of Article 1(2) of Directive 86/653. By contrast, in this case, it is not a matter of going beyond the scope of harmonisation set by Article 1(2) of Directive 86/653, but for the Court to interpret the terms, such as ‘goods’, contained in that provision where no clear meaning has been given in the text itself.

57. Consequently, the wording of Article 1(2) of Directive 86/653 does not provide an unequivocal answer to the question whether electronically supplied computer software, such as that at issue, qualifies as ‘goods’ under that provision. Nevertheless, that provision makes no distinction according to the tangible or intangible nature of the goods in question. It therefore allows for a broad interpretation of ‘goods’ covering all such tangible and intangible items which can be the subject of commercial transactions.

58. The origins of Directive 86/653 lend support for such an interpretation. In the Commission’s proposal,⁵⁹ the provision containing the definition of commercial agents referred to ‘an unlimited number of commercial transactions’, thereby covering goods as well as services.⁶⁰ No precise indications for the term ‘goods’ were given, as compared with another provision in that proposal which referred to ‘movables and other property’ in connection with the allowance for a commercial agent’s lien over the principal’s property upon termination of the agency contract.⁶¹ Those provisions were maintained, with some wording added, in the Commission’s amended proposal,⁶² following the European Parliament’s first reading⁶³ along with the European Economic and Social Committee’s Opinion.⁶⁴

59. However, at the Council’s first meeting on the amended proposal,⁶⁵ the Danish delegation considered that that proposal ‘should be confined to commercial transactions covering the sale of goods’, which was seconded by the Irish and United Kingdom delegations. This was reflected in comments by those delegations on the definition of commercial agent, according to which they requested that ‘commercial transactions’ be defined as ‘contracts for the sale of products’.⁶⁶

60. In consequence, the Commission issued a working document on the scope of the proposed directive,⁶⁷ which set out its views on certain ways in which it might be restricted. In particular, it noted that services could be excluded since there were few kinds to which the proposed directive would apply. Yet, it was essential, in its view, to cover commercial agents operating in sectors of special importance from an economic point of view, namely the buying and selling of goods. It indicated that, since certain kinds of goods, such as raw materials and agricultural products, were seldom bought or sold by commercial agents, the proposed directive could thus apply only to those agents who buy or sell industrial products and not to services or raw materials.

⁵⁹ See Commission, Equality of rights for commercial agents. Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, COM(76) 670 final, 13 December 1976 (‘Proposal’), draft Article 2.

⁶⁰ See, in that regard, Proposal, cited in footnote 59 of this Opinion, draft Articles 7(1) and (2), 8(1), 9(2), 10(2)(a), 11(2), 21(1) and 32(2).

⁶¹ See Proposal, cited in footnote 59 of this Opinion, draft Article 29(2).

⁶² See Commission, Amendment to the proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents, COM(78) 773 final, 22 January 1979 (‘Amended proposal’), draft Articles 2 and 29.

⁶³ See Resolution embodying the Opinion of the European Parliament on the Proposal, 12 September 1978 (OJ 1978 C 239, p. 18), in particular draft Articles 2 and 29.

⁶⁴ See Opinion of the European Economic and Social Committee on the Proposal, 24 November 1977 (OJ 1978 C 59, p. 31), in particular points 2.3.1, 2.8.7 and 2.8.8.

⁶⁵ See Doc 8278/79, 18 July 1979, pp. 2-3.

⁶⁶ See Doc 8278/79, cited in footnote 65 of this Opinion, pp. 6-7.

⁶⁷ See Doc 8664/79, 22 August 1979.

61. At its next meeting,⁶⁸ the Council, taking account of that working document, indicated its preference for the solution in which the proposed directive ‘would at least cover activities connected with the sale and purchase of goods’. In that regard, while several delegations endorsed an approach excluding services, the Danish, Irish and United Kingdom delegations entered reservations regarding a solution aimed at regulating anything more than just the sale of goods. Thus, according to the record of that meeting: ‘As it was not possible to settle either this question or the question whether or not the Directive should cover goods, products or tangible property, *the working assumption* adopted by *the Working Party* for its discussions was that the Directive would apply to *commercial agents engaged in the sale or purchase of goods*’.⁶⁹ This was embodied in the definition of commercial agent, which referred to the sale or purchase of goods.⁷⁰

