



NORGES HØYESTERETT

EFTA Court
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Luxembourg

Doc 56

Case No 20-183236SIV-HRET, civil case, appeal against judgment: Request for an Advisory Opinion

1. INTRODUCTION

- (1) Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), read in conjunction with section 51a of the Norwegian Courts of Justice Act (*Lov om domstolene*), the Supreme Court of Norway (*Norges Høyesterett*) hereby requests an Advisory Opinion from the EFTA Court for use in Case No 20-183236SIV-HRET. The appellant in the case is Norep AS, whilst the respondent is Haugen Gruppen AS.
- (2) The case concerns Norep AS's claim for remuneration upon termination of a contract under the Norwegian legislation on commercial agents. That claim was not successful before the District Court or the Court of Appeal in their judgments on the ground that Norep AS could not be deemed to be a "commercial agent" as defined in the first paragraph of section 1 of that legislation.
- (3) The case raises questions of 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 ("the Directive"). Those rules are implemented in Norwegian law by Law of 19 June 1992 on commercial agents and business travellers ("the Commercial Agents Act") (*lov om handelsagenter og handelsreisende (agenturloven) 19. juni 1992*).
- (4) The Supreme Court now requests the EFTA Court to give an Advisory Opinion on the precise substance of the rule laid down in the first option under Article 1(2) of the Directive, more specifically the term "negotiate".

2. OVERVIEW OF THE PARTIES TO THE CASE

(5) The parties involved in the case before the Supreme Court are:

(6) Appellant: Norep AS

Counsel: Advokat Magne Mjaaland
SANDS Advokatfirma DA
P.O. Box 1829 Vika
0123 Oslo

(7) Respondent: Haugen Gruppen AS

Counsel: Advokat Thor Einar Kristiansen
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3. FACTS

(8) Norep AS's appeal to the Supreme Court concerns an appeal against the judgment of 23 October 2020 of Hålogaland Court of Appeal (*Hålogaland lagmannsrett*). By its judgment, the Court of Appeal ruled on Norep AS's appeal against the judgment of 10 March 2020 of Salten District Court (*Salten tingrett*).

(9) The parties mainly agree on the Court of Appeal's presentation of the case history and background. In the introductory part of its judgment, the Court of Appeal described the facts and proceedings in the case as follows:

“Norep AS (hereinafter also Norep) was established in 1989, and, according to its key information in the Central Coordinating Register for Legal Entities (*Enhetsregisteret*), is engaged in ‘commercial agency and retail trade, and the usual related areas’ in terms of operations/nature/industry.

Haugen-Gruppen AS (hereinafter also 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 customers: Coop, NorgesGruppen and Rema.

On 17 April 1991, Norep concluded an agreement with Erik Haugen Management AS (now HG). The agreement is entitled ‘Cooperation agreement’ (*Samarbeidskontrakt*). 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 a topic of discussion

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.

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’ (*Samarbeidskontrakt*), 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 topic 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.

In November 2018, HG terminated the parties’ agreement. The reason for the termination was that Coop, NorgesGruppen and Rema decided to take care of the physical handling of the products in the retail outlets themselves. HG did therefore no longer need Norep’s services, which Norep has accepted. In January 2019, Norep lodged a claim for remuneration for 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 disputed that the Commercial Agents Act applied and that Norep was entitled to remuneration for the termination.

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 demanded the case to be dismissed on the ground that it did not involve a legal claim under Section 1-3 of the Norwegian Dispute Act (*tvisteloven*). 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.

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

- (10) Salten District Court found that the Commercial Agents Act did not apply to this cooperative relationship and acquitted Haugen Gruppen AS in full.
- (11) Hålogaland Court of Appeal came to the same result and dismissed the appeal. In the judgment a more detailed description is given of the contractual relationship. The parties agree in the main on that presentation of Norep AS’s operations and the description of the Norwegian grocery sector:

“The Court of Appeal finds it proven, and it does not appear to be disputed, 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’. The definition in the Act does however contain 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’.

