



JUDGMENT OF THE COURT

14 December 2021*

(Self-employed commercial agents – Directive 86/653/EEC – Article 1(2) – Definition of “commercial agent” – Negotiation of the sale or purchase of goods on behalf of the principal)

In Case E-2/21,

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

Norep AS

and

Haugen Gruppen AS,

concerning the interpretation of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Norep AS, represented by Magne Mjaaland, advocate;
- the German Government, represented by Johannes Möller, Dr David Klebs, Mathias Hellmann and Dr Ulrich Bartl, acting as Agents;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the EFTA Surveillance Authority (“ESA”), represented by Ingibjörg Ólöf Vilhjálmsdóttir, Marianne Arvei Moen, Catherine Howdle, Michael Sánchez Rydelski and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Lorna Armati and Mislav Mataija, acting as Agents;

having regard to the Report for the Hearing,

having heard the oral arguments of Norep AS, represented by Magne Mjaaland; Haugen Gruppen AS, represented by Thor Einar Kristiansen, advocate; ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir and Marianne Arvei Moen; and the Commission, represented by Lorna Armati and Mislav Mataija; at the remote hearing on 27 October 2021,

gives the following

Judgment

I Legal background

EEA law

- 1 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17) (“the Directive”) was incorporated into Annex VII to the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by virtue of the entry into force of the EEA Agreement.
- 2 The second recital of the Directive reads:

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

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

4 Article 1(2) of the Directive reads:

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

5 Article 3 of the Directive reads:

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

2. In particular, a commercial agent must:

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

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

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

6 Article 4(3) of the Directive reads:

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

7 Article 7 of the Directive reads:

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

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

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

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

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

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

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

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

8 Article 8 of the Directive reads:

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

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

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

9 Article 17(2) of the Directive reads:

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

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

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

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

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

National law

- 10 The first paragraph of Section 1 of the Act of 19 June 1992 on commercial agents and commercial travellers (*lov om handelsagenter og handelsreisende (agenturloven) 19. juni 1992*) (“the 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.

- 11 According to the referring court, the preparatory works (draft legislative proposal submitted to the Odelsting – Ot.prp. nr. 49 (1991–1992) page 13) state that it is assumed that anyone deemed to be a commercial agent for the purposes of the Directive will also come within the scope of the definition in the Act.
- 12 Furthermore, upon termination of the agency contract, the commercial agent is entitled to remuneration on termination under Section 28 of the Act if the criteria in that act are met. Those criteria correspond to those in Article 17(2) of the Directive. Under the Act, the commercial agent and the principal have a duty of mutual loyalty, and the substance of that duty is expressed in Sections 5 to 7 of that act. Those provisions are intended to implement Articles 3 and 4 of the Directive.

II Facts and procedure

- 13 Norep AS (“Norep”) was established in 1989. According to the request, Norep is engaged in “commercial agency and retail trade, and the usual related areas”.
- 14 What is now Haugen Gruppen AS (“HG”) was established in 1979. According to the request, HG is engaged in “trade, marketing, administration, property management and the usual related areas, and participation in other companies, possibly through acquisition of shares” 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, HG has had the three leading retail grocery chains in Norway as its customers: Coop, NorgesGruppen and Rema.

