

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 19 November 2008¹

1. This reference from the Landgericht Hamburg relates to the implementation of Article 17 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').² The Landgericht asks for an interpretation of Article 17, in particular to establish if and under which conditions the right to an indemnity of the commercial agent can be limited to lost commissions. Such an interpretation is necessary for the national court to assess whether the relevant national legislation, as interpreted by the German courts, is in violation of the approach set out in the directive in relation to the calculation of the indemnity to which a commercial agent is entitled following the termination of his or her contractual relationship with the principal.

31 December 2005, Mr Semen operated, in the capacity of commercial agent, a service station owned by the defendant. The defendant company is part of a larger, Libyan corporate group Oilinvest which in addition to its large network of service stations in Germany, is involved in the businesses of searching for and refining oil in several countries across the globe.

3. During the currency of his contractual relationship with the defendant the applicant received commission on the fuel he sold. The level of commission earned by the applicant varied depending on whether the clients in question purchased fuel through cards provided by the defendant which provided for reductions in price instead of using standard methods of payment.

I — The facts, the legal framework, the questions and preliminary issues

2. The reference arises in the context of litigation undertaken by the applicant, Mr Turgay Semen, who worked as the commercial agent of the defendant Deutsche Tamoil GmbH. Between 1 November 2001 and

4. Article 17 of the directive allows Member States to choose between two frameworks which provide for the compensation of commercial agents upon the termination of the contractual relationship with the principal. This compensation can take the form of compensation for damage (Article 17(3)) or that of an indemnity (Article 17(2)).

¹ — Original language: English.

² — OJ 1986 L 382, p. 17.

5. The German authorities chose the indemnity framework set out in Article 17(2). This article and the relevant German legislation (Article 89b of the Handelsgesetzbuch ('HGB')), establish that, provided that certain conditions are met, agents such as the applicant shall be entitled to an indemnity to be paid by the principal following the termination of the contractual relationship between them. The parties are in dispute in relation to the size of the indemnity to be awarded in this case and more specifically, as to whether the method of calculating the indemnity set out under German law is in conformity with the requirements of the directive.

- 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;

6. Article 17(2) sets out both the conditions under which an indemnity is to be awarded and the method to be used in the calculation of such an indemnity, in the following terms:

- (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
- (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.'

7. Article 89b, paragraph 1 of the HGB, which in fact provided the model for calculating indemnities on which the directive was based,³ largely follows the wording of Article 17(2) providing that:

2. If the commercial agent has expanded the volume of business with an existing customer so significantly that, in commercial terms, it is equivalent to acquiring a new customer, he is deemed to have brought a new customer.'

'1. The commercial agent may, after termination of the agency contract, demand from the principal a reasonable indemnity if and to the extent that

i. The principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business with new customers which the commercial agent brought,

ii. the commercial agent, by reason of the termination of the agency contract, loses rights to commission from business already transacted, and business to be transacted in the future, with customers he has brought, which he would have been entitled to if the agency agreement had remained in place; and

iii. the payment of an indemnity is equitable having regard to all the circumstances.

8. In its reference, the referring court states that the jurisprudence of the German courts in relation to Article 89b regards the criteria set out therein (namely the persistence of substantial advantages to the principal, the loss of commission to the agent and the equitable nature of any indemnity payment) as being of a cumulative character and as mutually limiting. The Hamburg court has doubts whether the limitation of the indemnity awardable inherent in this approach is compatible with Article 17(2) and asks the following two questions:

'(1) Is it compatible with Article 17(2)(a) 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 to limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value?

3 — See Commission of the European Communities, Report on the application of Article 17 of Council Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC), Brussels, 23.7.1996 COM(96) 364 final, pp. 1-3.

(2) Are benefits accruing to other companies within the group to which the principal belongs also to be taken into consideration for the purposes of the above calculation?

longer necessary for the effective resolution of the dispute.⁷

9. Before moving on to consider these two questions, a preliminary issue must first be dealt with. At the hearing, it was asserted on behalf of the defendant that changes in the German jurisprudence, which had occurred since the reference was made, were such as to render the proceedings before the Court of Justice moot. In particular it was asserted that changes in the national jurisprudence in relation to the definition of 'habitual client' would mean that, in almost all cases, the amount resulting from the calculation of commission lost would exceed the maximum laid down in Article 17(2)(b) thus rendering moot the issue of the permissibility of taking into account of other benefits accruing to the principal.

