



Brussels, 30.8.2021

sj.a(2021)5982567

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

represented by: Lorna ARMATI and Mislav MATAIJA, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-2/21

Norep AS v Haugen Gruppen AS

in which the Supreme Court of Norway has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice concerning 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 (OJ L 382 of 31.12.1986, p. 17), part of the EEA Agreement at the time of its signing.

TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	LAW.....	3
	II.1. Union law.....	3
	II.2. National law.....	5
III.	FACTS AND THE QUESTIONS ASKED.....	6
IV.	ANALYSIS.....	8
	IV.1. Question one.....	8
	IV.2. Question two.....	12
V.	CONCLUSION.....	15

I. INTRODUCTION

1. This request for an advisory opinion of the EFTA Court concerns the scope of the term “commercial agent” in Article 1(2) of Directive 86/653, and thus of that directive as a whole. The questions posed by the Supreme Court of Norway focus on the term “negotiate”. In order for a service provider performing sales-related activities on behalf of another person to be considered a “commercial agent”, must he or she actually take orders for goods? More broadly, what factors are relevant for determining whether such a provider “negotiates” the sale or purchase of goods, as opposed to merely supporting the principal’s sales activities?
2. The request is made in the course of proceedings in which the applicant, considering itself to have acted as a commercial agent for the respondent, seeks remuneration upon termination of the contract on the basis of the provisions of Norwegian law which implement Directive 86/653. Norwegian courts have so far agreed with the respondent that there was no commercial agency because the respondent’s customers placed orders directly with the respondent, without the applicant’s direct involvement. The Supreme Court of Norway asks, in particular, whether obtaining orders for the principal is a necessary element of commercial agency.

II. LAW

II.1. Union 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 L 382 of 31.12.1986, p. 17; hereinafter, “Directive 86/653”) provides, in its second and third recitals:

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;

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 [...]

4. According to Article 1(2) of that directive:

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

5. Article 3 (which, according to Article 5, the parties may not derogate from) provides, among other things:

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 transactions he is instructed to take care of; [...]

6. According to Article 7 of that directive:

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.

7. Article 8 of that directive provides as follows:

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.

8. Article 17 of that directive (which, according to Article 19, cannot be derogated from to the detriment of the commercial agent before the agency contract expires) deals with the indemnification of commercial agents after termination of the agency contract. It provides, *inter alia*:

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 [...]

II.2. National law

9. The first paragraph of Section 1 of the Norwegian Commercial Agents Act provides:

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.

10. According to the requesting court, the preparatory works suggest that the Norwegian legislator did not intend this definition to be narrower than the one in Directive 86/653. Furthermore, the relevant provisions of the Commercial Agents Act are said to correspond to Articles 3, 4, and 17(2) of Directive 86/653.

III. FACTS AND THE QUESTIONS ASKED

11. The applicant in the main proceedings, Norep AS, claims to have concluded a commercial agency contract with the respondent, Haugen Gruppen AS (hereinafter, “HG”), an importer selling goods to Norway’s largest retail chains. When HG terminated this contract, Norep claimed remuneration amounting to one year’s commission, invoking the provisions of Norwegian legislation implementing Directive 86/653. HG refused to pay on the grounds that it disagreed that Norep acted as a “commercial agent” within the meaning of that legislation, leading to the present dispute.
12. The following elements, drawn from the request by the referring court, provide the factual background to the dispute.
13. The parties concluded an agreement in 1991, and an updated version in 2008. Both are entitled simply “cooperation agreement”, and both refer to Norep as HG’s “exclusive agent” in Northern Norway. The agreement, as updated, tasks Norep with promoting HG’s sales through regular visits to retailers and wholesalers, servicing its geographical area with “sales and follow-up”, and promoting the sale and distribution of its products through “active and diligent sales work”. In exchange, Norep was entitled to a commission on “net invoiced wholesale turnover directly or indirectly to Norep’s geographical area”. There is no provision on indemnification after termination.
14. It is undisputed that, in that agreement, Norep undertook, on a continuing self-employed basis, to work to achieve the sale of goods on behalf of HG. On the other hand, it appears that Norep did not conclude agreements in HG’s name. It also

appears that, as of 2008, orders from retail stores to the retailers' wholesale entities, as well as the orders from those wholesalers to HG, were made directly through an electronic system, and not through Norep. While the 2008 agreement was in force, retail chains' head offices decided on and negotiated issues such as prices, terms and conditions and product ranges centrally and not through retail outlets. This means that sales transactions were negotiated between the chains' head offices and HG without the direct involvement of Norep.

