



E-2/21-15

REPORT FOR THE HEARING

in Case E-2/21

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

Norep AS

and

Haugen Gruppen AS

concerning the interpretation 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.

I Introduction

1. By letter of 26 May 2021, registered at the Court on 11 June 2021, the Supreme Court of Norway (*Norges Høyesterett*) requested an Advisory Opinion in the case pending before it between Norep AS (“Norep”) and Haugen Gruppen AS (“HG”).

2. The case before the referring court concerns an appeal brought by Norep against the judgment of Hålogaland Court of Appeal (*Hålogaland lagmannsrett*) in relation to a claim made by Norep under the Norwegian Act on Commercial Agents (“the Commercial Agents Act”) (*lov av 19. juni 1992 om handelsagenter og handelsreisende (agenturloven)*) for remuneration upon termination of a contract. The claim was not successful before the District Court or the Court of Appeal on the ground that Norep could not be deemed a “commercial agent” as defined in the first paragraph of section 1 of that Act.

II Legal background

EEA law

3. 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”) was incorporated into Annex VII to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by virtue of the entry into force of the EEA Agreement.

4. The second recital of the Directive reads:

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

5. The third recital of the Directive reads:

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

6. Article 1(2) of the Directive reads:

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.

7. Article 3 of the Directive reads:

1. In performing his activities a commercial agent must look after his principal’s interests and act dutifully and in good faith:

2. *In particular, a commercial agent must:*

(a) make proper efforts to negotiate and, where appropriate, conclude the transaction he is instructed to take care of;

(b) communicate to his principal all the necessary information available to him;

(c) comply with reasonable instructions given by his principal.

8. Article 4(3) of the Directive reads:

A principal must, in addition, inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

9. Article 7 of the Directive reads:

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

(a) where the transaction has been concluded as a result of his action; or

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

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

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

- or where he has an exclusive right to a specific geographical area or group of customers,

and where the transaction has been entered into with a customer belonging to that area or group.

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

10. Article 8 of the Directive reads:

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

(a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or

(b) if, in accordance with the conditions mentioned in Article 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

11. Article 17(2) of the Directive reads:

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

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

- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

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

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

National law

12. The first paragraph of Section 1 of the Commercial Agents Act reads:

For the purposes of this Act, 'commercial agent' shall mean a person who, in the course of business operations under agreement with another party (the principal) has undertaken, on a continuing self-employed basis, to work to achieve the sale or purchase of goods on behalf of the principal by obtaining orders for the principal or by concluding agreements in the principal's name.

13. According to the referring court, the preparatory works (draft legislative proposal submitted to the Odelsting – Ot.prp. nr. 49 (1991–1992) page 13) state that it is assumed that anyone deemed to be a commercial agent for the purposes of the Directive will also come within the scope of the definition in the Act.

14. Furthermore, upon termination of the agency contract, the commercial agent is entitled to remuneration on termination under Section 28 of the Commercial Agents Act if the criteria in the Act are met. Those criteria correspond to those in Article 17(2) of the Directive. Under the Act, the commercial agent and the principal have a duty of mutual loyalty, and the substance of that duty is expressed in Sections 5 to 7 of that Act. Those provisions implement Articles 3 and 4 of the Directive.

III Facts and procedure

15. Norep was established in 1989 and, according to its key information in the Central Coordinating Register for Legal Entities, is engaged in “commercial agency and retail trade, and the usual related areas” in terms of operations/nature/industry.

16. HG was established in 1979 and, according to its key information in the Central Coordinating Register for Legal Entities, is engaged in “trade, marketing, administration, property management and the usual related areas, and participation in other companies, possibly through acquisition of shares” in terms of operations/nature/industry and has “wholesale trade with a wide range of food and beverage products” as its industry code. It is stated that HG is an importer of international brand names in the grocery sector. Since the 1980s, the company has had the three leading retail grocery chains in Norway as its customers: Coop, NorgesGruppen and Rema.

17. On 17 April 1991, Norep concluded an agreement with Erik Haugen Management AS (now HG). The agreement is entitled “Cooperation agreement”. Point a of Clause 1 of that agreement provides that Norep “is ... to be E.H.’s exclusive agent for current and future products that may be introduced by E.H., in the specified geographical area”. The agreement further describes the parties’ obligations, financial matters, and the validity of the agreement. In the negotiations leading up to the agreement, the question of remuneration upon termination of the agreement was discussed between the parties. The agreement does not contain any provisions on this point. The parties disagree as to whether the agreement is an agency agreement regulated by the Commercial Agents Act.

18. After 17 years of cooperation on the basis of the 1991 agreement, the parties entered into a new agreement in 2008. This new agreement was also entitled “Cooperation agreement”, and in point a of Clause 1 Norep is referred to as exclusive agent. The agreement does not contain any provisions on remuneration upon termination of the agreement. Neither this nor the application of the Commercial Agents Act was a point of discussion between the parties during the negotiations leading up to the agreement. It is stated in the agreement that it “is a revision of and replaces” the 1991 agreement. The parties disagree as to whether the agreement is an agency agreement regulated by the Commercial Agents Act.

