

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

19 April 2018 (*)

(Reference for a preliminary ruling — Self-employed commercial agents — Directive 86/653/EEC — Right of the commercial agent to an indemnity or compensation for damage following termination of the commercial agency contract — Article 17 — Exclusion from the right to indemnity in the event of termination of the contract during the trial period provided for in the contract)

In Case C-645/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 6 December 2016, received at the Court on 15 December 2016, in the proceedings

Conseils et mise en relations (CMR)SARL

v

Demeures terre et tradition SARL,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Demeures terre et tradition SARL, by F. Molinié, avocat,
- the French Government, by D. Colas and R. Coesme, acting as Agents,
- the German Government, by T. Henze and M. Hellmann, acting as Agents,
- the European Commission, by J. Hottiaux and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2017,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 17 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17).
- 2 The request has been made in proceedings between *Conseils et mise en relations (CMR) SARL* and *Demeures terre et tradition SARL* ('DTT') concerning an application by CMR for payment of, first, compensation for the loss arising from the termination of a commercial agency contract it had with DTT and, second, damages it alleges it is owed as a result of the wrongful termination of that contract.

Legal context

European Union law

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

'... the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the [European Union] and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; ... moreover, those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States;

... trade in goods between Member States should be carried on under conditions which are similar to those of a single market, and this necessitates approximation of the legal systems of the Member States to the extent required for the proper functioning of the common market; ... in this regard the rules concerning conflict of laws do not, in the matter of commercial representation, remove the inconsistencies referred to above, nor would they even if they were made uniform, and accordingly the proposed harmonisation is necessary notwithstanding the existence of those rules'.

- 4 Article 1 of Directive 86/653 provides:

'1. The harmonisation measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States governing the relations between commercial agents and their principals.

2. For the purposes of this Directive, "commercial agent" shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal.

...'

- 5 Article 17(1) to (3) 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. ...

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

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

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

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

6 Article 18 of that directive is worded as follows:

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

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

7 Article 19 of Directive 86/653 states:

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

French law

8 Article L. 134-12 of the code de commerce (Commercial Code) provides as follows:

'In the event of termination of its relations with the principal, the commercial agent shall be entitled to compensation for loss suffered.

The commercial agent shall lose the right to compensation if he has not notified the principal within a period of one year from termination of the contract that he wishes to assert his rights.

The commercial agent's successors in title shall also be entitled to compensation where termination of the contract is occasioned by the death of the agent.'

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

- 9 On 2 December 2011, DTT entered into a commercial agency contract with CMR concerning the sale of individual houses. Under this contract, DTT and CMR had the status of principal and agent respectively. There was provision under the contract for a trial period of 12 months, at the end of which the contract would be deemed to be for an indefinite period, each party having the right to terminate during the course of the trial period, subject to the giving of 15 days' notice during the first month and one month's notice thereafter. The commercial agency contract laid down a target to be achieved of 25 sales per annum.
- 10 By letter of 12 June 2012, DTT notified CMR of its decision to terminate the contract at the end of the contractual notice period of one month. That decision was based on non-observance of the objective laid down in the contract, CMR having achieved only one sale in five months.
- 11 By a document dated 20 March 2013, CMR brought an action against DTT before the tribunal de commerce d'Orléans (Commercial Court, Orleans, France), for payment of compensation for the loss suffered as a result of termination of the commercial agency contract and for payment of damages for unlawful termination of the contract. By judgment of 30 January 2014, that court partially upheld CMR's application.
- 12 On 14 February 2014, DTT appealed against that judgment. By judgment of 18 December 2014, the cour d'appel d'Orléans (Court of Appeal, Orleans, France) set aside in part the judgment of the tribunal de commerce d'Orléans (Commercial Court, Orleans). In particular, it held that the compensation provided for under Article L. 134-12 of the Commercial Code was not payable where a commercial agency contract was terminated during the trial period. It also held that the termination of the contract concluded between DTT and CMR was not unlawful since only one sale had been concluded in five months, whereas the objective of that contract was 25 sales per year.
- 13 Ruling on the appeal brought by CMR against that judgment, the Cour de cassation (Court of Cassation, France) stated, first, that the judgment of the cour d'appel d'Orléans (Court of Appeal, Orleans) applied the settled case-law of the Economic, Financial and Commercial Chamber of the Cour de cassation (Court of Cassation) under which there is, by way of exception, no right to compensation where the commercial agency contract is terminated during the trial period. Secondly, it noted that Directive 86/653 does not refer to any trial period so that it seems possible for the parties to a commercial agency contract to provide for such a period without that constituting an infringement of EU law. Thirdly, it pointed out, with reference to the Court of Justice's case-law, that Directive 86/653 seeks to protect the commercial agent in his relations with the principal and that Article 17(2) of that directive is to be interpreted in such a way as to contribute to that protection.
- 14 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay proceedings and refer the following question to the Court:
- 'Does Article 17 of [Directive 86/653] apply where termination of the commercial agency contract occurs during the trial period provided for in that contract?'

