

Brussels, 30 August 2021
Case No: 87048
Document No: 1210445

ORIGINAL

IN THE EFTA COURT
WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-2/21

Norep AS
v
Haugen Gruppen AS

in which the Supreme Court of Norway (*Norges Høyesterett*) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement concerning the interpretation and application 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.

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1 INTRODUCTION AND THE FACTS OF THE CASE

1. Norep AS (“Norep”), the appellant in the case before the Norwegian Supreme Court (“the Referring Court”) is, according to its key information in the Central Coordinating Register for Legal Entities (“the CCRLE”), engaged in “commercial agency and retail trade, and the usual related areas.”¹
2. Haugen-Gruppen AS (“HG”), the defendant before the Referring Court, is, according to its key information in the CCRLE, 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.²
3. The present case concerns Norep’s claim for remuneration upon termination of an agreement under the Norwegian legislation on commercial agents. That claim was not successful before the Salten District Court (*Salten tingrett*) or the Hålogaland Court of Appeal (*Hålogaland lagmannsrett*). Those courts concluded in their judgments that Norep could not be deemed to be a “commercial agent” as defined in the first paragraph of Section 1 of the Norwegian Act on Commercial Agents of 19 June 1992 no. 56 (“the CA Act”).
4. Norep appealed the case to the Supreme Court which is now requesting (“the Request”) the EFTA Court to give an Advisory Opinion on the scope of the rule laid down 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 (“the Directive”).³
5. From the facts of the case it is evident that Norep and HG (together “the Parties”) have had ongoing commercial relations since 1991 on the basis of two

¹ See the Request, page 2.

² *Ibid*, page 2.

³ Part of the EEA Agreement at the time of signing in 1992.

cooperation agreements where Norep is referred to as an “*exclusive agent for current and future products*”. The first agreement was concluded in April 1991. A new agreement (“the Agreement”) was signed by the Parties in 2008.⁴ The latter was terminated by HG in November 2018.

6. 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. The Parties disagree as regards the applicability of the CA Act to Norep and, by extension, Norep’s claim for remuneration upon termination of the Agreement.
7. The first question asked by the Referring Court concerns the issue of how to interpret the term “negotiate” in the definition of a commercial agent in Article 2(1) of the Directive and whether it should be understood as presupposing involvement with orders from customers to the principal, with the results that the orders may not go directly from customers to the principal. If that is answered in the negative, then the second question asks which factors are relevant in the assessment of whether sales-related activity amounts to “negotiation” for the purposes of Article 1(2) of the Directive.

2 EEA LAW

8. The Directive was part of the EEA Agreement at the time of signing in 1992 and entered into force on the 1st of January 1994. The following Recitals and Articles of the Directive are relevant to the Request.

9. Recital 2 states:

“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;”

⁴ See the Request, page 2.

10. Recital 3 sets out the importance of harmonization:

"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;"

11. Recital 4 states:

"Whereas in this regard the legal relationship between commercial agent and principal must be given priority;"

12. Article 1 of the Directive sets out the scope:

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

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

3. A commercial agent shall be understood within the meaning of this Directive as not including in particular:

a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association,

a partner who is lawfully authorized to enter into commitments binding on his partners,

a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy."

13. Article 3 regarding rights and obligations states:

"1. In performing [his]⁵ 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;

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

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

⁵ Changed by ESA, in the English official translation it is written "has".

14. Article 4 regarding rights and obligations provides:

- “1. In his relations with his commercial agent a principal must act dutifully and in good faith.*
- 2. A principal must in particular:*
- (a) provide his commercial agent with the necessary documentation relating to the goods concerned;*
 - (b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.*
- 3. 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.”*

15. Article 7 regarding remuneration provides:

- “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.”*

16. Article 17 regarding conclusion and termination of the agency contract states:

- “1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.*
- 2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:*
- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and*
 - the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.*
- 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.

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

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

—depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,

—and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

4. Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death.

5. The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

6. The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this Article, and shall if necessary submit to it proposals for amendments.”

17. Article 18 regarding conclusion and termination of the agency contract provides:

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

(a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;

(b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities;

(c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.”

18. Article 19 regarding conclusion and termination of the agency contract states:

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

3 NATIONAL LAW

19. The CA Act (*Lov om handelsagenter og handelsreisende - agenturloven*)⁶ implemented the Directive into national law. Pursuant to the preparatory works⁷, the main objective was to align national law with EEA law. The following provisions in the CA Act are relevant to the Request.⁸

20. Section 1 (1) of the CA Act sets out the definition of a commercial agent:

“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.”