In order to shed light on Norep's work for HG, the parties have spent some time in the case describing the Norwegian grocery sector and have inter alia submitted 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)). It is not necessary for the court to go into greater detail on this for its assessment of whether Norep was a commercial agent for the purposes of the Act. Suffice to observe briefly that 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, it 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.

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.

It is not entirely clear for the Court of Appeal whether the Appellant submits that they have 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, has been submitted. The Court of Appeal does not find it probable that Norep concluded agreements in HG's name.

The question is then whether Norep can be said to have 'obtained orders for the principal'. It has been 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 good in a store ran low. Different testimonies have been given for 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 finds 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 the parties' agreement from 2008 was in effect. Stein Pettersen has testified that Norep operated with paper consignment forms longer than others. This was confirmed by the witness Trygve Johansen. At the same time, Norep has indicated that it should be considered a commercial agent, even though orders are placed directly from stores and wholesalers, something the Court of Appeal understands to be a confirmation that orders are placed directly.

That orders were placed directly at least from 2008, is also supported in some degree by the amendment of the fifth sub-clause of point i of Clause 3 of the agreement, from 1991 to 2008. In 1991, it 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’. The Court of Appeal notes that, by extension, the possibility cannot be ruled out that Norep to some extent obtained orders for HG in the 1990s and in the beginning of the 2000s. It appears likely that the amended wording reflects the development that Norep also has outlined in the grocery sector in the 1990s and 2000s, towards becoming more centrally- and chain-directed and automated. This suggests 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.”

- (12) Norep AS’s appeal to the Supreme Court concerned 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.

4. LEGAL BACKGROUND TO THE CASE

4.1. Relevant Norwegian legislation

- (13) 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.”

- (14) In the preparatory works (draft legislative proposal submitted to the Odelsting – Ot.prp. nr. 49 (1991–1992) page 13), it is stated 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.
- (15) Upon termination of the agency contract, the commercial agent is entitled to remuneration for termination under Section 28 of the Commercial Agents Act if the criteria in the Act are met. Those criteria correspond those in Article 17(2) of the Directive.
- (16) 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.

4.2. The Commercial Agents Directive (86/653/EEC)

- (17) Article 1(2) of the Commercial Agents Directive contains the following definition of self-employed commercial agent (in the Danish language version):

“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.”

- (18) The question of interpretation in this case concerns the term “negotiate the sale or the purchase of goods” (first option under Article 1(2)).
- (19) It follows from Article 3 of the Directive that the commercial agent must safeguard the principal’s interests and act loyally and in good faith, and in particular inter alia must “make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of”.
- (20) It follows from Article 4(3) of the Directive that the principal must inform the commercial agent within a reasonable period “of his acceptance [or] refusal” of a “commercial transaction which the commercial agent has procured for the principal”.
- (21) Further, it follows from Article 17(2) of the Directive that the commercial agent shall be entitled to an indemnity inter alia upon termination of the agency contract where 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”.

4.3. EU Court of Justice case-law

- (22) The EU Court of Justice has held that the term ‘negotiate’ is an autonomous concept in EU law. In its judgment of 4 June 2020 in *Trendsetteuse SARL v DCA SARL* (C-828/18), it gave the following analysis of the term “negotiate”:

“24 In that regard, it should be noted that, while Directive 86/653 does not define the term ‘negotiate’, the fact that the act of negotiation referred to in Article 1(2) of that directive must relate to ‘the sale or the purchase of goods for the principal’ highlights the intention of the EU legislature that that act have as its objective the conclusion of contracts of sale or of purchase on behalf of the principal.