62. That approach was maintained in the text of Directive 86/653 as adopted.⁷¹ The draft provision concerning a commercial agent’s lien over ‘movables and other property’ of the principal was amended and then deleted through the course of the decision-making process.⁷²

63. Consequently, it may be inferred from the agreement to use the term ‘goods’, rather than ‘products’, ‘tangible property’ or ‘movables’, that that term was intended to cover in a broad sense the subject matter of transactions which represented the main activities of commercial agents,⁷³ and that it was not necessarily limited to tangible and moveable items. That interpretation is also consistent with the historical context in which Directive 86/653 was situated, whereby an international convention on agency in the international sale of goods⁷⁴ had been drawn up, which was limited to the sale of goods in line with the principal activities of commercial agents in international trade at the time.⁷⁵ Contrary to Computer Associates’ contention, there are indications from the documents mentioned above that the possible application of that directive to ‘products’ may not have been meant to be broader than ‘goods’, but rather, especially in light of the reference to ‘industrial products’, to denote specific types of goods in commerce which were an important part of the work of commercial agents.

64. The context of Article 1(2) of Directive 86/653 further corroborates the view that the concept of ‘goods’ in that provision can be interpreted to cover tangible and intangible items. In particular, such an interpretation does not curtail a commercial agent from carrying out his essential tasks under Directive 86/653, which, as is apparent from Articles 3, 4 and 17 thereof, are to find new customers for the principal and to develop transactions with existing customers.⁷⁶

⁶⁸ See Doc 11507/79, 11 December 1979, p. 2.

⁶⁹ See Doc 11507/79, cited in footnote 68 of this Opinion, p. 2.

⁷⁰ See Doc 11507/79, cited in footnote 68 of this Opinion, pp. 3 and 9.

⁷¹ See, for example, Doc 7379/86, 4 June 1986, p. 3; Doc 8543/86, 18 July 1986, p. 3. In that regard, the United Kingdom delegation’s proposal to delete ‘or the purchase’ from the definition of commercial agent (see, for example, Doc 6877/80, 6 May 1980, p. 22) was rejected.

⁷² See, for example, Doc 4737/81, 10 February 1981, pp. 8-9; Doc 10292/81, 28 October 1981, pp. 8-10; Doc 4347/82, 21 January 1982, p. 23; Doc 7381/83, 9 June 1983, p. 19.

⁷³ It is worth noting that this is apparent from certain publications, annexed to Computer Associates’ observations, which were issued at the time: see Lando, O., ‘The EEC Draft Directive Relating to Self-Employed Commercial Agents’, *Rechts Zeitschrift für ausländisches und internationales Privatrecht*, vol. 44, 1980, pp. 1-16, in particular at pp. 2 and 5; United Kingdom Law Commission, *Law of Contract. Report on the Proposed E.E.C. Directive on the Law relating to Commercial Agents*, No 84, 1977, in particular Article 2(a) to (c), p. 15.

⁷⁴ Convention on Agency in the International Sale of Goods, signed in Geneva on 17 February 1983, available at <http://www.unidroit.org/>; it did not enter into force due to an insufficient number of ratifications. See further, for example, Jansen, N. and Zimmermann, R., *Commentaries on European Contract Laws*, Oxford University Press, 2018, pp. 592-593.

⁷⁵ See, in that regard, Maskow, D., ‘Internal Relations Between Principals and Agents in the International Sale of Goods’, *Revue de droit uniforme/Uniform Law Review*, vol. I, 1989, pp. 60-187, at pp. 99-101.

⁷⁶ See, in that regard, judgments of 12 December 1996, *Kontogeorgas* (C-104/95, EU:C:1996:492, paragraph 26), and of 4 June 2020, *Trendsetteuse* (C-828/18, EU:C:2020:438, paragraph 33).

65. Nor does such an interpretation preclude the operation of the other provisions of Directive 86/653 in which the term ‘goods’ is mentioned. In that regard, the description of the goods to be supplied by the principal under Article 4(2)(a) of Directive 86/653, the appropriate remuneration for a commercial agent based on what is given to agents concerned with the goods in question under Article 6(1) of that directive, and the requirement that, to be valid, a restraint of trade clause imposed on a commercial agent must relate to the kind of goods covered by the agency contract under Article 20(2)(b) thereof, would apply regardless of whether the goods are tangible or intangible.