21. Section 5 of the CA Act sets out the general duties of the agent:

“In performing his activities a commercial agent shall look after his principals interests dutifully and in good faith.

A commercial agent shall in particular:

- 1) Make proper efforts to procure orders and, where it is part of the agency contract, conclude transactions,*
 - 2) Inform the principal of orders procured and transactions concluded and of other significance for the performance of the agency contract, and*
 - 3) Comply with reasonable instructions given by his principal.*
- The parties may not derogate from the provisions of this section.”*

22. Section 10 of the CA Act regarding commission during the period of the agency contract aims at transposing Article 7(2) of the Directive and provides:

“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]⁹ 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]¹⁰ is concluded with a third party belonging to the geographical area or group of customers.*

A newly appointed commercial agent shall not be entitled to the commission referred to in the first paragraph if that commission is payable, pursuant to

⁶ Norwegian Act on Commercial Agents of 19 June 1992 no. 56.

⁷ Ot. prp. nr. 49 (1991-1992) Om lov om handelsagenter og handelsreisende (agenturloven), Chapter 1 and 2.

⁸ Please note that there are translation deviations in public translations. Inaccurate translations may occur in the text.

⁹ Translation by ESA.

¹⁰ Translation by ESA.

section 11, to the previous agent, unless it is equitable because of the circumstances for the commission to be shared between them.”

23. Section 28 of the CA Act sets out the remuneration when the agency agreement is terminated:

“When an agency contract is terminated, the commercial agent shall be entitled to an indemnity if and to the extent that

- 1) He has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal will continue to derive substantial benefits from the business with such customers, and*
- 2) The indemnity is equitable having regard to all the circumstances, including the commission lost by the commercial agent on contracts with customers as mentioned in subparagraph 1.*

The provision of the first paragraph shall apply correspondingly when an agency contract is terminated as a result of the commercial agent’s death.

The amount of the indemnity under the first or second paragraph shall not exceed a figure equivalent to one year’s indemnity. This amount shall be calculated on the basis of the commercial agent’s average annual remuneration over the preceding five years. If the contract goes back less than five years the indemnity shall be calculated on the basis of the average for the period in question.

The parties may not derogate from the provisions of this section to the detriment of the commercial agent before the agency contract expires.”

4 THE QUESTIONS REFERRED

24. The Referring Court asks the following two 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?”

5 LEGAL ANALYSIS

5.1 Introductory remarks

25. The Directive was, as stated above, part of the EEA Agreement at the time of its signing in 1992 and entered into force on the 1st of January 1994. It was

incorporated into the EEA Agreement without any amendments or adaptations. The Directive was implemented into Norwegian law by the CA Act.

26. ESA submits that when looking at the text of the Directive it is evident that the aim is to harmonise national laws with regard to commercial representation. This is clear from the Recitals and the Articles of the Directive.¹¹

27. In ESA's view, it is furthermore supported by settled case law of the Court of Justice of the European Union ("CJEU") that the aim of the Directive is to harmonise the legislation regarding commercial agents.¹² This case law confirms that it is apparent from Recital 2 of the Directive that 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.¹³

28. Furthermore, a natural starting point is to recall certain fundamental characteristics of what constitutes a commercial agent for the purposes of the Directive. ESA notes that with regards to the scope and applicability of the Directive, it follows from case law that self-employed commercial agents must act in the name of a third party to fall within its scope. If they act on behalf of a principal, but in their own name, then they fall outside of the Directive's scope.¹⁴

29. A commercial agent is thus someone that is self-employed and works as a contractor with one or more parties. The commercial agent acts as an

¹¹ See Recitals 2 and 3 as well as Articles, 3, 4, 5, 17, 18 and 19 of the Directive.

¹² See e.g. Judgment of the CJEU of 3 December 2015 in Case C-338/14, *Quenon K. SPRL v Beobank SA and Metlife Insurance SA*, EU:C:2015:795, paragraph 23 and the case law cited, judgment of the CJEU of 7 April 2016 in Case C-315/14, *Marchon Germany GmbH v Yvonne Karaszkiwicz*, EU:C:2016:211, paragraph 23, and judgment of the CJEU of 4 June 2020 in Case C-828/18, *Trendsetteuse SARL v DCA SARL*, EU:C:2020:438, paragraph 36.