10. The Court has previously held that its functions under Article 234 EC do not include the giving of advisory opinions⁴ or answering hypothetical questions.⁵ Furthermore, in *Zabala*⁶ it refused to give a ruling in relation to a reference where the proceedings in the national court had been terminated through the acquiescence of one party to the claims of the other on the grounds that a ruling was no

11. Nevertheless, the Court has repeatedly stressed that 'it is solely for the national courts before which proceedings are pending ... to determine in the light of the particular circumstances of each case both the need for a preliminary ruling to enable them to give judgment, and the relevance of the questions which they submit to the Court'⁸ and that 'a request for a preliminary ruling from a national court may be rejected only if it is manifest that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the true facts or the subject-matter of the main proceedings'.⁹

12. Changes in national law following the making of a reference have not been held to render a reference liable to rejection for these reasons; in *CIA*¹⁰ the Court stressed that the need for a preliminary ruling could not be regarded as having become redundant in circumstances where the national law which was the subject of the reference had been repealed and replaced by different national legislation. The case for redundancy must be even weaker in circumstances such as those in the instant case where the changes which may have occurred are in the case-law of national courts whose impact is as yet not entirely

4 — Case 244/80 *Foglia v Novello* (No.2) [1981] ECR 3045, paragraph 18.

5 — Case C-467/04 *Gasparini and Others* [2006] ECR I-9199.

6 — Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala and Others* [1995] ECR I-1567.

7 — *Ibid.*, paragraphs 28 and 29.

8 — Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 15.

9 — *Ibid.*

10 — Case C-194/94 *CIA Security International* [1996] ECR I-2201.

certain. Accordingly, I am of the view that the Court should not refuse to give a ruling on the questions submitted on the basis that it should be for the national court to assess the impact of the new national jurisprudence on the relevance of the answers given by the Court of Justice to its final resolution of the case before it.

II — Analysis

The first question

13. The approach contained in the German legislation, as interpreted by the German courts, caps the indemnity awardable to an agent on the basis of a definitive interpretation of what is to be considered equitable which establishes that any award over and above the amount of commission lost by the agent will not be equitable. Assessing the compatibility of such an approach with the directive involves the reconciliation of two potentially competing principles identified in previous cases relating to Article 17.

14. On the one hand, in *Ingmar*¹¹ and *Honyvem*,¹² the Court held that the system established by Article 17 was mandatory in nature. The Court also stressed the role of Article 17 as a protective minimum standard for commercial agents and that national legislation cannot establish rules which would give a lower level of indemnity to such agents than provided for by Article 17.¹³

15. On the other hand in both *Ingmar* and *Honyvem* the Court also held that Article 17 'does not give any detailed indications as regards the method of calculation of the indemnity for the termination of a contract'¹⁴ and that within the framework established by Article 17 'Member States may exercise their discretion as to the choice of methods for calculating the indemnity'.¹⁵ This margin of discretion was held by the Court to be applicable 'in particular, in relation to the criterion of equity'.¹⁶

16. Therefore, although Article 17 is intended to establish a basic level of protection for agents, it would seem that the directive envisages that the level of this protection

11 — Case C-381/98 [2000] ECR I-9305, paragraphs 21 and 22.

12 — Case C-465/04 *Honyvem Informazioni Commerciali* [2006] ECR I-2879.

13 — *Ibid.*, paragraph 28.

14 — *Ibid.*, paragraph 34.

15 — *Ingmar*, paragraph 21.

16 — *Honyvem*, paragraph 36.

may vary from State to State depending on the interpretation given by individual Member States to the notion of equity in this context. Nevertheless, this discretion cannot be absolute as this would defeat the very purposes of the directive, namely the harmonisation of Member State practices in relation to commercial agents and the establishment of a minimum level of protection for such agents.¹⁷

17. Furthermore, the wording of the article states that the agent ‘*shall be* entitled to an indemnity if and to the extent that’ certain conditions are fulfilled (emphasis added). The use of the phrase ‘*shall be entitled*’ and the decisions of the Court in both *Ingmar* and *Honyvem* all underline the mandatory nature of the system and imply that Member States are prevented from adopting measures which would deny an indemnity to an agent when the conditions set out in the article are fulfilled.

18. Indeed, as I pointed out in *Honyvem*, Article 17(2) ‘lays down not only the conditions for recognising entitlement to the... indemnity but also the items actually needed to calculate the indemnity’.¹⁸ Member State measures implementing their obligations under the directive must therefore respect both these conditions of eligibility and adhere to the list of items to be taken into account in calculation of the indemnity.

19. Accordingly, it is clear that the discretion granted to the Member States operates within the context of boundaries set by the system established by Article 17(2) which Member States are not free to disregard.

