JUDGMENT OF THE COURT (First Chamber)

28 October 2010 *

In Case C-203/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 29 April 2009, received at the Court on 8 June 2009, in the proceedings

**Volvo Car Germany GmbH**

v

**Autohof Weidensdorf GmbH,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J Kasel, A. Borg Barthet, E. Levits and M. Safjan (Rapporteur), Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

after considering the observations submitted on behalf of:

— Volvo Car Germany GmbH, by J. Krummer and P. Wassermann, Rechtsanwälte,

— Autohof Weidensdorf GmbH, by J. Breithaupt, Rechtsanwalt,

— the German Government, by J. Möller, J. Kemper and S. Unzeitig, acting as Agents,

— the European Commission, by H. Støvlbæk and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2010

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 18(a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17) ('the Directive').

2 The reference was made in the context of proceedings between Autohof Weidensdorf GmbH ('AHW') and Volvo Car Germany GmbH ('Volvo Car') concerning a claim by AHW for an indemnity and a claim for payment on the basis of credit notes.

## Legal context

*European Union legislation*

3 Under Article 1(2) of the Directive:

'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.'

4 Article 16 of the Directive provides as follows:

'Nothing in this Directive shall affect the application of the law of the Member States where the latter provides for the immediate termination of the agency contract:

(a) because of the failure of one party to carry out all or part of his obligations;

(b) where exceptional circumstances arise.'

5 Article 17 of that directive provides:

'1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

— he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers,

and

— the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. …'

6 Article 18 of the Directive provides:

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

(a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;

(b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities

…'

7 Under Article 19 of that directive:

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

*National legislation*

8 Under Paragraph 89a of the German Handelsgesetzbuch (Commercial Code) ('the HGB'):

'(1) Each party may terminate the contract on serious grounds without complying with the notice period. That right may be neither excluded nor limited …'

9 Paragraph 89b of the HGB implements Articles 17 to 19 of the Directive. That paragraph, as it was worded at the material time, reads as follows:

'(1) The commercial agent may, after termination of the agency contract, demand from the principal a reasonable indemnity if and to the extent that:

1. the principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business with new customers which the commercial agent brought;

2. the commercial agent, by reason of the termination of the agency contract, loses rights to commission from business already transacted, and business to be transacted in the future, with customers he has brought, and

3. the payment of an indemnity is equitable having regard to all the circumstances.

If the commercial agent has expanded the volume of business with an existing customer so significantly that, in commercial terms, it is equivalent to acquiring a new customer, he is deemed to have brought a new customer.

…

(3) That indemnity shall not be payable if:

1. the commercial agent terminated the contract, except where the principal's conduct was a reason justifying the termination or where the commercial agent may no longer be required to continue his activities due to age or illness, or

2. the principal terminated the contract and there were serious grounds for termination relating to wrongful conduct by the commercial agent …'

10 According to the settled case-law of the Bundesgerichtshof (Federal Court of Justice) referred to in the order for reference, the provisions concerning a commercial agent's goodwill indemnity in Paragraph 89b of the HGB apply by analogy to a dealership agreement such as the one at issue in the main proceedings. Under that case-law, it is sufficient if a serious ground justifying immediate termination of the contract existed objectively at the date of the decision to terminate the contract. Where the

commercial agent has failed, before the normal end of the contract, to perform his obligations in such a manner that termination without notice is justified, the case-law of the Bundesgerichtshof permits even a principal who had decided to terminate the contract at the end of a notice period to decide either to terminate that contract afresh, without notice, if he learned of the default during the period of notice, or to rely on that default as a ground for refusal to pay a goodwill indemnity where the principal learned of the default only after the normal end of the contract.

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

11 A dealership agreement was concluded between Volvo Car (the principal) and AHW (the dealer). At the same time the directors of AHW operated, together with a former director of that undertaking, Autovermietung Weidensdorf GbR ('AVW'). Through another company, AVW established commercial relations with Volvo Car which were governed by a 'framework agreement for big buyers' concerning special discounts for supplying brand-new Volvo vehicles. On the basis of the framework agreement AVW purchased vehicles from AHW, availing itself of the agreed discounts. In return for this, AHW received allowances from Volvo Car.