¹³ Judgment of the CJEU of 9 November 2000 in Case C-381/98, *Ingmar GB Ltd and Eaton Leonard Technologies Inc.*, EU:C:2000:605, paragraph 23, judgment of the CJEU of 30 April 1998 in Case C-215/97, *Barbara Bellone v Yokohama SpA*, EU:C:1998:189, paragraph 10, judgment of the CJEU of 23 March 2006 in Case C-465/04, *Honyvem Informazioni Commerciali Srl v Mariella De Zotti*, EU:C:2006:199, paragraph 18, judgment of the CJEU of 26 March 2009 in Case C-348/07, *Turgay Semen v Deutsche Tamoil GmbH.*, EU:C:2009:195, paragraph 14, judgment of the CJEU of 17 October 2013 in Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, EU:C:2013:663, paragraph 36.

¹⁴ Judgment of the CJEU of 10 February 2004 in Case C-85/03, *Mavrona & Sia OE and Delta Etairia Symmetochon AE.*, EU:C:2004:83, paragraph 21.

intermediary between the two parties. The reason for this demarcation is that the activity pursued by a person acting on behalf of a third party but in their own name is different from the activity pursued by commercial agents. The difference being that when acting in the name of the principal the intermediary is under the principal's protection and the principal is responsible for the work of the intermediary, while when the intermediary acts under his own name he bears the responsibilities himself. Thus, the interests and need for protection of the two occupations are not the same.¹⁵

30. ESA respectfully submits the following legal assessment in the case:

5.2 The first question

31. The first question asks how to interpret the term “*negotiate*” in Article 1(2) of the Directive and whether it should 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 are described in the Request.

32. To start with ESA would like to recall the wording of the provision contained in Article 1(2) of the Directive, which provides: “*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.*”¹⁶

33. ESA submits that Article 1(2) of the Directive lays down the conditions to be fulfilled, in order to be considered a commercial agent, as further clarified in settled case law. The CJEU stated in Case C-452/17 *Zako* that Article 1(2) of the Directive 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***

¹⁵ See judgment of the CJEU of 10 February 2004 in Case C-85/03, *Mavrona & Sia OE v Delta Etairia Symmetochon AE.*, EU:C:2004:83, paragraph 17.

¹⁶ Article 1(2) of the Directive, cited above.

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.¹⁷

34. These conditions were confirmed in Case C-828/18 *Trendsetteuse* as being “[...] ***the three necessary and sufficient conditions*** [...]”¹⁸ needed to be fulfilled in order to be considered a commercial agent under the Directive. To answer the question from the Referring Court, it is necessary to define the meaning of the term “*negotiate*” from the third and last condition in Article 1(2), in order to establish whether it necessarily means that orders cannot go directly from the customer to the principal.¹⁹

35. ESA notes when looking at the interpretation of the term “*negotiate*” within the EEA that the objective of the Directive, as stated above in paragraphs 26 and 27 is to harmonise national laws concerning commercial representation. Furthermore, in *Trendsetteuse* it is stated that since the Directive made no reference to national law regarding “*the meaning to be given to the concept of “negotiate”, that provision must be regarded, for the purposes of the application of [the Directive], as containing an autonomous concept of EU law which must be interpreted in a uniform manner throughout the territory of the [EEA].*”²⁰ This leads to the conclusion that the term “*negotiate*” must be interpreted in a uniform manner within the EEA.

36. ESA submits that it is also clear from case law, *inter alia*, that national provisions set individually by the EEA States subjecting the validity of an agency contract to a condition, of e.g. registering the commercial agent with the result that if the agent is not registered he is deprived of any protection under the Directive, is contrary to the aims of the Directive.²¹ ESA notes that the conditions are exhaustively listed in the Directive and once it has been established that a commercial agent falls within the scope of the Directive, then all the provisions

¹⁷ See judgment of the CJEU of 21 November 2018 in Case C-452/17, *Zako SPRL v Sanidel SA*, EU:C:2018:935, paragraph 23.

¹⁸ See Case C-828/18 *Trendsetteuse*, cited above, paragraph 22.

¹⁹ Emphasis in paragraphs 32, 33 and 34 of these wobs added by ESA.

²⁰ See Case C-828/18, *Trendsetteuse*, cited above, paragraph 25.