Consideration of the question referred

- 15 By its question, the referring court asks, in essence, whether Article 17 of Directive 86/653 must be interpreted as meaning that the indemnity and compensation regimes laid down by that article, in paragraphs 2 and 3 respectively, in the event of termination of a commercial agency contract are applicable where termination occurs during the trial period provided for by the contract.
- 16 As a preliminary point, it is necessary to consider the question whether Directive 86/653 precludes provision being made for a trial period in a commercial agency contract.

- 17 As observed by the Advocate General in point 34 of his Opinion, that directive makes no reference to the concept of a ‘trial period’. Given that no provision in that directive regulates the provision of a trial period, it must be considered that such a provision, which falls within the scope of the freedom of contract of the parties to the commercial agency contract, is not as such prohibited by that directive.
- 18 In the present case, it is apparent from the order for reference that the Commercial, Financial and Economic Chamber of the Cour de cassation (Court of Cassation) held that the commercial agent has no right to indemnity where the termination of the commercial agency contract occurs during the trial period.
- 19 In that regard, it must be recalled that, under the third paragraph of Article 288 TFEU, ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’.
- 20 As was also pointed out by the Advocate General in point 34 of his Opinion, while Directive 86/653 does not preclude the provision for a trial period in a commercial agency contract, legal effects which may affect the full effectiveness of that directive cannot, none the less, be attributed to such a trial period under domestic law.
- 21 It is necessary to examine in the light of the foregoing considerations whether the provision for a trial period in a commercial agency contract precludes the application of the indemnity and compensation regimes, laid down in Article 17(2) and (3) of Directive 86/653 respectively, in the event of termination of the contract during the trial period.
- 22 According to the Court’s settled case-law, in determining the scope of a provision of EU law, in this case Article 17 of Directive 86/653, its wording, context and objectives must all be taken into account (judgment of 16 April 2015, *Angerer*, C-477/13, EU:C:2015:239, paragraph 26 and the case-law cited).
- 23 As regards the wording of that article, it should be noted, first, that, as set out in Article 17(1) of Directive 86/653, the Member States must take the measures necessary to ensure that the commercial agent is, after ‘termination of the agency contract’, indemnified or compensated for the damage suffered. Similarly, Article 17(3) of that directive provides that a commercial agent is entitled to compensation for the damage he suffers as a result of ‘the termination of his relations with the principal’. Thus, the commercial agent’s right to indemnity or compensation is conditional on the termination of his contractual relationship with the principal.
- 24 While, as the Advocate General noted in point 38 of his Opinion, the provision for a trial period is intended to facilitate the termination of a commercial agency contract, the fact remains that the termination of such a contract during the trial period provided for in the contract constitutes a ‘termination of the agency contract’ or a ‘termination of [the commercial agent’s] relations with the principal’, within the meaning of Article 17(1) and (3) of Directive 86/653.
- 25 In that regard, it should be noted that it follows from the observations submitted to the Court that the case-law of the Cour de cassation (Court of Cassation) cited in paragraph 18 of the present judgment, according to which the commercial agent has no right to indemnity where the termination of the commercial agency contract occurs during the trial period, is based on the premiss that, during that period, the commercial agency contract has not yet been definitively concluded.
- 26 There is no basis for such an interpretation in Directive 86/653. On the contrary, as the Advocate General noted in point 39 of his Opinion, relations between a commercial agent and a principal, as defined in Article 1 of Directive 86/653, subsist as from the time when a contract, the purpose of which is either to negotiate the sale or purchase of goods, or to negotiate and conclude such transactions on behalf of the principal, irrespective of whether that contract provides for a trial period. It follows that the provisions of that directive are applicable as soon as such a contract is concluded between the principal and the commercial agent, even if that contract provides for a trial period.

27 Secondly, it is apparent from Article 17(2)(a) of Directive 86/653 that the commercial agent is entitled to an indemnity, inter alia, if 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. Furthermore, according to Article 17(2)(b) of that directive, the amount of the indemnity depends on the performance of the commercial agent during the term of the contract. Similarly, it is clear from the wording of Article 17(3) of that directive that the commercial agent is entitled to compensation for damage suffered, in particular where such damage is deemed to occur when the termination of the contractual relations takes place in circumstances depriving that agent of the commission which performance of the contract would have procured him whilst providing the principal with substantial benefits linked to the agent's activities and/or in circumstances which have not enabled the commercial agent to amortise the costs and expenses that he incurred for the performance of the contract on the principal's advice.