19. In November 2018, HG terminated the parties' agreement. The reason for the termination was that Coop, NorgesGruppen and Rema had decided to take care of the physical handling of the products in the retail outlets themselves. HG therefore no longer had need for Norep's services, which Norep has accepted. In January 2019, Norep lodged a claim for remuneration on termination under Section 28 of the Commercial Agents Act. The claim amounted to one year's commission, based on the average of the previous five years' turnover. HG denied that the Commercial Agents Act applied and that Norep was entitled to any remuneration on the termination.

20. On 24 June 2019, Norep lodged legal proceedings before Salten District Court, claiming that the contractual relationship between the parties "is regulated by the Commercial Agents Act". The writ of summons was subsequently amended twice. HG claimed that the action had to be dismissed on the ground that it did not involve a legal claim for the purposes of Section 1-3 of the Norwegian Dispute Act. By ruling of 4 October 2019, Salten District Court dismissed the action. That ruling was appealed as to the order on costs. By order of 6 December 2019 of Hålogaland Court of Appeal, Norep was ordered to pay costs in the amount of NOK 75 000 for the proceedings before the District Court and NOK 25 800 for the proceedings before the Court of Appeal.

21. On 10 October 2019, Norep again lodged legal proceedings before Salten District Court, claiming that HG should be ordered to pay damages determined at the court's discretion. The claim was subsequently amended to have as its principal claim remuneration on termination under the Commercial Agents Act or, in the alternative, damages.

22. Salten District Court found that the Commercial Agents Act did not apply to this cooperation relationship and determined that HG was not liable to Norep.

23. Hålogaland Court of Appeal came to the same result and dismissed the appeal. Its judgment contained a more detailed description of the contractual relationship. The parties agree in the main on that presentation of Norep's operations and the description of the Norwegian grocery sector.

24. The Court of Appeal found it proven that Norep through the agreement with HG "in the course of business operations under agreement with another party ... has undertaken, on a continuing self-employed basis, to work to achieve the sale ... of goods on behalf of the principal". It noted, however, that the definition in the Act contains a more specific indication of how the party to the contract is to "work to achieve the sale" in order to be considered a commercial agent, that is to say, "by obtaining orders for the principal or by concluding agreements in the principal's name".

25. In order to shed light on Norep's work for HG, the parties spent some time in the case describing the Norwegian grocery sector and submitted, inter alia, a report on food,

power and disempowerment – the power relationships in the value chain for food (Official Norwegian Reports – NOU 2011: 4), and a Report to the Parliament on the Grocery sector and competition – the battle for customers (Meld. St. 27 (2019-2020)). According to that description, the three leading grocery chains in Norway, Coop, NorgesGruppen and Rema, who are HG’s three customers in the grocery sector market, each have their own head offices. At the level under the head office, there is a chain office for each type of store: Obs, Extra, Prix, Mega and Marked/Matkroken under Coop, Spar/Eurospar, Joker, Meny, Kiwi and Bunnpris under NorgesGruppen and Rema 1000 under Rema. Each type of store has a range of stores distributed around the country. Between the stores and the chain offices there is the wholesaler: Coop logistikk for Coop, ASKO logistikk for NorgesGruppen and Rema Distribusjon for Rema. According to the information provided, prices, terms and conditions and product ranges are determined by the head offices, as are the choice of partners and market activities for the chains. All products must be approved at head office level before it is permitted to sell them at retail store level. The planogram is also prepared centrally, that is to say, where, in which quantities and how the individual goods are to be placed in the store.

26. On the basis of that structure, HG negotiates prices, terms and conditions, product range and approval of goods with the head offices. HG receives orders from and delivers goods to the wholesalers, not directly to the retail stores. During the contract period, HG used Norep in Northern Norway and its own sales force in the rest of the country as a sales organisation to promote sales. Under the first subclause of point i of Clause 3 of the parties’ agreement, Norep was to “engage in optimal promotion of HG’s sales in the area through regular visits to retailers and wholesalers”. Under point a of Clause 1, Norep was to service its geographical area with “sales and follow-up”. Under point b of Clause 1, Norep was to “promote the sale and distribution of HG’s products through active and diligent sales work”. Under point a of Clause 6, HG was to pay a commission to Norep “of net invoiced wholesale turnover directly or indirectly to Norep’s geographical area” before deduction of discounts.

27. It was not entirely clear to the Court of Appeal whether Norep submitted that they had entered into agreements in HG’s name. In any event, no written power of attorney to that effect, for the purposes of Section 18 of the Commercial Agents Act, nor any documentation attesting to such agreements was submitted. The Court of Appeal did not find it probable that Norep concluded agreements in HG’s name.