15. The disagreement between the parties is whether the applicant can be said to have acted as a commercial agent even though HG negotiated the main terms for the sales of its goods directly with retail chains' head offices, whose wholesale companies then placed orders directly with HG.
16. This disagreement should be seen in light of the fact that, unlike Article 1(2) of Directive 86/653, the Norwegian Commercial Agents Act expressly refers to the agent's role in "obtaining orders". Applying that legislation, the Norwegian courts deciding in this case have so far concluded that Norep was not a commercial agent because it "did not obtain orders for HG".¹
17. The Supreme Court of Norway considers that this understanding may not be in line with EEA law. Referring in particular to the judgments of the CJEU in *Trendsetteuse* (C-828/18) and *Zako* (C-452/17), it wonders whether Article 1(2) of Directive 86/653 presupposes that commercial agents must "obtain orders" for the principal.
18. The Supreme Court of Norway therefore refers the following questions to the EFTA Court:
 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?

¹ Request for an advisory opinion, para. 11.

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. ANALYSIS

IV.1. Question one

19. The first question seeks to ascertain whether Article 1(2), and in particular the reference to “negotiate”, requires commercial agents to be involved with orders from customers to the principal. Can there still be commercial agency if orders go directly from the customer to the principal?
20. As a starting point, the Commission recalls the well-settled case law according to which Directive 86/653 aims to coordinate the laws of the EEA States as regards the legal relationship between the parties to a commercial agency contract. The harmonising measures laid down by the Directive are intended, *inter alia*, to eliminate restrictions on the carrying-on of the activities of commercial agents, to make the conditions of competition within the EEA uniform and to increase the security of commercial transactions.² Thus, as a general rule, a commercial agent is entitled to the level of protection envisaged by the directive, in particular with respect to indemnification upon termination. Neither the legislators of EEA States, nor the parties themselves, are free to adopt a narrower definition of commercial agency.
21. In the Commission’s view, Article 1(2) does not require that commercial agents must be involved in obtaining (in the sense of “taking”) orders for the principal, and it does not necessarily exclude a situation in which orders go directly from customers to the principal.
22. This position is supported both by various provisions of Directive 86/653 and by the case law of the CJEU.

² Judgment of 17 October 2013, *Unamar*, C-184/12, EU:C:2013:663, paras. 36-37, and the case law cited therein.

23. Unlike the Norwegian legislation, Article 1(2) of Directive 86/653 does not expressly require the agent to “obtain” orders. It sets out two alternative possibilities: the agent must have “continuing authority” to either “negotiate the sale or the purchase of goods on behalf of another person” or “negotiate and conclude such transactions on behalf of and in the name of that principal”. If the term “negotiate” presupposed that in each instance orders must be placed, or transactions concluded, through the agent, then the first of those possibilities would be superfluous. It should also be underlined, in that connection, that the term “negotiate” in Article 1(2) of Directive 86/653 is an autonomous concept of Union law which must be interpreted in a uniform manner.³
24. Furthermore, Article 3(2) of that directive provides that a commercial agent must “make proper efforts to negotiate and, *where appropriate*, conclude the transactions he is instructed to take care of”. Thus, to *negotiate* transactions is not necessarily the same as to conclude them; negotiation can still take place even if the commercial agent does not ultimately conclude a transaction.
25. Next, under Article 7 of that directive, commercial agents are in some cases expressly entitled to commission for transactions which they did not personally conclude, or in which they took no part. Article 7(2) provides for a right to a commission for all transactions concluded in a geographical area with which the agent was entrusted or to which he has an exclusive right, regardless of whether the agent actually took part in those transactions. Indeed, in *Kontogeorgas* and *Chevassus-Marche*, the CJEU confirmed that, under Article 7(2), “where a commercial agent is entrusted with a geographical area, he is entitled to commission on transactions concluded with customers belonging to that area, even if they were concluded without any action on his part.”⁴ As the Commission understands, Norep was HG’s “exclusive agent” in Northern Norway, and its commission was paid precisely on that basis, i.e. as a percentage of HG’s invoiced turnover in that area.
26. In addition, Article 7(1)(b) entitles agents to a commission where the transaction is concluded with a third party that the agent previously acquired as a customer for

³ Judgment of 4 June 2020, *Trendsetteuse*, C-828/18, EU:C:2020:438, para. 25.

⁴ Judgment of 12 December 1996, *Kontogeorgas v Kartonpak*, C-104/95, EU:C:1996:492, para. 19; judgment of 17 January 2008, *Chevassus-Marche*, C-19/07, EU:C:2008:23, para. 14.

transactions of the same kind. Again, this implies that a commercial agent need not conclude or obtain the order for each transaction.