25 In addition, it should be noted that, since Article 1(2) of Directive 86/653 does not make any reference to national laws concerning the meaning to be given to the concept of ‘negotiate’, that provision must be regarded, for the purposes of the application of that directive, as containing an autonomous concept of EU law which must be interpreted in a uniform manner throughout the territory of the European Union (see, to that effect, the judgment of 19 December 2019, *Engie Cartagena*, C-523/18, EU:C:2019:1129, paragraph 34 and the case-law cited).

26 In that regard, it is settled case-law that the meaning and scope of terms, for which EU law gives no definition, must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (see, inter alia, judgment of 29 July 2017, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 77).

27 While the majority of the language versions of Article 1(2) of Directive 86/653 use terms which can be translated as ‘negotiate’, inter alia the German- and Polish-language

versions contain broader terms, which can be translated as ‘act as intermediary’.

28 However, that disparity notwithstanding, the terms used in the various language versions of Article 1(2) of Directive 86/653 do not necessarily mean that the commercial agent himself can set the price of the goods he sells on behalf of the principal.

29 It is appropriate, therefore, to interpret the term ‘negotiate’, contained in Article 1(2) of Directive 86/653, taking into account the context in which that provision operates and the objectives pursued by that directive.

30 As regards, in the first place, the context in which that provision operates, first, it follows from Article 3(1) and (2) of Directive 86/653 that, under its contract, the commercial agent must safeguard the principal’s interests by, in particular, making proper efforts to negotiate and, where applicable, to conclude the transactions of which he has been instructed to take care by the principal. The purpose of a commercial agent’s activity thus depends on the terms of the contract which binds him to the principal and, in particular, on the agreement between the parties with regard to the goods which the principal intends to sell or purchase through the mediation of that commercial agent (judgment of 7 April 2016, *Marchon Germany*, C-315/14, EU:C:2016:211, paragraphs 31 and 32).

...

33 It is apparent from at combined reading of Articles 4(3) and 17(2)(a) of Directive 86/653 that the commercial agent’s main tasks are to bring the principle new customers and to increase the volume of business with existing customers.

34 However, as was highlighted, in essence, by the Austrian Government in its written observations, it is possible for the commercial agent to accomplish those tasks by providing information and advice as well as through discussion, aimed at facilitating the conclusion of the transaction for the sale of goods on behalf of the principal, without the commercial agent having the power to change the prices of those goods.

35 Second, interpreting Article 1(2) of Directive 86/653 as meaning that that provision excludes from the classification of ‘commercial agent’ those persons who do not have the power to change the prices of the goods they sell on behalf of the principal would run counter to the objectives of that directive.

36 Indeed, as is clear from the second and third recitals, that directive seeks 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 harmonising their legal systems within the area of commercial representation (judgment of 21 November 2018, *Zako*, C-452/17, EU:C:2018:935, paragraph 26 and the case-law cited).”

- (23) In its judgment of 21 November 2018 in *Zako SPRL v Sanidel SA* (C-452/17) paragraph 37 et seq., the EU Court of Justice held that the intermediary may perform other tasks in addition to intermediate purchasing and selling, without losing their status as a commercial agent.

5. BRIEF REMARKS ON THE REASONS FOR THE REQUEST

- (24) The Commercial Agents Act is intended to implement the Commercial Agents Directive. The conditions for being deemed a commercial agent are formulated somewhat differently in the first paragraph of Section 1 of that act and in Article 1(2) of the Directive. It is considered appropriate to obtain the EFTA Court's view on whether the term "negotiate" as used in the Directive is to be understood as presupposing involvement with orders from customers to the principal, so as to exclude a scheme in which the orders go directly from customers to the principal, particularly in the light of the EU Court of Justice's interpretation of the term in Case C-828/18.

6. SUBMISSIONS OF THE PARTIES

6.1. Norep AS

- (25) The submissions of Norep AS are reproduced below:

"The first option under Article 1(2) of the Commercial Agents Directive does not include any requirement that the commercial agent's activities must consist of obtaining orders for the principal, but is limited to providing that the agent must be engaged to 'negotiate' the sale or the purchase of goods, that is to say, act as an intermediary having the task of promoting the principal's goods in relation to existing customers and new customers.