28 Therefore, as the Advocate General observed in points 26 and 50 of his Opinion, it is clear from the wording of Article 17(2) and (3) of Directive 86/653 that the indemnity and compensation regimes laid down by that provision are not intended to penalise termination of the contract but to indemnify the agent for his past services from which the principal will continue to benefit beyond the termination of the contractual relationship or for the costs and expenses he has incurred in providing those services. Consequently, the agent cannot be denied the indemnity or compensation on the sole ground that the termination of the commercial agency contract occurred during the trial period, if the conditions set out in Article 17(2) and (3) are satisfied.

29 Accordingly, it follows from the wording of that article that the right to indemnity and to compensation for damage suffered is applicable even if the termination of the contractual relationship between the principal and the commercial agent occurs during the trial period.

30 The above considerations are supported by the analysis of the context of Article 17 of Directive 86/653 as well as the objective of that directive.

31 In the first place, as regards the context of Article 17 of that directive, it should be noted, first, that Article 18 of the directive provides an exhaustive list of the circumstances in which indemnity or compensation for damage is not payable. Termination of the trial period is not mentioned. In addition, since Article 18 represents an exception to the right to indemnity and compensation, it must be interpreted strictly. It follows that that article cannot be interpreted in a way which amounts to adding a ground for exclusion of the indemnity or compensation for which no express provision is made (see, to that effect, judgment of 28 October 2010, *Volvo Car Germany*, C-203/09, EU:C:2010:647, paragraph 42). To consider that no indemnity or compensation is payable when the termination of the contractual relationship occurs during the trial period is in fact tantamount to allowing a ground for exclusion not provided for in Article 18 of that directive.

32 Moreover, Article 19 of Directive 86/653 prohibits the parties derogating from Articles 17 and 18 of that directive to the detriment of the commercial agent before the agency contract expires. As observed by the Advocate General in point 48 of his Opinion, to take the view that the provision for a trial period in a commercial agency contract means that the right to indemnity and compensation, laid down in Article 17 of that directive, does not apply amounts to such a derogation to the detriment of the agent. However he performs, a commercial agent will be granted or refused redress depending solely on whether or not a trial period is provided for in the commercial agency contract.

33 In the second place, as regards the objective of Directive 86/653, it is apparent from its second and third recitals that one of the objectives of that directive is to protect the commercial agent in his relations with the principal (judgment of 17 May 2017, *ERGO Poist'ovňa*, C-48/16, EU:C:2017:377, paragraph 41).

34 In that regard, the Court has held that Articles 17 and 18 of that directive are of crucial importance, as they define the level of protection which the European Union legislature considered reasonable to grant commercial agents in the course of the creation of the single market (judgment of 17 October 2013,

Unamar, C-184/12, EU:C:2013:663, paragraph 39). In addition, according to the Court's case-law, the purpose of Articles 17 to 19 of that directive is to protect the commercial agent after termination of the commercial agency contract. The regime established by Directive 86/653 for that purpose is mandatory in nature (judgments of 9 November 2000, *Ingmar*, C-381/98, EU:C:2000:605, paragraph 21, and of 23 March 2006, *Honyvem Informazioni Commerciali*, C-465/04, EU:C:2006:199, paragraph 22).

35 The Court also has stated that, in the light of the aim of Directive 86/653, any interpretation of Article 17 which may prove to be detrimental to the commercial agent is not permissible (see, to that effect, judgment of 26 March 2009, *Semen*, C-348/07, EU:C:2009:195, paragraph 21).

36 The interpretation that no indemnity is payable in the event of termination of the commercial agency contract during the trial period is incompatible with the mandatory nature of the regime established by Article 17 of Directive 86/653. Such an interpretation, which effectively makes the award of redress conditional on whether or not a trial period is provided for in the commercial agency contract, without regard for the performance of the commercial agent or the costs and expenses that he has incurred, contrary to the requirements of that article, constitutes, for the same reasons as those set out in paragraph 32 above, an interpretation detrimental to the commercial agent, who is denied any redress on the sole ground that the contract he has with the principal includes a trial period.

37 Consequently, an interpretation of Article 17 of Directive 86/653 that no indemnity or compensation is payable where the termination of the commercial agency contract occurs during the trial period is contrary to the objective of that directive.

38 In the light of the foregoing considerations, the answer to the question referred is that Article 17 of Directive 86/653 must be interpreted as meaning that the indemnity and compensation regimes laid down by that article, in paragraphs 2 and 3 respectively, in the event of termination of the commercial agency contract are applicable where termination occurs during the trial period provided for by the contract.

Costs

39 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 (Fourth Chamber) hereby rules:

Article 17 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that the indemnity and compensation regimes laid down by that article, in paragraphs 2 and 3 respectively, in the event of termination of the commercial agency contract are applicable where termination occurs during the trial period provided for by the contract.

[Signatures]

* Language of the case: French.