- 15 On 17 April 1991, Norep concluded an agreement with HG (at that time called Erik Haugen Management AS (“E.H.”)). The agreement is entitled “Cooperation agreement”. The agreement provides that Norep “is ... to be E.H.’s exclusive agent for current and future products that may be introduced by E.H., in the specified geographical area”. The agreement further describes the parties’ obligations, financial matters, and the validity of the agreement. In the negotiations leading up to the agreement, the question of remuneration upon termination of the agreement was discussed between the parties. However, the agreement does not contain any provisions on this point.
- 16 After 17 years of cooperation on the basis of the 1991 agreement, the parties entered into a new agreement in 2008. This new agreement is also entitled “Cooperation agreement”, and in the agreement Norep is referred to as the “exclusive agent”. The agreement does not contain any provisions on remuneration upon termination of the agreement. Neither this nor the application of the Act was a point of discussion between the parties during the negotiations leading up to the agreement. It is stated in the agreement that it “is a revision of and replaces” the 1991 agreement.
- 17 In November 2018, HG terminated the parties’ agreement. The reason for the termination was that HG’s customers, Coop, NorgesGruppen, and Rema, had decided to undertake the physical handling of the products in the retail outlets themselves. HG therefore no longer needed Norep’s services. In January 2019, Norep lodged a claim for remuneration on termination under Section 28 of the Act. The claim amounted to one year’s commission, based on the average of the previous five years’ turnover. HG denied that the Act applied to the 1991 and 2008 agreements and that Norep was entitled to remuneration on the termination.
- 18 On 10 October 2019, Norep lodged legal proceedings before Salten District Court (*Salten tingrett*), claiming that HG should be ordered to pay damages determined at the court’s discretion. The claim was subsequently amended to have as its principal claim remuneration on termination under the Act or, in the alternative, damages.
- 19 The District Court found that the Act did not apply to this cooperation relationship, and determined that HG was not liable to Norep.
- 20 Hålogaland Court of Appeal (*Hålogaland lagmannsrett*) came to the same result and dismissed the appeal. The Court of Appeal found it proven that Norep through the agreement with HG “in the course of business operations under agreement with another party ... has undertaken, on a continuing self-employed basis, to work to achieve the sale ... of goods on behalf of the principal”. It noted, however, that the definition in the Act contains a more specific indication of how the party to the contract is to “work to achieve

the sale” in order to be considered a commercial agent, that is to say, “by obtaining orders for the principal or by concluding agreements in the principal’s name”.

- 21 The Court of Appeal did not find it probable that Norep concluded agreements in HG’s name. The question was then whether Norep could be said to have “obtained orders for the principal”. Overall, the Court of Appeal found it most probable that both orders from stores to wholesalers and from wholesalers to HG went electronically and directly, without Norep as an intermediary, throughout the period that the parties’ 2008 agreement was in effect.
- 22 Norep’s appeal to the Supreme Court concerns the Court of Appeal’s application of the law. Leave to appeal was granted by decision of 21 January 2021 of the Supreme Court’s Appeals Selection Committee.
- 23 In the request it is stated that the Act is intended to implement the Directive. However, the conditions for being deemed a commercial agent set out in the first paragraph of Section 1 of that act differ from those provided for in Article 1(2) of the Directive.
- 24 Against this background, the Supreme Court decided to stay the proceedings and request an advisory opinion from the Court. The request, dated 26 May 2021, was registered at the Court on 11 June 2021. The Supreme Court has referred the following questions to the 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 is described in the facts of the request]?*
 2. *If Question 1 is answered in the negative, which factors are relevant in the assessment of whether sales-related activity is to be deemed to be “negotiation” for the purposes of Article 1(2) of Directive 86/653?*
- 25 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Question 1

- 26 By its first question, the referring court seeks in essence to ascertain whether the term “negotiate” in Article 1(2) of the Directive requires commercial agents to be involved with orders from customers to the principal, with the result that the orders may not go directly from customers to the principal.
- 27 Article 1(2) of the Directive defines a commercial agent as a self-employed intermediary who has continuing authority either to negotiate the sale or the purchase of goods on behalf of another person, referred to as the “principal”, or to negotiate and conclude such transactions on behalf of and in the name of the principal.
- 28 That provision 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, he must be bound to the principal by a contractual relationship 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 (compare the judgments in *Zako*, C-452/17, EU:C:2018:935, paragraph 23, and *Trendsetteuse*, C-828/18, EU:C:2020:438, paragraph 22 and case law cited).
- 29 Therefore, it is sufficient that a person satisfies those three conditions in order to be classified as a “commercial agent” within the meaning of Article 1(2) of the Directive, regardless of the arrangements under which he performs his activities, and provided that he does not fall within one of the exclusions laid down by Article 1(3) and Article 2 (compare the judgment in *Zako*, cited above, paragraph 24).
- 30 Only the third of those conditions, insofar as it concerns the term “negotiate”, is at issue in the present case. It must be noted that the Directive does not define the term “negotiate” and does not make any reference to national law concerning the meaning to be given to it. Thus, the term “negotiate” must be regarded as containing an autonomous concept of EEA law which must be interpreted in a uniform manner throughout the EEA. Its scope cannot therefore be determined by reference either to concepts known to the laws of the EEA States or to classifications made at national level (compare the judgment in *Trendsetteuse*, cited above, paragraph 25 and the case law cited).
- 31 It should be borne in mind that the meaning and scope of terms for which EEA law provides 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 (compare the judgment in *Trendsetteuse*, cited above, paragraph 26 and the case law cited). Such considerations must be taken into account when determining whether the term “negotiate” in Article 1(2) of the Directive necessarily entails that orders

must be placed – or transactions concluded – through an individual, in order for that individual to be regarded as a commercial agent.