The Directive is based largely on the German rules governing commercial agents. In paragraph 27 of the Danish version of the judgment in Case C-828/18, it is stated *inter alia* that the German version of Article 1(2) contains an expression that can be translated as 'act as intermediary'.

The Directive does not contain any provisions stating that commercial agents must obtain orders to come within its scope. Article 7, which covers agents' entitlement to commission, supports the point that there is no requirement that orders must be obtained. Article 7 is implemented in the Commercial Agents Act in the first paragraph of Section 10:

'The commercial agent shall be entitled to commission on agreements concluded during the period covered by the agency contract, if:

- (1) the agreement is concluded as a result of his action;
- (2) the agreement not concluded as a result of his action is concluded with a third party whom he has previously acquired as a customer for agreements of the same kind; or
- (3) the agent has been assigned a given geographical area or a given group of customers and the agreement not concluded as a result of the agent's action is concluded with a third party belonging to the geographical area or group of customers.'

In the preparatory works to Section 10 (Ot.prp. nr. 49 (1991–1992) page 50), it is stated that a commercial agent may also 'be entitled to a commission under point (1) where the agent's contributory actions do not amount to either conclusion of an agreement or negotiation of orders'. The same applies under point (2) and (3) of the first paragraph of Section 10.

A commercial agent's main task is to perform sales promotion work for the principal, and Article 1(2) assumes that customers' decisions to place orders have come about as a result of a preceding sales process to which the agent has made a decisive contribution.

The principal may provide in his terms and conditions that orders from customers are to be given directly to him. It does not make much sense that a commercial agent who has performed sales promotion work for a principal should fall outside the scope of the Act because the orders go directly to the principal, with the result that the agent falls outside the scope of the Act's safeguard provisions, including Section 28 on remuneration for termination.

If Section 1 of the Commercial Agents Act were to be interpreted as meaning that orders must be taken by a commercial agent in order for the agent to benefit from the protection conferred by the Act, that would be contrary to the purpose of the Directive, which is to ensure legal protection for commercial agents: see paragraph 36 of the judgment in Case C-828/18.”

6.2. Haugen Gruppen AS

(26) The submissions of Haugen Gruppen AS are reproduced below:

“The first option under Article 1(2) of the Commercial Agents Directive does not apply to each and every type of marketing activity that someone carries out on behalf of someone else with a view to generate sales of goods and products.

It is correct that, based on its wording, the Directive does not impose any requirements to the effect that the agent's contribution to sales must occur in the form of obtaining orders. However, the Directive cannot be construed as containing a prohibition against such a condition in national law, when the condition of obtaining orders is a precondition for a binding agreement for the sale of the principal's goods to be deemed concluded under national law. Danish national law also includes conditions to the effect that the commercial agent must obtain orders for the principal in order to be deemed a commercial agent. The correct legal question is, in Haugen-Gruppen AS's view, whether it can be considered contrary to the Directive that the Commercial Agents Act has imposed a condition as to when the agent can be deemed to have contributed to the conclusion of a sales agreement. The agent cannot be deemed to have negotiated the sales agreement without having obtained the order for the principal.

In paragraph 24 of the judgment in *Trendsetteuse SARL v DCA SARL* (C-828/18), it is stated that although the Directive does not include a definition of the term 'negotiate', is the condition that the agent must 'negotiate' an indication of the “intention of the EU legislature that that act have as its objective the conclusion of contracts of sale or of purchase on behalf of the principal’.

Mere promotion of the principal's goods not linked to specific sales can hardly be read into the term 'negotiate' in the Directive in relation to a sale of the principal's goods. This is not in line with how the term 'negotiate' is generally understood. Nor is such an interpretation in line with the purpose and context of the Directive. Under the Directive, the purpose of the agreement between the agent and the principal must be that the agent is to conclude or obtain sales agreements on behalf of the principal. General marketing activity alone, in which the alleged agent does not participate in the actual conclusion of the agreement or obtaining agreements (obtaining orders that are then accepted by the

principal), do not come within the scope of the term 'negotiate' a sale of the principal's goods under the Commercial Agents Directive.