²¹ See Case C-215/97, *Barbara Bellone v Yokohama SpA*, cited above, paragraph 13.

of the Directive apply to the agent including the provisions regarding remuneration.

37. ESA submits, as is stated earlier, that the CA Act implements the Directive into the Norwegian legal system. ESA notes that the translation of the term “*negotiation*” in the CA Act, seems to be formulated differently, Section 1(1) of the CA Act, cf. uses the wording “obtaining orders” (Norwegian: *innhente ordrer*), while Article 1(2) of the Directive uses the term “negotiate”.
38. In the preparatory works accompanying the CA Act, the definition of an agent states that “[a]nyone who is regarded as a “commercial agent” within the meaning of the EC Directive will also be covered by the definition of the draft law, cf. Article 1 (2) of the Directive”.²²
39. Norwegian case law supports the preparatory works’ reference to the application of the definition in the Directive. In a judgment by the Oslo District Court it was thus stated;²³ “[a]s the Commercial Agents Act is an implementation of the EC Council Directive of 18 December 1986 (Directive), an interpretation of the Act must also refer to this Directive and other sources of EC/EU law. Anyone who is considered a commercial agent within the meaning of the Directive will also be covered by the definition of the draft law”.²⁴
40. Consequently, ESA understands that the relevance of involvement with orders has the same bearing pursuant to the CA Act as under the Directive.
41. As stated above in paragraph 33, an agent must fulfil the three “Zako conditions”, in order to fall within the scope of the Directive. When looking beyond these three conditions, there are other factors ESA has considered to answer the first question from the Referring Court. *Trendsetteuse* further clarified the meaning of the term “*negotiate*” and stated that the fact that the act of negotiation referred to in Article 1(2) of the Directive “*must relate to ‘the sale*

²² Ot. prp. nr. 49 (1991-1992) Om lov om handelsagenter og handelsreisende (agenturloven), Chapter 7, part 1, *Til § 1 Definisjoner*, paragraph 4.

²³ Translation by ESA.

²⁴ Judgment of 17 October 2003 by the Oslo District Court - TOSLO-2001-11864.

or purchase of goods for the principal' highlights the intention of the EU legislature" that the objective is the conclusion of contracts of sale or of a purchase by the principal.

42. ESA submits that in Case C-3/04 *Poseidon Chartering*, the CJEU stated that it was clear from Article 1(2) of the Directive that a commercial agency contract is defined in particular by the fact that the agent, a self-employed intermediary, is invested by the principal with a continuing authority to negotiate. This the CJEU found evident based on several provisions of the Directive e.g. Articles 3 and 4. The Court also stated that the number of transactions concluded for and on behalf of the principal could normally be an indicator of that continuing authority.²⁵
43. ESA considers, first, that the three conditions set out in *Zako*²⁶ do not suggest that actual involvement with orders constitutes a determining factor to be considered a commercial agent under the Directive. Reference is in particular made to the first option under the third condition: "*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 [...]*". Furthermore, a commercial agent satisfying those conditions may also engage in ancillary activities, not strictly speaking connected to sales, and still be considered a commercial agent for the purposes of the Directive.²⁷
44. Second, in *Trendsetteuse*, the CJEU found it apparent that the "*main tasks*" of the commercial agent are to "*bring the principal new customers and to increase the volume of business with existing customers*".²⁸ The CJEU further pointed out that it is possible for the agent to accomplish those tasks by **providing information and advice**²⁹ as well as through discussions, aimed at facilitating

²⁵ See judgment of the CJEU of 16 March 2006 in Case C-3/04, *Poseidon Chartering BV v Marianne Zeeschip VOF and Others*, EU:C:2006:176, paragraphs 24 and 25.

²⁶ See Case C-452/17, *Zako*, cited above, paragraph 23.

²⁷ *Ibid*, paragraphs 37 and 38.

²⁸ See Case C-828/18, *Trendsetteuse*, cited above, paragraph 33.

²⁹ Emphasis added by ESA.

the conclusion of the transaction for the sale of goods on behalf of the principal.³⁰

45. These cases could be interpreted as meaning that there needs to be a conclusion of a contract of sale in order for the three conditions from *Zako* to be fulfilled. Another indication of this is that the provisions contained in Article 10(1) and (2) of the Directive consistently refer to the execution of transactions in their wording.