- 32 As regards the wording of that provision, the third condition 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”. As the Commission observed, 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.
- 33 The European Court of Justice has noted that while the majority of the language versions of Article 1(2) of the Directive use terms which can be translated as “negotiate”, some versions such as the German one contains a broader term, which can be translated as “act as intermediary” (compare the judgment in *Trendsetteuse*, cited above, paragraph 27). The Norwegian-language version, like the Danish-language version, also contains the broader term “formidle”, which can be translated as “to intermediate”.
- 34 Notwithstanding such differences, the wording used in the various language versions of Article 1(2) of the Directive do not contain any requirements presupposing involvement with orders from customers to the principal or that orders must be placed via the commercial agent. That conclusion is supported by the context and objective of Article 1(2).
- 35 The Directive aims to coordinate the laws of the EEA States with respect to the legal relationship between the parties to a commercial agency contract (compare the judgment in *Quenon K.*, C-338/14, EU:C:2015:795, paragraph 22 and the case law cited). As is clear from its second and third recitals, the 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 EEA States by harmonising their legal systems within the area of commercial representation (compare the judgment in *Zako*, cited above, paragraph 26 and the case law cited). It is therefore necessary to interpret Article 1(2) of the Directive in a manner which contributes to that protection of the commercial agent and accordingly the term “negotiate”, within the meaning of that provision, may not be construed restrictively (compare the judgment in *Marchon Germany*, C-315/14, EU:C:2016:211, paragraph 33).
- 36 It follows from Article 3(1) and (2) of the Directive that, on the basis of the contract between the agent and the principal, 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 (compare the judgment in *Trendsetteuse*, cited above, paragraph 30 and case law cited).

- 37 Thus, the Court observes that 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. Some negotiations may lead to the conclusion of a transaction while others may not. This implies that the involvement of the agent in finalising a transaction (if one is in fact concluded) is incidental, rather than essential. Furthermore, the requirement of an activity which may consist of being an intermediary for the sale or purchase of goods, as set out in *Zako*, cited above, paragraph 23 and *Trendsetteuse*, cited above, paragraph 22, does not necessarily entail a role for the agent in taking orders.
- 38 In that connection, the commercial agent cannot be excluded from the benefit of the Directive’s protection on the grounds that the contract which binds him to the principal provides for the performance of other tasks than those related to the activities of a commercial agent. Any contrary interpretation would allow the principal to circumvent the mandatory provisions of the Directive (compare the judgment in *Zako*, cited above, paragraph 45).
- 39 The Court observes that it would enable the principal to evade his obligations to the agent and jeopardise the achievement of the objective pursued by the Directive, if the classification of “commercial agent” were made subject to conditions additional to those laid down by Article 1(2), such as a condition necessitating the direct involvement of the commercial agent in taking or finalising orders.
- 40 It should be noted that the fact that a commercial agent does not have a role in taking or finalising orders on behalf of the principal does not, in itself, prevent the commercial agent from carrying out the main tasks of a commercial agent, namely to bring the principal new customers and to increase the volume of business with existing customers (compare the judgment in *Trendsetteuse*, cited above, paragraphs 32 and 33).
- 41 It is possible for the commercial agent to accomplish those tasks 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, without requiring the commercial agent to have a direct involvement in taking orders (compare the judgment in *Trendsetteuse*, cited above, paragraph 34).
- 42 The referring court has stated that the Act was intended to implement the Directive. However, according to the request, the conditions for being deemed a commercial agent set out in the first paragraph of Section 1 of that act differ from those provided for in Article 1(2) of the Directive.
- 43 In this regard, the Court notes that the requirement for national law to be interpreted in conformity with EEA law is inherent in the objectives of the EEA Agreement, since national courts are bound in accordance with Article 3 EEA, for the matters within their jurisdiction, to ensure the full effectiveness of EEA law when they determine the disputes

before them (see Case E-14/20 *Liti-Link AG*, judgment of 15 July 2021, paragraphs 74 and 75 and case law cited). This is the case all the more when the national court is seised of a dispute concerning the interpretation of domestic provisions specifically enacted for the purpose of transposing a directive intended to confer rights on individuals (see Case E-28/13 *LBI hf.* [2014] EFTA Ct. Rep. 970, paragraph 41).