27. It is true that these provisions address situations in which it is already established that the representative is a commercial agent for the principal, however they serve to illustrate the broad approach to the protection afforded to commercial agents that was taken by the EU legislators.
28. More interesting, perhaps, from the point of view of ascertaining what is the essence of the notion of “negotiating” when the final act of concluding the transaction is missing, is Article 8 of the directive. That provision establishes a right to commission where a transaction was concluded after the termination of the agency agreement as long as it was “mainly attributable to the commercial agent's efforts”.
29. In *Zako*, the CJEU explained that Article 1(2) of Directive 86/653 lays down the three necessary and sufficient conditions for a person to be classified as a ‘commercial agent’. First, that person must be a self-employed intermediary. Second, the contractual relationship must be of a continuing character. Third, he 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.⁵ This suggests two conclusions relevant to the case at hand. First, the broad reference to “intermediary for the sale or purchase of goods” does not necessarily entail a role for the agent in taking orders. Second, apart from those three, there can be no additional conditions for classifying an actor as a commercial agent.
30. The CJEU also clarified that Directive 86/653 “seeks to protect commercial agents in their relations with their principals.”⁶ In this regard, the right to remuneration upon termination is of particular importance, and it must be interpreted “in a manner which contributes to that protection of the commercial agent and which therefore takes full account of the merits of the latter in carrying out the transactions assigned

⁵ Judgment of 21 November 2018 23, *Zako*, C-452/17, EU:C:2018:935, para. 23.

⁶ *Zako*, C-452/17, para. 26. See also judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, para. 23.

to him.”⁷ This protective objective would be jeopardised by placing any additional requirements on classifying an actor as a commercial agent,⁸ or by allowing the principal to unilaterally or contractually circumvent the mandatory provisions of Directive 86/653, in particular, those relating to its obligations with regard to the commercial agent.⁹ In this case, requiring the direct involvement of the commercial agent in taking orders would precisely allow the principal to evade its obligations to the agent by switching to a system of centralised and direct ordering.

31. In *Trendsetteuse*, the CJEU was faced with the situation of a commercial agent that was not authorised to set the price of the goods he sold on behalf of the principal. This led the CJEU to interpret the term “negotiate” in Article 1(2) as not necessarily requiring that the commercial agent set the price independently. According to the CJEU, the agency contract can validly limit the agent’s role in that respect, as this does not prevent the agent from fulfilling his or her “main tasks” under Directive 86/653: “to bring the principal new customers and to increase the volume of business with existing customers.” Those tasks can be fulfilled not just by negotiating the price, but more broadly by “providing information and advice as well as through discussions, aimed at facilitating the conclusion of the transaction for the sale of goods on behalf of the principal.”¹⁰
32. Like in *Zako*, the CJEU referred to the protective objective of Directive 86/653 and the risk of the principal circumventing its obligations to the agent (including in particular indemnification after termination, which is, as the CJEU has explained elsewhere, a “mandatory regime” from which neither the Member States nor the parties to an ongoing contract can derogate to the detriment of the agent¹¹), as reasons why a restrictive reading of Article 1(2) should be avoided.¹²

⁷ Judgment of 7 April 2016, *Marchon Germany*, C-315/14, EU:C:2016:211, para. 33.

⁸ *Zako*, C-452/17, para. 27.

⁹ *Zako*, C-452/17, para. 45.

¹⁰ *Trendsetteuse*, C-828/18, paras. 30-34.

¹¹ *Unamar*, C-184/12, para. 40; judgment of 9 November 2000, *Ingmar GB*, C-381/98, EU:C:2000:605, para. 21.

¹² *Trendsetteuse*, C-828/18, paras. 35-38.

33. Thus, various provisions of Directive 86/653 suggest that the commercial agents' task of "negotiating" on behalf of the principal does not necessarily, at least in all cases, require that they conclude transactions or take orders. The case law of the CJEU further clarifies that "negotiating the sale or purchase of goods" means, more broadly, acting as an intermediary, whose main task is to bring new customers or improve sales to existing customers. This task can be achieved not just by setting the terms of individual orders, such as prices or quantities, but more broadly by facilitating the placing of such orders through information, advice or similar.
34. For these reasons, in the Commission's view, the answer to the first question should be that 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.