46. However, Article 3(2)(a) of the Directive sets out the agent's duties and merely states that the agent must "*make proper efforts to negotiate*", "*where appropriate*", to conclude the transaction. In ESA's view this indicates that concluding the contract is not a determining factor to be considered a commercial agent, but rather refer to those instances where it is "*appropriate*". Moreover, ESA notes that the CJEU's remarks in *Poseidon Chartering* regarding the number of transactions see paragraph 42 above must be read in light of the particular question put before the Court in that case, namely whether a self-employed intermediary with authority to conclude a single charter for a ship, qualified as a commercial agent for the purposes of the Directive.³¹

47. Moreover, it is settled case law that the meaning and scope of terms, where there is no definition given in EEA law, must be determined by considering their usual meaning in everyday language, while also taking into account the context where they occur in and the purposes of the rules of which they are part.³²

48. ESA notes, when looking at the interpretation of the term "*negotiate*" in settled case law of the CJEU and the Directive's objective and aim, that it does not entail "*that orders may not go directly from customers to the principal*". On the contrary, as is stated in Case C-315/14 *Marchon Germany* it is clear that the

³⁰ See Case C-828/18, *Trendsetteuse*, cited above, paragraph 34.

³¹ See Case C-3/04, *Poseidon Chartering*, cited above, paragraphs 24 and 25.

³² See judgment of the CJEU of 29 July 2019 in Case C-516/17, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:625, paragraph 77, judgment in Case C-828/18, *Trendsetteuse*, cited above, paragraph 26 and judgment of 1 March 2016 in Case C-443/14 and C-444/14, *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, EU:C:2016:127, paragraph 27.

intention was to interpret the term broadly to give a wider protection to the commercial agents.³³

49. ESA further submits that when looking at the term “*negotiate*” in the context of the Directive, e.g. Article 3 which refers to proper efforts to negotiate, where appropriate and Article 7 it does seem that the order can go directly from customers to the principal. The circumstances as mentioned in Article 7 of the Directive do not require that the agent obtains orders. Rather, the wording seems to support and take into account that such orders exist without involvement from the agent and that the commercial agent shall be entitled to a commission as laid out in Article 7(2) without having to negotiate.

50. It is ESA’s understanding that the CJEU case law refers to a broader interpretation of the wording “*negotiate*”, a wider scope of activities and a broader time line in the sale process that may entail that someone is considered a commercial agent within the scope of the Directive.

51. ESA submits that the interpretation of the case law above entails that in general a narrow interpretation does not seem to be accepted and the aim of both the legislature as well as the case law seems to be to interpret the scope broader for the protection of the commercial agent in line with the provisions of the Directive.³⁴ Consequently in ESA’s view, any interpretation to the effect that the Directive would exclude commercial agents from its scope because the order was made directly from the customer to the principal, is too narrow.

52. Therefore, with reference to the above, ESA concludes that there does not seem to be any legal ground to interpret the term “*negotiate*” to mean that orders may not go directly from customers to the principal.

Conclusion to the first question

53. ESA consequently submits that the answer to question one is negative, meaning that the term “*negotiate*” in Article 1(2) of the Directive shall not be interpreted

³³ See Case C-315/14, *Marchon Germany*, cited above, paragraph 33.

³⁴ *Ibid*, paragraph 33 and Case C-452/17, *Zako*, cited above, paragraphs 27 and 28.

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.

5.3 The second question

54. The second question from the Referring Court is asked, if the first question is answered in the negative, as ESA has done above. The question asks 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 the Directive.

55. When considering which factors are relevant in the assessment of whether sales-related activity is to be deemed “*negotiation*”, and in which cases it is not, it is important to examine *inter alia* the intention of the legislature, the objectives of the Directive, the relevant case law and context in which the provision features.

56. ESA submits, that the term “*negotiation*” is set out to mean that negotiation under the Directive should be done with the view of concluding the transaction, where appropriate. In *Trendsetteuse* it is stated that the Directive does not define the term negotiate but the fact that the act of “*negotiations*” referred to in Article 1(2) 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 objective the conclusion of contracts of sale or of purchase on behalf of the principal.³⁵

57. In paragraphs 33 to 52 above the interpretation of the term negotiate is assessed in accordance with settled case law and the conclusion drawn is that the provision must be interpreted as stated above in paragraph 55, in line with the context in which that provision operates.³⁶ The first context would be the Directive itself.