12 By letter of 6 March 1997, Volvo Car gave contractual notice of termination of the dealership agreement, with effect from 31 March 1999.

13 In the period from April 1998 to July 1999, 28 vehicles which AVW had purchased from AHW were sold prematurely, contrary to the dealership agreement. As is

apparent from the order for reference, it is assumed, in the context of the appeal on a point of law ('Revision' under German law), that Volvo Car became aware of those facts only after the end of the dealership agreement.

14 Since it considered that Paragraph 89b of the HGB applied to the dealership agreement, AHW then claimed, in its action against Volvo Car, a goodwill indemnity and payments on the basis of credit notes. Volvo Car maintains that payment of a goodwill indemnity to AHW is precluded by point 2 of Paragraph 89b(3) of the HGB. It submits that AHW procured for itself allowances to which it was not entitled because, in collusion with AVW, it did not adhere to the contractually agreed minimum retention period. It has been established, in the appeal proceedings which led to the reference for a preliminary ruling, that AHW failed thereby to comply with its contractual obligations under the dealership agreement concluded with Volvo Car. Consequently, Volvo Car would have been entitled to terminate that contract immediately if it had been aware of the default before the end of the contract.

15 The Landgericht (Regional Court) allowed AHW's claim for the goodwill indemnity in the amount of EUR 180 159,46 and upheld the claim in respect of the credit notes in full, together with interest in each case.

16 The Oberlandesgericht (Higher Regional Court), on appeal by Volvo Car, varied the judgment at first instance in part with regard to the amounts of the goodwill indemnity and the credit notes. The Oberlandesgericht considered that AHW was entitled to a goodwill indemnity from Volvo Car through an application by analogy of Paragraph 89b(1) of the HGB. The Oberlandesgericht held that point 2 of Paragraph 89(b)(3) of the HGB must be interpreted in a way which is consistent with Article 18(a) of the Directive. Consequently, that court held that a serious ground for termination

must have been the cause of the principal's decision to terminate the contract in order for the agent to be deprived of his entitlement to a goodwill indemnity.

17 Volvo Car appealed on a point of law against the judgment of the Oberlandesgericht. The referring court took the view that the outcome of the case turned on the interpretation of Article 18(a) of the Directive.

18 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 18(a) of [the Directive] to be interpreted as precluding national legislation under which a commercial agent is not entitled to an indemnity in the event of contractual termination of the contract by the principal if a serious ground for immediate termination of the contract because of the agent's default existed at the date of contractual termination but was not the cause of the termination?

2. If such national legislation is consistent with the Directive:

Does Article 18(a) of the Directive preclude the application by analogy of the national legislation concerning the exclusion of the indemnity claim to a case where a serious ground for the immediate termination of the contract because of the agent's default arose only after contractual notice of termination was given and the principal became aware of that ground only after the contract ended, so that

he was no longer able to give a further notice of immediate termination of the contract based on the agent's default?'

## The questions referred for a preliminary ruling

*The Court's jurisdiction and the admissibility of the questions referred*

Observations submitted to the Court

19 Volvo Car submits that the reference for a preliminary ruling is inadmissible. The subject-matter of the dispute in the main proceedings does not come within the scope of the Directive. A dealer such as AHW is not a 'commercial agent' within the meaning of Article 1(2) of the Directive or the first sentence of Paragraph 84(1) of the HGB. Moreover, the principle that national provisions are to be interpreted in a manner consistent with directives applies only in so far as those directives have direct effect.

20 At the hearing, AHW argued that, since under German law the provisions governing commercial agents are applied by analogy to dealership agreements, the questions referred are admissible. The first question, moreover, is not hypothetical in nature.

21 The German Government maintains that, under German law, the provisions governing commercial agents apply by analogy to dealers. Consequently, the decision on AHW's entitlement to an indemnity is contingent on the interpretation to be given to the provisions of the Directive relating to the exclusion of commercial agents' entitlement to an indemnity. Regarding the first question referred, the representative of the German Government explained at the hearing that that question is not hypothetical because it involves an issue which must be resolved before the second question can be addressed.