66. This is illustrated by the circumstances of the present case. As noted in point 9 of this Opinion, the software was treated in the agreement as a commodified ‘product’ that The Software Incubator was engaged to promote, market and sell. In addition, according to that agreement, (i) the Software Incubator was obliged to devote a substantial amount of time and effort in the development of Computer Associate’s sales and customer relationships regarding the software; (ii) the calculation of The Software Incubator’s commission was based on the sales of the software; and (iii) there was a restraint of trade clause prohibiting The Software Incubator from engaging in activities which competed with the software. On that basis, it should be observed that the fact that the software was supplied by intangible means did not appear to prevent The Software Incubator or Computer Associates from carrying out their responsibilities under the agreement.

67. Contrary to the arguments advanced by Computer Associates, while Article 1(2) of Directive 86/653 is a central provision for delineating the scope of that directive, it does not follow from this that the term ‘goods’ must be understood as referring solely to tangible items. Based on the Court’s case-law (see point 44 of this Opinion), the definition of commercial agent in that provision is an inclusive one, in the sense that all persons who satisfy the conditions set down therein are deemed to be commercial agents, provided that they do not fall within the exclusions under Articles 1(3) and 2(1) thereof. Those exclusions generally refer to the occupation and activities of certain kinds of persons, and not the type of goods marketed.⁷⁷

68. Furthermore, the interpretation of the notion of ‘goods’ in other fields of EU law does not invalidate my analysis. In particular, in the context of EU measures on customs⁷⁸ and VAT,⁷⁹ where the term ‘goods’ has been limited to tangible property, computer software supplied by intangible means has not been regarded as ‘goods’, whereas in the context of EU measures on trade marks⁸⁰ and medical devices,⁸¹ computer software has been classified as a type of ‘goods’.

⁷⁷ Generally speaking, Article 1(3) of Directive 86/653 excludes persons working in companies, associations and partnerships or involved with bankruptcy, whereas Article 2(1) thereof excludes commercial agents whose activities are unpaid or who operate on commodities markets, along with a specific body in the United Kingdom.

⁷⁸ In the context of EU measures concerning the common customs regime, the term ‘goods’ has been interpreted as pertaining only to tangible property in light of the nature of that regime and thus has involved questions of computer software as intangible property incorporated in a tangible good for customs valuation purposes. See, for example, judgments of 14 July 1977, *Bosch* (1/77, EU:C:1977:130, paragraph 4); of 18 April 1991, *Brown Boveri* (C-79/89, EU:C:1991:153, paragraph 21); of 16 November 2006, *Compaq Computer International Corporation* (C-306/04, EU:C:2006:716, paragraphs 30, 31 and 37); and of 10 September 2020, *BMW* (C-509/19, EU:C:2020:694, paragraphs 12 to 23); see also Opinion of Advocate General Stix-Hackl in *Compaq Computer International Corporation* (C-306/04, EU:C:2006:68, points 50 to 58).

⁷⁹ In the context of EU measures on the VAT regime, the term ‘supply of goods’ is expressly limited to tangible property, such that digital products, including computer software, supplied on an intangible medium are classified as a supply of services, whereas such products supplied on a tangible medium are classified as a supply of goods. See, for example, judgments of 5 March 2015, *Commission v France* (C-479/13, EU:C:2015:141, paragraph 35); of 5 March 2015, *Commission v Luxembourg* (C-502/13, EU:C:2015:143, paragraph 42); and of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraphs 43 to 72, in particular paragraph 50). See also, in the context of customised computer software, judgment of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:649, paragraphs 17 to 30), and Opinion of Advocate General Kokott in *Levob Verzekeringen and OV Bank* (C-41/04, EU:C:2005:292, points 28 to 60).

⁸⁰ See, for example, judgment of 29 January 2020, *Sky and Others* (C-371/18, EU:C:2020:45, in particular paragraphs 30, 47 and 54).

⁸¹ See, for example, judgment of 22 November 2012, *Brain Products* (C-219/11, EU:C:2012:742, in particular paragraphs 16 to 19).

Those examples differ from the context of the present case in which the concept of ‘goods’ in Directive 86/653 has not been expressly delimited to tangible items nor has computer software been addressed.

