

**Federal Republic of Germany**

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(Art. 38 (4) Rules of Procedure of the  
EFTA Court)

**Via e-EFTACourt**

EFTA Court  
- Registry -  
1, rue du Fort Thüngen

L – 1499 Luxembourg

## Statement

We make the following statement on behalf of the Government of the Federal Republic of Germany, as evidenced in the attached authorisation, on case E-2/21

concerning the request for an advisory opinion submitted to the EFTA Court by the Supreme Court of Norway (*Norges Høyesterett*) by a decision dated 26 May 2021 concerning the appeals proceedings pending there of

Norep AS

v.

Haugen Gruppen AS

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## A. INTRODUCTION

- 1 The Request for an Advisory Opinion concerns the interpretation of Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (“Commercial Agent Directive”).<sup>1</sup> The questions raised therein pertain to the interpretation of the term “negotiate” as used in the English language version and the term “*vermitteln*” as used in the German language version of Article 1(2) of the Commercial Agent Directive and under which conditions an activity is to be regarded as that of a commercial agent within the meaning of the Commercial Agent Directive.
- 2 The parties to the case are in disagreement as to whether the activity performed by the complainant in the main proceedings on a contractual basis on behalf of the defendant in the main proceedings is to be regarded as that of a commercial agent. Following termination of the contractual relationship, the complainant is seeking compensation in the amount of the average annual remuneration which was paid throughout the five years prior to the termination. Under the relevant national provisions, entitlement to such compensation is dependent on the complainant being classified as commercial agent.

## B. LEGAL BACKGROUND

- 3 Regarding the legal background to the case, reference is made to the legal provisions presented in the Request for an Advisory Opinion made by the Supreme Court of Norway (*Norges Høyesterett*).<sup>2</sup>

## C. THE FACTS AND QUESTIONS RAISED

- 4 Regarding the facts of the case, reference is made to the Request for an Advisory Opinion made by the Supreme Court of Norway.<sup>3</sup> In its Request dated 26 May 2021, the Supreme Court of Norway submits to the EFTA Court the following questions concerning the interpretation of Article 1(2) of the Commercial Agent Directive:

“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?”

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<sup>1</sup> OJ L 382, 31.12.86, p. 17ff.

<sup>2</sup> Margin nos. 13 to 16 of the Request.

<sup>3</sup> Margin nos. 8 to 12 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?”

## D. LEGAL ASSESSMENT

### I. Wording

- 5 The Supreme Court of Norway raises questions concerning the interpretation of the term “negotiate” as used in the English language version of Article 1(2) of the Commercial Agent Directive in reference to the two types of activity performed by a commercial agent. The German language version of Article 1(2) of the Commercial Agent Directive, which corresponds almost word for word to section 84 (1) sentence 1 of the German Commercial Code (*Handelsgesetzbuch*, HGB) which transposes that provision, distinguishes between the two types of activity of a commercial agent, namely between “*vermitteln*” [to intermediate] the sale or purchase of goods and “*abschließen*” [to conclude] such transactions. The conclusion of a transaction is a subset of “*vermitteln*”, in the course of which the “*Vermittler*” [intermediary] also concludes the transaction. Thus, the act of intermediating [*vermitteln*] transactions is the main point of reference for determining whether an activity fulfils the characteristics of a commercial agent.
- 6 The *Duden*, Germany’s leading dictionary of the German language, defines the verb “*vermitteln*” as “*zustande bringen*” [to bring about], “*herbeiführen*” [to cause], “*dafür sorgen, dass jemand etwas, was er anstrebt, bekommt*” [to ensure that someone receives what they are seeking] and “*dafür sorgen, dass jemand, der eine Stelle o. Ä. sucht, mit jemandem in Verbindung gebracht wird, der eine solche zu vergeben hat*” [to ensure that someone who is looking for a job, for instance, is brought into contact with someone who has what they are looking for].<sup>4</sup>
- 7 According to the consistent past decisions of the German Federal Court of Justice, “*vermitteln*” as used in in section 84 (1) sentence 1 of the German Commercial Code refers to promoting the conclusion of a transaction by impacting on a third party. According to this, it is sufficient for the commercial agent’s promotional work to be contributory to the subsequent conclusion of the transaction if the commercial agent’s activity at least facilitated the conclusion of a concrete transaction.<sup>5</sup>

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<sup>4</sup> *Duden – Deutsches Universalwörterbuch*, 6th ed., Mannheim, p. 1820; see also <https://www.duden.de/rechtschreibung/vermitteln#bedeutungen> (retrieved 21 July 2021).

<sup>5</sup> Federal Court of Justice (BGH) NJW 1980, 1793; BGH NJW 2015, 1754 margin no. 14.

8 However, the wording used in the Directive does not impose the requirement that declarations of intent leading to the conclusion of a transaction must be passed on by the commercial agent to the principal. However, the passing on of an order can provide evidence of the sales agent having contributed to the conclusion of the transaction and thus of his or her classification as a commercial agent.