According to previous case-law of the EFTA Court, three cumulative conditions must be met in order for someone to be considered a commercial agent. Inter alia one must be considered a self-employed intermediary.

When determining how the term 'negotiate' is to be construed, it must also be taken into account that the Directive imposes a clear condition that, in order to be considered a commercial agent for the purposes of the Directive, one must act as a self-employed intermediary in the agreements for the sale of the principal's goods that are concluded. One can hardly be considered as an intermediary upon conclusion of the sales agreements if the term 'negotiate' is not viewed as imposing such qualitative requirements on the agent's activity that it has a direct connection to the individual specific agreements for the sale of the principal's goods that may be concluded.

The activity that the Court of Appeal has found proven that Norep AS has engaged in, does not come within the purpose of the Commercial Agents Directive since the agreements for the sale of Haugen-Gruppen AS's goods are concluded between Haugen-Gruppen AS and the grocery chains' wholesalers, and not between Haugen-Gruppen AS and the wholesalers' purchasers (the chains' stores). The stores buy from the wholesalers, and not from Haugen-Gruppen AS. Norep AS has not in any way contributed to the negotiations Haugen-Gruppen AS conduct every year with the grocery chains' head offices, in which inter alia agreements are made as to which product ranges (goods) Haugen-Gruppen AS may sell to the chains, which market activities are to be implemented centrally and locally, which shelf placement individual goods are to have in the stores who report to the grocery chains (planogram), etc. The Court of Appeal's assessment of the evidence is final.

It is not contrary to the purpose of the Directive to interpret Section 1 of the Commercial Agents Act as meaning that orders must be obtained by a commercial agent in order for the commercial agent to be considered an intermediary and protected by the Act. The purpose of the Directive is to ensure protection for those who have concluded agreements for being an intermediary upon sale of the principal's goods, (see paragraph 24 of the judgment in C-828/18). The purpose is not to confer legal protection on those who have concluded agreements with principals where the purpose is not to act as intermediary and conclude/obtain sales agreements for the principal, but the work concerns the performance of other types of promotional work in relation to the principal's goods. The purpose of the Directive does not justify expanding the interpretation of the term 'negotiate' to encompass a bigger group than those who actually conclude/obtain sales agreements for the principals.

Article 7 of the Directive, which concerns the commercial agent's entitlement to a commission, applies only to those persons who fulfil the three cumulative conditions in Article 1 to be considered a commercial agent. Article 7 must be given limited weight when interpreting the definition of a commercial agent. The article serves a purpose of protecting those who already is considered commercial agents against dilution of the commission income from the principal. The same applies for the significance of Section 10 of the Commercial Agents Act with regard to the understanding of the requirement to obtain orders under Section 1 of the Act in national law.

Article 7 cannot be construed as applying to those who have not at any time during the parties' contractual period acted as an intermediary between the principal and the specific purchaser of the good sold by the principal. The substance of Article 4(3) supports that

genuine participation in the actual conclusion/obtention of the sales agreement is required in order to be deemed a commercial agent.

Article 1(2) does not presume that customers' decisions to place orders is a result of a preceding sales process in which the agent has contributed."

7. QUESTIONS REFERRED TO THE EFTA COURT

Based on the abovementioned factual and legal background in the case, and in the spirit of a wish for dialogue between the EFTA Court and the national courts, the Supreme Court hereby asks the EFTA Court to provide answers to the following questions:

1. Shall 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 the facts in the present case is described in Chapter 3 above?
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?

Oslo, 26 May 2021

Hilde Indreberg
Supreme Court Justice

Electronic signature