69. Likewise, in the context of the free movement of goods, the Court has consistently defined ‘goods’ in a broad sense as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions’.⁸² Thus, for example, electronic games, including computer games,⁸³ and electricity⁸⁴ fall within that definition, notwithstanding their intangible nature. Given that, as is clear from the circumstances of this case, the software is a product which has been valued in money and formed the subject of commercial transactions, it would seem to fall squarely within that definition. To my mind, contrary to Computer Associates’ contention, the Court’s rulings in *Sacchi*⁸⁵ that the transmission of television signals constitutes services, whereas the products used for the diffusion of television signals constitute goods, and in *Jägerskiöld*⁸⁶ that fishing rights and fishing permits are services, rather than goods, relate to the specific circumstances of those cases and do not indicate a general limitation of ‘goods’ in that context to tangible items.

70. Directives 2011/83, 2019/770 and 2019/771 also do not, in my view, support an interpretation of ‘goods’ in Article 1(2) of Directive 86/653 which is limited to tangible items. In brief, those directives are key legal instruments in EU consumer contract law.⁸⁷ Directive 2011/83 covers consumer contracts for the supply of digital content regardless of the method of transmission, and while digital content supplied on a tangible medium is classified as ‘goods’, digital content supplied on an intangible medium is regarded as neither a sales contract nor a service contract, and specific rules are set out.⁸⁸ Thus, that directive does not resolve the classification of such digital content⁸⁹ and establishes a *sui generis* category for it apart from that of ‘goods’ defined as ‘tangible movable items’.⁹⁰

71. Directives 2019/770 and 2019/771 follow similar lines. Directive 2019/770 applies to consumer contracts for the supply of digital content or digital services irrespective of the medium, tangible or intangible, used for transmission, even covering the tangible medium itself where it serves exclusively as the carrier for the digital content.⁹¹ Yet, it leaves the question of the legal nature of such contracts to national law.⁹² In complementary fashion, Directive 2019/770 sets down harmonised rules on consumer contracts for the sale of goods, which includes ‘goods with

⁸² See, for example, judgments of 10 December 1968, *Commission v Italy* (7/68, EU:C:1968:51, p. 428), and of 23 January 2018, *Buhagiar and Others* (C-267/16, EU:C:2018:26, paragraph 67).

⁸³ See judgment of 26 October 2006, *Commission v Greece* (C-65/05, EU:C:2006:673, paragraphs 23 and 24).

⁸⁴ See, for example, judgment of 6 December 2018, *FENS* (C-305/17, EU:C:2018:986, paragraph 34), and Opinion of Advocate General Sharpston in *FENS* (C-305/17, EU:C:2018:536, points 19 to 21).

⁸⁵ See judgment of 30 April 1974 (155/73, EU:C:1974:40, paragraphs 6 and 7).

⁸⁶ See judgment of 21 October 1999 (C-97/98, EU:C:1999:515, paragraphs 30 to 39).

⁸⁷ For a discussion of those directives and their broader context, see, for example, Helberger, N. et al., ‘Digital Content Contracts for Consumers’, *Journal of Consumer Policy*, vol. 36, 2013, pp. 37-57; Jansen and Zimmermann, *Commentaries on European Contract Laws*, cited in footnote 74 of this Opinion, pp. 1-18; Staudenmayer, D., ‘The Directives on Digital Contracts: First Steps Towards the Private Law of the Digital Economy’, *European Review of Private Law*, vol. 28, 2020, pp. 219-250.

⁸⁸ See Directive 2011/83, in particular Articles 1, 5(2), 6(2), 9(2)(c), 14(4)(b), 16(m) and 17(1); recital 19. See also, for example, Commission, Report on the application of Directive 2011/83, COM(2017) 259 final, 23 May 2017, point 5.

⁸⁹ See, in that regard, Helberger et al., cited in footnote 87 of this Opinion, p. 44.

⁹⁰ See Directive 2011/83, Article 2(3).

⁹¹ See Directive 2019/770, in particular Articles 1 and 3(1) and (3); recitals 19 and 20.

⁹² See Directive 2019/770, in particular recital 12.

digital elements’, denoting ‘tangible movable items’ that incorporate or are interconnected with digital content or digital services for their functioning.⁹³ Thus, that directive limits ‘goods’ to ‘tangible movable items’, whilst adding specific rules for digital goods.