- 44 When national courts apply domestic law, they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose (see *Liti-Link AG*, cited above, paragraph 75).
- 45 The answer to the first question must therefore be that Article 1(2) of the Directive, and in particular the term “negotiate”, should be interpreted as not necessarily presupposing the agent’s direct involvement with the placing of orders by customers with the principal, or excluding a scenario in which orders go directly from customers to the principal.

Question 2

- 46 By its second question, the referring court asks in essence which factors are relevant to the assessment as to whether sales-related activity should be deemed to constitute negotiation for the purposes of Article 1(2) of the Directive.
- 47 As stated above, Article 1(2) of the Directive lays down the three necessary and sufficient conditions for a person to be classified as a “commercial agent”. A commercial agent’s role as an intermediary involves endeavouring to bring the principal new customers or increasing the volume of business with existing customers. This can be accomplished 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 (compare the judgment in *Trendsetteuse*, cited above, paragraphs 33 and 34).
- 48 While the Directive does not define the term “negotiate”, the fact that the act of negotiation referred to in Article 1(2) of the Directive must relate to “the sale or purchase of goods for the principal” highlights the intention of the legislature that that act should have as its objective the conclusion of contracts of sale or of purchase on behalf of the principal (compare the judgment in *Trendsetteuse*, cited above, paragraph 24).
- 49 However, as noted in the answer to the first question, concluding transactions or taking orders on behalf of the principal does not constitute an essential element of negotiation for the purposes of Article 1(2) of the Directive. As such, while the term “negotiate” should not be read restrictively, it cannot be so broad as to encompass all activities related to sales.
- 50 The agent’s activities on behalf of the principal must therefore be undertaken specifically with a view to achieving the conclusion of contracts of sale or purchase of goods by the

principal. This applies regardless of whether such sales occur, even if the placing of orders or the actual act of conclusion is carried out directly with the principal.

- 51 Further, the wording and context of Article 1(2) of the Directive also imply that the commercial agent must act as an intermediary, which entails functioning as a link between the principal and the customers, or appearing before customers as a representative of the principal. As such, the mere provision of sales-related or promotional services to a client (for example, gathering data on sales, or providing publicity) would not, in itself, entail that a person acts as a commercial agent.
- 52 While the above observations may serve to delineate certain factors of what does and does not constitute negotiation by a commercial agent, it is not possible exhaustively to enumerate all of the potential facts that may be relevant in applying these requirements to a specific case. Rather, it is for the national court to take into account all the relevant facts, in light of the guidance above.
- 53 In particular, it follows from Article 3(1) and (2) of the Directive that, under its contract, the commercial agent must safeguard 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 purpose of a commercial agent's activity depends on the terms of the contract which binds the agent 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 (compare the judgment in *Trendsetteuse*, cited above, paragraph 30). Therefore, the national court should assess how the respective obligations of the parties are set out in the contract.
- 54 By way of example, it may be relevant whether the purported commercial agent is granted exclusive rights in a particular geographic area, leading to remuneration as foreseen in Article 7(2) of the Directive. It may also be relevant whether the purported agent represented the principal, participated in sales meetings, actively pursued increased sales, or sought and obtained new clients. However, none of these conditions may be seen as independently determining whether the person in question is a commercial agent undertaking negotiation. Rather, it is necessary to look at the agreement, as well as the person's activities, as a whole.
- 55 In the light of the foregoing, the answer to the second question is that sales-related activity should be deemed to be negotiation for the purposes of Article 1(2) of the Directive if it is specifically undertaken 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 his customers.

IV Costs

- 56 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

- 1. 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, 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/EEC if it is specifically undertaken 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 his customers.**

Páll Hreinsson

Per Christiansen

Bernd Hammermann

Delivered in open court in Luxembourg on 14 December 2021.

Ólafur Jóhannes Einarsson

Páll Hreinsson

Registrar

President