## II. Systematic aspects

9 Article 1(2) of the Commercial Agent Directive lays down the three necessary and sufficient conditions for a person to be classified as a “commercial agent”:<sup>6</sup>

- a. First, that person must be a self-employed intermediary.
- b. Second, the contractual relationship must be of a continuing character.
- c. Third, that person must exercise, on behalf of and in the name of the principal, an activity which may consist either simply in being an intermediary for the sale or purchase of goods or in both acting as intermediary and concluding sales or purchases of goods.

10 It is, thus, sufficient for a person to satisfy these three conditions in order to be classified as a “commercial agent” within the meaning of Article 1(2) of the Commercial Agent Directive, regardless of the arrangements under which the activities are performed.<sup>7</sup> According to the system applied in the Commercial Agent Directive, this only does not apply if a person does not fall within one of the exclusions laid down in Article 1(3) and Article 2 of the Directive. However, these do not relate to the question of how customers’ orders are passed on to the principal.

11 Nor do any of the other provisions of the Commercial Agent Directive relating to the content and extent of the activity of a commercial agent as required by Article 1(2) of the Commercial Agent Directive permit the conclusion that orders cannot also be passed on directly from a customer to the principal.

12 Article 4(3) of the Commercial Agent Directive requires that a principal must 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. Neither this nor any other provision of the Commercial Agent Directive specifies that the customer must use a particular channel to pass on a previously made offer to

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<sup>6</sup> ECJ, judgment of 21 Nov. 2018, Case C-452/17, *Zako SPRL*, EU:C:2018:935, margin no. 23.

<sup>7</sup> ECJ, judgment of 21 Nov. 2018, Case C-452/17, *Zako SPRL*, EU:C:2018:935, margin no. 24.

conclude a transaction. Article 7 sets out the conditions relating to payment of a commission. These conditions are met where the conclusion of a transaction is based on the activity of the commercial agent in the case of a follow-up order placed by an existing customer or if the transaction can be linked to the commercial agent's responsibility for a specific geographical area or group of customers. This, likewise, does not permit the conclusion to be drawn that the Commercial Agent Directive requires orders to be passed on via a particular channel. Rather, it is clear that the principal's contractual obligation to pay a commission, which is of key importance to a commercial agent, is triggered on the basis of an approach which brings results and the commercial agent's contribution into play.

- 13 Finally, this approach is also reflected in Article 17(2) of the Commercial Agent Directive, which entitles a commercial agent to an indemnity if and to the extent that the commercial agent has brought the principal new customers, among other criteria. Here, too, it is the result which is decisive – namely that the commercial agent is responsible for bringing in new customers – and not the manner in which transactions are ultimately concluded.

### **III. Purpose**

- 14 The purpose of the Commercial Agent Directive is to harmonise the Member States' legal provisions concerning legal relations between the parties to a commercial agent's contract. As is clear from Recitals 2 and 3 of the Commercial Agent Directive, the Directive seeks to protect commercial agents in their relations with principals, to promote the security of commercial transactions and to facilitate the trade in goods between Member States by harmonising their legal systems within the area of commercial representation.
- 15 It would, however, limit the scope of this protection and thus also the objective of the Directive if a person's classification as a commercial agent, and therefore application of the Commercial Agent Directive, were made dependent on whether the sales agent passed on orders to a principal or whether customers themselves contacted the principal directly. To whom a customer ultimately declares his or her intent to conclude a contract can be matter of chance. Linking classification as a commercial agent solely to the manner in which orders are placed could hold the potential for abuse which would be difficult to contain, for example if a principal were able to favour orders placed directly by granting a discount and were therefore able to influence the definition of "commercial agent" through that means alone. A commercial agent can contribute in diverse ways to a principal's turnover, including by means of providing information and advice as well as by discussing matters aimed at facilitating the conclusion of a transaction for the sale of goods on behalf

of the principal.<sup>8</sup> The definition thus in principle also encompasses preparatory measures taken by a sales agent. Such contributions could be ignored if too formal a definition were applied. The strict requirement that a sales agent “pass on” a customer’s order to the principal would, therefore, be too restrictive.

- 16 The decisive criterion when it comes to classifying someone as a commercial agent within the meaning of the Commercial Agent Directive must be that he or she contributes in a more than insignificant way to the conclusion of a contract while acting as an intermediary. The fact that other circumstances can establish independent causalities is irrelevant so long as the sales agent’s contribution is not entirely insignificant. Acting as an intermediary must, thus, be delimited from mere customer relations and customer services work, which does not represent a case of “*vermitteln*” as used in Article 1(2) if the contribution to the concrete conclusion of a contract is lacking.
- 17 Whether, measured against this yardstick, the complainant in the case at hand can be assumed to have contributed to the conclusion of individual contracts is a question which can only be assessed in terms of fact by a national court.

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<sup>8</sup> ECJ, judgment of 4 June 2020, Case C-828/18, *Trendsetteuse*, EU:C:2020:438, margin no. 34.

## E. RESULT

18 Against this backdrop, the questions raised are, in the opinion of the German Federal Government, to be answered as follows:

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.

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.



Klebs