72. On that basis, it should be observed in particular that those three directives represent the EU legislature’s intention to develop special rules to accommodate digital content, including computer software, in consumer contracts without disturbing the traditional notion of ‘goods’ which, unlike Directive 86/653, is explicitly tied to tangible items. Moreover, Directive 2019/770 assimilates tangible and intangible methods for the supply of digital content, which militates in favour of interpreting ‘goods’ in Directive 86/653 to cover both.

73. Lastly, I share the view of The Software Incubator, the German Government and the Commission that an interpretation of ‘goods’ which applies to tangible and intangible items is consonant with the objectives pursued by Directive 86/653. In particular, it should be pointed out that the restriction of the concept of ‘goods’ to tangible items would have the effect of failing to protect commercial agents who negotiate the sale of the same item supplied in intangible form. This would restrict the scope of protection granted to commercial agents in their relations with their principals under Directive 86/653, which is one of the objectives of that directive (see point 43 of this Opinion).

74. In that regard, as mentioned in points 46 to 50 of this Opinion, the Court has recognised in the judgment in *UsedSoft* that the supply of a computer program by a tangible medium is the functional equivalent of transmission by download. It therefore follows from that judgment that an interpretation of the concept of ‘goods’ in Article 1(2) of Directive 86/653 which encompasses tangible and intangible items ensures that commercial agents who negotiate the sale of computer software receive the same protection irrespective of the medium of supply.

75. On the contrary, an interpretation of ‘goods’ in Article 1(2) of Directive 86/653 as limited to tangible items would allow a principal to circumvent the mandatory provisions of Directive 86/653, including those concerning the indemnity or compensation due to commercial agents upon termination of the agency contract (see point 43 of this Opinion), simply by arranging for the supply of goods by intangible means. This would undermine the objectives pursued by that directive to provide protection for commercial agents and to promote the security of commercial transactions. Indeed, as pointed out by The Software Incubator and the Commission, a commercial agent should not be deprived of protection under that directive on account of a decision of a principal, or a customer as the case may be, regarding the means of supply, which may be made after that agent has carried out his task of negotiating the sale of the goods.

76. In addition, there is nothing to suggest, contrary to the arguments advanced by Computer Associates, that the reference to ‘trade in goods’ in the third recital of Directive 86/653, read together with Articles 1 and 2 thereof, supports an interpretation of ‘goods’ which is limited to tangible items. That reference relates to the objective of Directive 86/653 to harmonise the rules of the Member States on commercial agency for the purposes of establishing a single market, and is unconcerned with the meaning of ‘goods’ in Article 1(2) of that directive. This is evidenced by

⁹³ See Directive 2019/771, in particular Articles 1, 2(5) and 3(3) and (4); recitals 12 to 16. See also Directive 2019/770, Articles 2(3) and 3(4); recitals 21 and 22.

the fact that such a reference appeared in identical form in the Commission's proposal for Directive 86/653, which contained a wider definition of commercial agent covering goods and services (see point 58 of this Opinion).⁹⁴

77. Furthermore, consideration should be given to the need for a dynamic or evolving interpretation of Article 1(2) of Directive 86/653 which takes account of technological developments in line with meeting the objectives of that directive.⁹⁵ In that regard, while the marketing of computer software by download was not foreseeable when Directive 86/653 was adopted, it is prevalent nowadays. In those circumstances, the failure to recognise such technological developments would be liable, in my view, to preclude the effectiveness of the rules for commercial agents set down in Directive 86/653.

78. I therefore conclude that computer software supplied to a principal's customers by electronic means, such as that at issue, falls within the concept of 'goods' under Article 1(2) of Directive 86/653.

C. Question 2

79. As mentioned in point 38 of this Opinion, the second question before the Court is whether a copy of computer software which is supplied to a principal's customers pursuant to a perpetual licence, such as that at issue, qualifies as a 'sale' under Article 1(2) of Directive 86/653.

80. As is apparent from the order for reference together with the information placed before the Court, in the circumstances of the present case, the licence granted by Computer Associates to its customers gives the customer a right to use a copy of the software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy (see points 11 and 12 of this Opinion).

81. According to the arguments advanced by Computer Associates, such a licence cannot be characterised as a 'sale' because it does not involve a transfer of ownership of the software. The Software Incubator, the German Government and the Commission take a different view.

82. As noted in point 53 of this Opinion, the terms in Article 1(2) of Directive 86/653, including the term 'sale', make no reference to national law. Therefore, that term must be regarded as an autonomous concept of EU law, which must be interpreted uniformly throughout the EU independently of national legislation, by reference principally to the wording, context and objectives of Directive 86/653.