28. The question was then whether Norep could be said to have “obtained orders for the principal”. It was explained before the Court of Appeal that, in the period from the 1990s to the 2000s, orders from stores to wholesalers became automated, so that an electronic system automatically generated new orders to wholesalers when the stock of a given product in a store ran low. Different testimonies were given as to when the use of paper consignment forms and orders stopped, and the transition was made to fully electronic ordering of goods. Overall, the Court of Appeal found it most probable that both

orders from stores to wholesalers and from wholesalers to HG went electronically and directly, without Norep as an intermediary, throughout the period that the parties' 2008 agreement was in effect. Witnesses testified that Norep operated with paper consignment forms longer than others. At the same time, Norep had indicated that it should be considered a commercial agent, even though orders were placed directly by stores and wholesalers, which the Court of Appeal understood to be a confirmation that orders were placed directly.

29. According to the Court of Appeal, some degree of support for the finding that orders were placed directly at least from 2008 onwards is provided by the amended wording of the fifth subclause of point i of Clause 3 in the 2008 version of the agreement. In the 1991 agreement, it was provided that it was for E.H. in particular "to inform Norep without delay as to whether and to what extent orders cannot be accepted or whether there are to be delays in delivery". In the 2008 agreement this was amended to the effect that it was for HG in particular "to provide Norep with all information so that Norep will be able to carry out its sales tasks in an optimal manner". By extension, the Court of Appeal noted that the possibility could not be ruled out that Norep to some extent obtained orders for HG in the 1990s and at the beginning of the 2000s. The Court of Appeal considered it likely that the amended wording reflected the development in the grocery sector in the 1990s and 2000s, outlined also by Norep, namely, that it became more centrally and chain-directed and automated. According to the Court of Appeal, this suggested that Norep, before 2008 and at least from 2008 onwards, did not obtain orders for HG, but carried out tasks which the chains themselves took over in 2018/2019.

30. Norep's appeal to the Supreme Court concerns the Court of Appeal's application of the law. Leave to appeal was granted by decision of 21 January 2021 of the Supreme Court's Appeals Selection Committee.

31. Against this background, the Supreme Court of Norway decided to stay the proceedings and refer the following questions to the Court:

1. Must the term "negotiate" in Article 1(2) of Directive 86/653 be interpreted as presupposing involvement with orders from customers to the principal, with the result that the orders may not go directly from customers to the principal, [as is described in the facts of the request]?

2. If Question 1 is answered in the negative, which factors are relevant in the assessment of whether sales-related activity is to be deemed to be "negotiation" for the purposes of Article 1(2) of Directive 86/653?

IV Written observations

32. Pursuant to Article 20 of the Statute of the Court and Article 90 of the Rules of

Procedure, written observations have been received from:

- Norep AS, represented by Magne Mjaaland, advocate;
- the German Government, represented by Johannes Möller, Dr David Klebs, Mathias Hellmann and Dr Ulrich Bartl, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Ingibjörg Ólöf Vilhjálmsdóttir, Marianne Arvei Moen, Catherine Howdle, Michael Sánchez Rydelski and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Lorna Armati and Mislav Mataija, acting as Agents.

V Proposed answers submitted

Norep AS

33. Norep AS proposes that the questions referred be answered as follows:

Question 1:

Norep AS does not identify a specific answer to this question.

Question 2:

Norep AS does not identify a specific answer to this question.

The German Government

34. The German Government proposes that the questions referred be answered as follows:

Question 1:

Article 1(2) of the Commercial Agent Directive is to be interpreted such that a sales agent can also be charged with intermediating [vermitteln] contracts within the meaning of that provision where orders are passed on directly from a customer to the principal if the other conditions set out in the provision are also met.

Question 2:

“Vermitteln” [intermediation] within the meaning of Article 1(2) of the Commercial Agent Directive requires the making of a promotional contribution towards the

conclusion of a contract which is at least contributory to the conclusion of that contract. Contributions made by third parties or by the principal which play a causal role, in addition to the sales agent's contribution, in the conclusion of the contract are irrelevant so long as the sales agent's contribution is not entirely insignificant.

ESA

35. ESA proposes that the questions referred be answered as follows:

Question 1:

The term "negotiate" 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 shall not be interpreted as presupposing involvement with orders from customers to the principal, with the result that the orders may not go directly from customers to the principal.

Question 2:

The factors that are relevant in the assessment of sales-related activity to be deemed to be "negotiation" for the purposes of Article 1(2) of the 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, need to be interpreted broadly based on the above analysis and in the context of the Agreement between the Parties which is for the Referring Court to assess.

The Commission

36. The Commission proposes that the questions referred be answered as follows:

Question 1:

Article 1(2) of Directive 86/653, and in particular the term "negotiate", should be interpreted as not necessarily presupposing the agent's direct involvement with the placing of orders by customers with the principal, or excluding a scenario in which orders go directly from customers to the principal.

Question 2:

Sales-related activity should be deemed to be "negotiation" for the purposes of Article 1(2) of Directive 86/653 if it is specifically undertaken with a view to achieving the conclusion of contracts of sale or purchase of goods by the principal,

such that the agent acts as an intermediary between the principal and customers.

Páll Hreinsson
Judge-Rapporteur