22 In the Commission's view, there is nothing to preclude the Court's having jurisdiction to provide an answer to the questions referred, since the German legislation implementing the Directive must be interpreted in a manner consistent therewith. The Commission nevertheless expresses doubts as to the admissibility of the first question, as it concerns a scenario which does not reflect the facts with which the referring court has to deal in the present case.

Findings of the Court

23 Regarding, first, the Court's jurisdiction to provide an answer to the questions referred, it must be borne in mind that, within the framework of the cooperation between the Court and national courts and tribunals established by Article 267 TFEU, it is solely for the national court to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court can refuse a request submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation of European Union law bears no relation to the actual facts of the main action or its purpose or where the problem is general or hypothetical (see, inter alia, Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 14).

24 Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court remains, in principle, obliged to give a ruling. Neither the wording of Article 267 TFEU nor the aim of the procedure established by that article indicates that the framers of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a European Union provision where the domestic law of a Member State refers to that provision in order to determine the rules applicable to a situation which is purely internal to that State (see *Poseidon Chartering*, paragraph 15).

25 Where domestic legislation adopts the same solutions as those adopted in European Union law in order, in particular, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the European Union interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (*Poseidon Chartering*, paragraph 16).

26 In the present case, although the questions concern a dealership agreement and not a commercial agency contract and the Directive does not therefore directly govern the situation in issue, the fact remains that German law treats those two types of contract in the same way (see, to that effect, *Poseidon Chartering*, paragraph 17).

27 There is, moreover, nothing in the case-file to indicate that the referring court may depart from the interpretation given by the Court to the provisions of the Directive.

28 In those circumstances, the plea alleging lack of jurisdiction must be rejected.

29 As regards, second, the admissibility of the first question, it should be observed that that question relates to a situation in which, on the date of normal termination of the contract, there were grounds justifying termination without notice of the contract which were not relied on by the principal to justify that termination. As is apparent from the order for reference, AHW's alleged breach of its contractual obligations occurred after the notice of normal termination of the dealership agreement had been given.

30 In those circumstances, it is clear that the first question referred relates to a purely hypothetical situation which in no way reflects the facts at issue in the main proceedings and is, therefore, a question which is wholly irrelevant for the outcome of the dispute in the main proceedings.

31 It follows that the first question is inadmissible.

*Substance*

Observations submitted to the Court

32 Volvo Car submits that the second question referred should be answered in the negative, relying on a broad interpretation of the criteria laid down in Article 18(a) of the

Directive. In particular, there is nothing in the Directive to indicate that the exclusion of an indemnity should depend on the wholly fortuitous criterion of whether the wrongful conduct justifying a decision to terminate the contract without notice was or was not discovered before the end of the contract.

33 As AHW pointed out at the hearing, if the principal were able to release himself from the obligation to pay an indemnity to the commercial agent through a broad interpretation of Article 18(a) of the Directive, that would lead to a distortion of competition. Consequently, there should be a textual interpretation of that provision, which provides for an exception to the obligation to pay an indemnity, requiring that the wrongful conduct by the agent be a direct cause of the decision to terminate the contract. It is also possible, on the basis of Article 17(2)(a) of the Directive, which provides for a fairness-based assessment, to reduce the amount of the indemnity or even to deprive the agent of the indemnity entirely.

34 The German Government proposes that the second question referred be answered in the affirmative. The Directive, the essential principles of which are trust and the duty of each party to act in good faith, aims to strike a fair balance between the parties' interests. Under Article 18(a) of the Directive, there is no entitlement to an indemnity where the default attributable to the commercial agent was not directly the cause of the decision to terminate the contract but that default did in fact exist before that decision and, under national law, could have justified a decision to terminate the contract without notice. It is sufficient that the wrongful conduct by the commercial agent may, in theory, be used by the principal as grounds for the decision to terminate the contract (hypothetical causality). Since both of the aforementioned conditions must be satisfied, however, Article 18(a) of the Directive does not apply, in the German

Government's submission, when they are not met simultaneously and the failure to fulfil an obligation occurred only after the decision to terminate the contract.

35 According to the Commission, the system introduced by Articles 17 to 19 of the Directive is mandatory in nature. That being said, a broader interpretation of Article 18(a) of the Directive may be reconciled with a fair compromise between the interests of the principal and those of the commercial agent. The commercial agent is also deserving of protection when the principal did not hold his conduct to be so serious as to justify terminating the contract. There is, moreover, nothing prohibiting the principal from informing the commercial agent that his conduct would have led him to terminate the contract if he had not already done so.