58. As stated in *Trendsetteuse*³⁷, “*in the first place, the context in which that provision operates, first, it follows from Article 3(1) and (2)*” of the Directive that, under his contract, the commercial agent must safeguard the principal’s

³⁵ See Case C-828/18, *Trensetteuse*, cited above, paragraph 24.

³⁶ *Ibid*, paragraph 29 and Case C-315/14, *Marchon Germany*, cited above, paragraphs 30 and 33.

³⁷ See Case C-828/18, *Trendsetteuse*, cited above, paragraph 30.

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 of, by the principal. It is evident that the purpose of the commercial agent's activity thus depends on the terms of the agreement which binds him to the principal and in particular, on the contract between the Parties with regard to the goods which the principal intends to sell or purchase through the mediation of that commercial agent.³⁸

59. Second, as stated in *Trendsetteuse*, the fact that the commercial agent cannot change the price of the goods by negotiation does not prevent the commercial agent from carrying out his main tasks. Excluding those who do not have the power to negotiate prices would run counter to the objectives of the Directive.³⁹

60. However, it is important to emphasize, that the general starting point for any agency agreement; in order for the commercial agent to fall within the scope of the Directive, is that the three necessary and sufficient conditions for a person to be classified as a "commercial agent" of Article 1(2) set out in *Zako*⁴⁰ have to be fulfilled, see above paragraph 33.

61. ESA submits that, the commercial agent can carry out other activities in addition to the activities set out in these three conditions without being precluded from the protection of the provisions of the Directive.⁴¹ It is only after those conditions have been satisfied that the agent can take on other activities. This is confirmed by Case C-104/95 *Georgios Kontogeorgas* where the commercial agent was doing marketing work.⁴² This is moreover, assessed in greater detail in *Zako* where the court concluded that the Directive does not preclude the commercial agent from taking on other tasks than stated in Article 1(2) of the Directive.⁴³

³⁸ *Ibid*, paragraph 30.

³⁹ *Ibid*, paragraphs 31 – 37.

⁴⁰ See Case C-452/17, *Zako*, cited above, paragraph 24.

⁴¹ *Ibid*, paragraph 38.

⁴² See judgment of the CJEU of 12 December 1996 in Case C-104/95, *Georgios Kontogeorgas v Kartonpak AE*, EU:C:1996:492.

⁴³ See Case C-452/17, *Zako*, cited above, paragraph 48.

62. ESA furthermore notes that the Agreement determines the role and the aim of the contractual relationship between the Parties⁴⁴ and what the Parties considered to be the role of the “*commercial agent*”. The context of the term “*negotiate*” in Article 1(2) of the Directive and the provisions of the Agreement also needs to be considered.
63. The Agreement cannot however, exclude the commercial agent from the protection of the Directive by providing in the Agreement other tasks in addition to those related to the activities of commercial agents. This is clearly stated in *Zako* as the commercial agent cannot be excluded from the protection of the Directive on the ground that the agreement provides for other tasks than those related to the activities of a commercial agent. This is to make sure that the mandatory provisions are not circumvented by the principal.⁴⁵
64. ESA submits that it is important to note whether the contractual relationship between the parties lays out activities which indicate that the agent is carrying out commercial activity such as participating in meetings, negotiating the price and bringing new clients to the principal. In this respect, it is for the Referring Court to assess the Agreement in the light of the applicable national law.⁴⁶
65. Furthermore, ESA submits that a reference to a specific geographical area is a factor that should be considered. In *Georgios Kontogeorgas*⁴⁷ the parties had concluded a marketing agreement, which was later terminated and the parties disagreed about the remuneration. The CJEU concluded that the second indent of Article 7(2) meant “*that, where a commercial agent is responsible for 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.*”⁴⁸ ESA considers that since the interpretation of the CJEU regarding remuneration is this broad, it is relevant to consider this when looking at the interpretation of the term “*negotiation*”.

⁴⁴ See Case C-315/14, *Marchon Germany*, cited above, paragraphs 23, 30-33.

⁴⁵ See Case C-452/17, *Zako*, cited above, paragraph 45.

⁴⁶ See Case C-348/07, *Turgay Semen*, cited above, paragraph 30.

⁴⁷ See Case C-104/95 *Georgios Kontogeorgas*, cited above, paragraph 3.

⁴⁸ *Ibid*, paragraph 19.