IV.2. Question two

35. By its second question, the Supreme Court of Norway asks which factors are, in general, relevant to the assessment of whether sales-related activity should be deemed to be "negotiation" for the purposes of Article 1(2) of Directive 86/653.
36. The request for an advisory opinion does not describe in detail the various factual elements that may be relevant to deciding that question. Notably, it does not set out in detail the tasks that Norep actually performed on behalf of HG. Nor is it clear from the request to what extent the Supreme Court of Norway is even able to assess such facts in the context of the appeal before it, given that the discussion of the findings of lower instance courts in the request focuses almost entirely on the issues dealt with in the first question. For these reasons, the following observations will necessarily remain somewhat abstract.
37. The issue here seems to be the following: if concluding transactions or taking orders on behalf of the principal is not a necessary element, how then to draw the line between the tasks of a commercial agent and other types of sales-promoting activities? Indeed, while the definition of a commercial agent should not be read restrictively, it cannot be so broad as to encompass all activities related to sales.

38. To recall, in *Zako*, the CJEU set out three “necessary and sufficient conditions” for the existence of commercial agency. The condition expressed in the terms “negotiate the sale or the purchase of goods” in Article 1(2) means, as the CJEU explained, that the agent must be “an intermediary for the sale or purchase of goods”. Furthermore, in *Trendsetteuse*, the CJEU explained that this intermediary role involves bringing the principal new customers or increasing the volume of business with existing customers, which can be done by “providing information and advice as well as through discussions, aimed at facilitating the conclusion of the transaction for the sale of goods on behalf of the principal.”¹³
39. As already explained in response to the first question, commercial agents need not actually conclude transactions or take orders from customers. In other words, “negotiating” is not in each instance an obligation of result. However, there should clearly be a link between the activities that the commercial agent performs on behalf of the principal and the conclusion of sales made by the principal. This is expressed in several provisions of Directive 86/653 and in the case law. For example, Articles 1(2) and 3 explain that what the agent negotiates are, respectively, “sales” and “transactions”. Article 7 provides for a right to remuneration where transactions are concluded “as a result” of the agent’s actions or with a customer the agent obtained for the principal. That provision also provides for a right to remuneration for all transactions concluded in an area with which he was entrusted, which seems to be based on an assumption that such transactions can be attributed to the efforts of the commercial agent. Article 8 speaks of transactions that are “mainly attributable to the commercial agent's efforts”, and Article 17 refers to the agent’s role in bringing the principal new customers or significantly increasing the volume of business with existing customers.
40. Accordingly, in *Trendsetteuse*, the CJEU explained 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 purchase of goods for the principal’ highlights the intention of the EU legislature that that act have as its

¹³ *Trendsetteuse*, C-828/18, paras. 30-34.

objective the conclusion of contracts of sale or of purchase on behalf of the principal.”¹⁴

41. All of the above suggests a rather strong causal relationship between the agent’s activities and sales to new or existing customers. The agent’s efforts on behalf of the principal must therefore be specifically with a view to achieving the conclusion of contracts of sale or purchase of goods by the principal (even if the placing of orders or the actual act of conclusion is achieved directly with the principal).
42. A commercial agent must also be an intermediary, which means to act as a link between the principal and the customers, or to appear before customers as a representative of the principal. Thus, to simply provide sales-related or promotional services to a seller (for example, gathering data on sales, distributing information to customers, re-stocking shelves etc.) would not amount to commercial agency. Of course, while not sufficient in themselves to conclude that there is commercial agency, such services may, when carried out in combination with other tasks which do fulfil the definition, be an element of the commercial agent’s work.¹⁵
43. It is impossible to set out all factual elements that may be relevant in applying these requirements to specific cases. It is for the national court to take into account all the relevant facts, in light of the guidance of the EFTA Court and the CJEU. In particular, the national court will need to assess the content of the agency contract. As the CJEU explained in *Trendsetteuse*, the purpose of a commercial agent’s activity “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”.¹⁶ The national court should assess the way in which the obligations of the parties are defined. For example, while not determinative in and of itself, the fact that the purported commercial agent is defined as an “exclusive agent” in a particular geographic area, leading to remuneration as foreseen in Article 7(2) of Directive 86/653, may be relevant. It may also be relevant, for example, whether the

¹⁴ *Trendsetteuse*, C-828/18, para. 24.

¹⁵ In that sense, see *Zako*, C-452/17, para. 51.

¹⁶ *Trendsetteuse*, C-828/18, paras. 30.

applicant represented the respondent, participated in sales meetings, actively pursued increased sales, sought and obtained new clients, etc.

44. Based on the foregoing, the Commission considers that the answer to the second question should be that sales-related activity should be deemed to be “negotiation” for the purposes of Article 1(2) of Directive 86/653 if it is specifically taken with a view to achieving the conclusion of contracts of sale or purchase of goods by the principal, and if the agent acts as an intermediary between the principal and customers.

V. CONCLUSION

45. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by the Supreme Court of Norway should be answered as follows:
 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.
 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.

Lorna ARMATI

Mislav MATAIJA

Agents for the Commission