36 In a situation where the principal discovers the commercial agent's default only after the end of the contractual relationship, it is impossible for him to terminate the contract on that ground, since there is no longer a contractual relationship to be terminated. Since the European Union legislature refrained from including provisions in the Directive to cover that eventuality, the Member States are free to exclude – or not – entitlement to an indemnity, subject to the limitations in the Treaty. Where the principal learned of the agent's wrongful conduct before the end of the contract and did not rely on that conduct as grounds for termination, entitlement to an indemnity will of course be upheld, but that conduct may be taken into account in the adjustment of the indemnity for reasons of fairness.

The Court's reply

37 By its second question, the referring court asks, essentially, whether Article 18(a) of the Directive is to be interpreted as meaning that it precludes a self-employed

commercial agent from being deprived of his goodwill indemnity where the principal establishes a default on the part of that agent which occurred after notice of termination of the contract was given but before the contract expired and which was such as to justify immediate termination of the contract in question.

38 In answering that question, it must be borne in mind that, under Article 18(a) of the Directive, the indemnity referred to therein is not payable where the principal has terminated the contract 'because of' default attributable to the commercial agent which would justify immediate termination of the contract under national law.

39 The use, by the European Union legislature, of the wording 'because of' tends to support the proposition, put forward inter alia by the Commission, that the legislature intended to require that there be a direct causal link between the default attributable to the commercial agent and the principal's decision to terminate the contract in order to deprive the commercial agent of the indemnity provided for in Article 17 of the Directive.

40 That interpretation is corroborated by the history of the Directive. As evidenced by the proposal for the directive (OJ 1977 C 13, p. 2), the Commission had initially proposed that the goodwill indemnity should not be payable where the principal terminated or 'could have terminated the contract' in the event of fault on the part of the commercial agent such that the principal could not be required to maintain the contractual relationship. It is clear, however, that the European Union legislature opted not to retain the second cause of termination proposed.

41 The interpretation outlined above is supported by the fact that the same part of speech is used in the various language versions of Article 18(a) of the Directive, including Spanish ('por un incumplimiento imputable al agente comercial'), German ('wegen eines schuldhaften Verhaltens des Handelsvertreters'), English ('because of default attributable to the commercial agent'), French ('pour un manquement imputable à l'agent commercial'), Italian ('per un'inadempienza imputabile all'agente commerciale'), and Polish ('z powodu uchybienia przypisywanego przedstawicielowi handlowemu').

42 Moreover, as an exception to the agent's entitlement to an indemnity, Article 18(a) of the Directive must be interpreted restrictively. That provision cannot, therefore, be interpreted in a way which amounts to adding a ground for exclusion of the indemnity where no express provision is made to that effect.

43 In those circumstances, when the principal becomes aware of the commercial agent's default only after the end of the contract, it is no longer possible to apply the mechanism provided for in Article 18(a) of the Directive. Consequently, the commercial agent cannot be deprived of his entitlement to an indemnity under that provision where the principal establishes, after notifying him of the termination of the contract with notice, a default on the part of that agent which was such as to justify immediate termination of that contract.

44 It is nevertheless appropriate to add that, under the second indent of Article 17(2)(a) of the Directive, the commercial agent is to be entitled to an indemnity if and to the extent that the payment of that indemnity is equitable having regard to all the circumstances. The possibility cannot, therefore, be ruled out that that agent's conduct

may be taken into account in the assessment made to determine the fairness of his indemnity.

45 In the light of those considerations, the answer to the second question is that Article 18(a) of the Directive precludes a self-employed commercial agent from being deprived of his goodwill indemnity where the principal establishes a default by that agent which occurred after notice of termination of the contract was given but before the contract expired and which was such as to justify immediate termination of the contract in question.

## Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 18(a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes a self-employed commercial agent from being deprived of his goodwill indemnity where the principal establishes a default by that agent**

**which occurred after notice of termination of the contract was given but before the contract expired and which was such as to justify immediate termination of the contract in question.**

[Signatures]