20. What, therefore, are these mandatory limitations which the system established by Article 17(2) imposes? In *Honyvem* the Court held that an Italian system which based the amount of the indemnity solely on fixed percentages of commissions gained in previous years, was in violation of the directive due to its failure to enable agents who would have fared better under an approach based on consideration of the benefits accruing to the principal, to obtain an indemnity greater than such fixed percentages.¹⁹ In the light of this decision and of the wording of the first indent of Article 17(2) (a), it is clear that a meritocratic approach which links the amount of the indemnity to be awarded to the benefits derived by the principal from the work of the agent in the period after the termination of the contract is one such mandatory feature.

21. The wording of the directive also makes it clear that regard must be had to the concept of equity in the determination of the amount of

¹⁷ — These are the aims cited in the recital to the directive.

¹⁸ — See my Opinion in *Honyvem*, point 41.

¹⁹ — *Honyvem*, paragraph 29.

the indemnity and that this process must take into account the commissions lost by the agent as a result of the termination of the contractual relationship between him or her and the principal.

22. The parties disagree as to whether the concept of equity can function so as to raise as well as to diminish the level of the indemnity awarded to the agent. The applicant argues that the primary determinant of the amount of the indemnity is the amount of the benefits gained by the principal and that the level of lost commission falls to be considered only as an element of the assessment of equity which can function so as to increase or decrease the amount of the indemnity. The Italian Government also submits that the notion of equity acts both as ‘floor’ capable of raising the level of the award, as well as a ‘ceiling’ capable of reducing it. The defendant, on the other hand, argues that the elements listed in Article 17(2)(a) are of a cumulative and reciprocally limiting nature and that each operates as a ‘ceiling’ limiting the amount awardable to the lowest of the three figures.

23. I am of the view that the phrase ‘if and to the extent that’ suggests that the notion of equity is intended to act as a limit on the amount of the indemnity rather than as a factor which may also increase it beyond that arising from the calculation of the benefits accruing to the principal. Nevertheless,

whether the notion of equity operates in this regard solely as a ceiling or as both a floor and a ceiling, is not determinative of the issues before the Court in this case. The directive is clear that an indemnity cannot exceed what is considered to be equitable. The major issue between the parties relates to whether the discretion which the Court has held Member States to hold in relation to the calculation of the indemnity and particularly in relation to the notion of equity, extends to a right to define equity as including a limitation on the level of indemnity to that of lost commissions. This relates to the issue of content of the notion of equity, the method of calculation of the equitable ‘ceiling’ so to speak. Whether the notion of equity is also capable of acting as a ‘floor’ does not affect this question.

24. How, therefore, does the German approach, which limits the definition of equity in this way, fit within the mandatory features of the directive set out above? As noted above, the HGB, as interpreted by the German courts, has not viewed as equitable any indemnity exceeding the loss of commission by the agent. As the defendant points out, such an approach is based on the notion that an agent should not be placed in a better position by an indemnity than he or she would have been placed in by a continuation of the contract. The applicant and the Italian Government view this approach as depriving the agent of a right given to him or her by the directive, namely that of obtaining an indemnity which is equitable in all the circumstances, not merely in the light of commissions lost. Moreover, it is clear that the application of an equity criterion must not

operate so as to deprive of any useful effect the meritocratic approach enshrined in the directive and reflected, in particular, in Article 17(2), first indent.

25. However, if the discretion on the part of Member States in relation to the calculation of equity is to have meaning, Member States must be able to use the notion of equity to cap levels of indemnity according to their national conceptions of what is equitable provided that in doing so they do not violate the mandatory features of the system established by Article 17(2) outlined above.

26. The interpretation of the notion of equity as precluding awards of indemnities greater than the level of lost commissions is, quite plainly, not in contravention of the duty to have regard to the level of commissions lost by the agent. The directive is also clear that all circumstances must be taken into account in the calculation of equity. However, capping indemnities at the level of commission lost merely reflects a judgment in relation to the relative importance of different circumstances rather than a decision to ignore circumstances that should be taken into account and should not be seen as being, in principle, in violation of the directive.

27. Neither is such an approach, in itself, a violation of the meritocratic requirement that

the indemnity be linked to the future gains of the principal, provided that the notion of lost commission is interpreted so as to enable such gains to be taken into account. In many cases the level of commissions lost by the agent during the currency of the contractual relationship will reflect the gains of the principal. However, this may not always be the case. According to the report of the Commission compiled in relation to the functioning of Article 17, and as confirmed by the defendant's lawyer at the hearing, the German system calculates, for the purposes of the indemnity, the commissions lost by the agent on the basis of the commissions earned by him or her during the final 12 months of the duration of the contractual relationship. Commissions gained in the final period of the contractual relationship will normally be a good guide as to the gains accruing to the principal and the commissions lost by the agent in the period following the termination of the contract. However, under the system established by Article 17(2) the indemnity is to be calculated in respect of future gains to the principal and losses of the agent. The wording of Article 17(2) makes it clear that this future orientation is mandatory. Past commissions can only ever act as evidence of such future gains and losses.