83. It is on that basis that I have reached the conclusion that computer software supplied to a principal's customers pursuant to a perpetual licence, such as that at issue, which grants the customer a right to use a copy of the software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy, falls within the concept of 'sale' for the purposes of Article 1(2) of Directive 86/653. My reasons for so concluding are as follows.

⁹⁴ See Proposal, cited in footnote 59 of this Opinion, draft third recital. See also Amended proposal, cited in footnote 62 of this Opinion, draft third recital.

⁹⁵ See, in that regard, Opinion of Advocate General Szpunar in *Vereniging Openbare Bibliotheken* (C-174/15, EU:C:2016:459, points 24 to 40), and Opinion of Advocate General Bobek in *Entoma* (C-526/19, EU:C:2020:552, points 69 to 84).

84. As regards the wording of Article 1(2) of Directive 86/653, that provision does not give any indication as to how the concept of ‘sale’ is to be understood. In reference to the arguments submitted by Computer Associates, the words used in the various language versions of Article 1(2) of Directive 86/653 do not seem to indicate that ‘sale’ must necessarily be understood in a particular way.⁹⁶

85. Nonetheless, it should be observed that the use of the term ‘sale’ in that provision without any reservation allows for an interpretation covering all such transactions which involve a transfer of ownership of goods. In that regard, as mentioned in points 46 to 50 of this Opinion, in the judgment in *UsedSoft*, the Court has recognised a broad interpretation of the term ‘sale’ which encompasses all forms of product marketing characterised by the grant of a right to use a copy of a computer program for an unlimited period in return for payment of a fee corresponding to the economic value of that copy. I see no reason why the Court’s approach in that judgment should not be applied to the present case. Indeed, it seems to me that the context and objectives of Directive 86/653 call for a broad interpretation of the concept of ‘sale’ along those lines.

86. As regards the context of Directive 86/653, it should be pointed out that this interpretation is consistent with the essential tasks carried out by a commercial agent, which – as noted in point 64 of this Opinion and as is apparent from Articles 3, 4 and 17 of that directive – are to find new customers for the principal and to develop transactions with existing customers. This is demonstrated by the agreement in the present case, which refers to the ‘sale’ of the software in connection with the tasks to be carried out by The Software Incubator as mentioned above (see point 66 of this Opinion).

87. This interpretation is also consistent with the objectives of Directive 86/653. In particular, in light of the judgment in *UsedSoft*, it should be considered that a broad interpretation of ‘sale’ in Article 1(2) of Directive 86/653 is in line with the objective pursued by that directive to protect commercial agents in their relations with their principals (see point 43 of this Opinion). Any other solution would undermine that objective by allowing a principal to evade the mandatory provisions of Directive 86/653 simply by calling the agreement with his customer a ‘licence’ rather than a ‘sale’. In addition, it would be likely to deprive a large number of commercial agents of the protection afforded by Directive 86/653, given that computer software is generally marketed through licences.

88. It should be added that, while minimal guidance as to the meaning of ‘sale’ can be drawn from the origins of Article 1(2) of Directive 86/653, having regard to the commercial context of the time (see points 58 to 63 of this Opinion), the concept of ‘sale’ in that provision was intended to cover the primary activities of commercial agents and not to foreclose the application of Directive 86/653 to future technological developments impacting on those activities.

89. I therefore conclude that a copy of computer software supplied to a principal’s customers pursuant to a perpetual licence, such as that at issue, which grants the customer a right to use a copy of the software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy, falls within the concept of ‘sale’ under Article 1(2) of Directive 86/653.

⁹⁶ See footnote 15 of this Opinion.

VII. Conclusion

90. In light of the foregoing considerations, I propose that the Court of Justice should answer the questions referred by the Supreme Court of the United Kingdom as follows:

- ‘1. A copy of computer software, such as that at issue in the main proceedings, which is supplied to a principal’s customers electronically, and not on any tangible medium, constitutes “goods” within the meaning of Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of Member States relating to self-employed commercial agents.
2. Computer software which is supplied to a principal’s customers by way of the grant to the customer of a perpetual licence, such as that at issue in the main proceedings, to use a copy of the computer software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy, constitutes a “sale” within the meaning of Article 1(2) of Directive 86/653.’