66. In a later judgment in Case C-19/07 *Heirs of Paul Chevassus-Marche* the CJEU ruled that the first indent of Article 7(2) of the Directive must be interpreted as meaning that a commercial agent entrusted with a specific geographical area does not have the right to a commission for transactions concluded by customers belonging to that area with a third party without any action, direct or indirect, on the part of the principal. This conclusion of CJEU was based on Articles 7(2), 10(1) and (2), and 11(1) of the Directive, read in conjunction with the result that the commercial agent can claim commission on the basis of a transaction only to the extent that the principal acted, directly or indirectly, in the conclusion of that transaction.⁴⁹
67. These two judgments show in ESA's view that the principal has to act in the conclusion of the transaction in order for the commercial agent to be entitled to remuneration, while that does not seem to be needed with regards to the commercial agent.
68. ESA submits that the previous remuneration could also be an indicator of what type of relation applies to the parties. Thus, if a party has been receiving remuneration on the basis of contractual relations between the parties that is based on the provisions of the Directive the remuneration upon termination of the contractual relationship should also be based on the provisions of the Directive.
69. Finally, ESA has considered if there are any relevant circumstances that would likely fall outside of the term "*negotiation*". Of particular interest for our case is promotional work. ESA notes that when looking at different Norwegian case law, courts assess this distinction.⁵⁰ ESA submits that for example the Norwegian case from the Borgarting Court of Appeals (*Borgarting lagmannsrett*) of 15 January 2007 LB-2005-166645, where a request for remuneration for an advertisement sale for a newspaper was declined. The court found that the relationship **did not have sufficient similarities with an agency relationship**

⁴⁹ See judgment of the CJEU of 17 January 2008 in Case C-19/07, *Heirs of Paul Chevassus-Marche v Groupe Danone, Kro beer brands SA (BKSA), Évian eaux minérales d'Évian SA (SAEME)*, EU:C:2008:23, paragraphs 21 and 23.

⁵⁰ See Norwegian case LB-2005-166645.

for it to be natural to apply the CA Act by analogy.⁵¹ The sellers did not incorporate the newspaper into the market, and it was not considered to be after-effects of their work that entailed a significant advantage for the principal.

70. This indicates in ESA's view that there has to be some advantages for the principal in order for the commercial agent to fall within the scope of the Directive and in order to be protected by its provisions. These advantages could mean that there has been increased volume in business for the principal. Furthermore, the agent could, in ESA's view, be considered to perform more than mere promotional work when the agent is working with the aim of concluding a specific sale for the principal, such as by participating in scheduled meetings with specific clients.

71. To summarise the above-mentioned factors, ESA submits that the commercial agent must be acting with the view of concluding the purchase or the contract, and safeguarding the principal's interests by 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 agent does not need to be able to change the price of the goods, but he must fulfil the three sufficient and necessary conditions mentioned in *Zako*.⁵²

72. After it has been determined that the commercial agent falls within the scope of the Directive the commercial agent can take on other tasks such as marketing. This is confirmed by *Georgios Kontogeorgas*⁵³ and in *Zako*. Furthermore, the geographical area assigned to the agent can indicate the entitlement to remuneration. Finally, ESA submits that if the commercial agent falls under the scope of the Directive the provisions of the remunerations of the Directive also apply.

73. ESA does not exclude that promotional work could fall within the scope of the term "*negotiation*" for the purposes of Article 1(2) of the Directive. However, promotional work must be assessed on the basis of the above-mentioned factors, as opposed to for example mere advertisement without any link to the

⁵¹ Emphasis added by ESA.

⁵² See Case C-452/17, *Zako*, cited above, paragraph 23.

⁵³ See Case C-104/95, *Georgios Kontogeorgas*, cited above, paragraph 3.

wording “*negotiate*”. This will follow from the context of the Agreement, which is for the Referring Court to assess.

Conclusion to the second question

74. Finally, ESA respectfully submits that based on the above assessment, and settled case law of the CJEU, the relevant factors in determining whether sales-related activity is to be deemed “*negotiation*” for the purposes of Article 1(2) of the Directive must be interpreted broadly based on the above analysis and in the context of the Agreement between the Parties. The provisions of the Agreement applicable to this case are for the Referring Court to assess.

6 CONCLUSION

Accordingly, ESA respectfully proposes that the Court responds to the Request as follows:

- 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.**
- 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.**

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