28. There may be circumstances in which basing the calculation on the past commissions does not reflect the reality of future gains and losses, for example, when the agent realises a major and successful marketing campaign shortly before the contract is

terminated or where the price of the product sold on behalf of the principal rises sharply shortly before or after the termination of the contract.²⁰ In such circumstances calculation of an indemnity based on the final period of the contract has to be adjusted so as to reflect the reality of future gains and losses. The definition of 'lost commissions' must therefore be sufficiently flexible to enable it to ensure that the indemnity awarded is truly reflective of future gains and losses of the principal and agent respectively and must therefore be capable of reflecting changes in the circumstances applying before and after the termination of the contract. It is for the national court to decide whether, bearing in mind the mandatory nature of the prospective orientation of the process of calculating the indemnity, the German approach to calculating the indemnity, in particular its approach to the definition of 'lost commissions', is sufficiently flexible in this regard.

30. The applicant argues that the advantages retained by the principal are equally to be found in the fact that its Libyan parent company obtains profit from its subsidiary, the principal, which it uses to increase turnover, decrease its tax liabilities and increase its profits.

31. The German Government points out that neither Article 89b of the HGB nor Article 17 of the directive seeks to regulate the issue of the relationship between subsidiaries and parent companies. Such questions may be relevant to the issue of equity but it is up to national authorities, in exercising their discretion, to decide if and how regard may be had to the earnings of other companies in a group owned by the owners of the principal.

The second question

29. The second question focuses on the issue of whether, in a situation where the principal belongs to a group of businesses, the advantages obtained by the businesses of this group are to be considered to be part of these advantages taken into account for the purposes of calculating the indemnity under Article 17 of the directive.

32. The Commission is of the view that the calculation of the advantages gained by the principal for the purposes of Article 17 is, in principle, not required to take account of other companies with the same owner unless the contractual duties of the agent also consisted of a duty to create or develop the commercial relationships undertaken by third parties with other companies in the same group. It notes that the relevant advantages for the calculation of the indemnity under Article 17(2)(a) are those linked to the transactions with clients won by the agent or which resulted from the agent's development of business with existing clients. This shows the contractual focus of Article 17(2)(a). As the indemnity is linked to these processes of

²⁰ — Not to take this into account might even promote opportunistic behaviour on the part of the principal regarding when to terminate the contract.

gaining new clients for the principal or increasing the level of business with the principal's pre-existing clients, there is no reason that advantages other than those gained by the principal himself or herself should be taken into account unless the duties of the agent extended to carrying out similar work for other companies belonging to the principal's parent company.

33. The defendant further argues that to enable the agent to make claims in respect of profits of businesses with whom he or she has no contractual relationship, risks uncontrollable and aberrant effects and asserts that there is no reason why the lessee of a service station in Germany should have access to the profits of a parent company engaged in petroleum exploitation in Libya.

34. The Italian Government suggests that, although in general the calculation of advantages for the purposes of Article 17 should be restricted to those gained by the principal, the necessity of upholding the principles of loyalty and good faith, which are imposed by Article 4 of the directive, means that there are grounds to suggest that when the principal attempts to restrict the indemnity payable to the agent by attributing profits arising from the activity of the agent to other companies in the group, methods of opposing such breaches of loyalty and good faith must be available. However, as the government itself notes, this can be achieved through a demand for damages.

35. It is clear that the primary focus of Article 17(2)(a) is on the activities benefiting the principal arising out of activities undertaken by the agent under a contract agreed between them. The wording of the directive explicitly refers to the customers of the principal and the advantages derived by the principal. It does not refer to any other advantages that may be taken into account. The Community legislature could have chosen to include advantages accruing to other companies to which the principal was linked but would appear to have chosen not to do so. Furthermore, the contractual origin of the right to the indemnity militates against recognition of indemnity rights deriving from those with whom the agent had no contractual relationship.

36. On the other hand, Member States are required to have regard 'to all the circumstances' in their assessment of the equity of the indemnity to be awarded. However, 'circumstances' in this instance cannot refer to all conceivable facts but must be limited to those factors relevant to the contractual relationship between the agent and the principal. The degree to which an agent of a subsidiary of a parent company may be taken to have a relationship with such a parent company by virtue of his or her contract with the principal is a matter to be decided under national law and taking into account, on a case-by-case basis, the particular contractual relationship of the agent with the principal and its possible links to the parent company. If national law does not establish such a relationship between the agent and the parent company of his or her principal, the profits accruing to such a parent company cannot be considered to be a circumstance for the purposes of Article 17(2)(a).

37. These factors militate against a conclusion that the directive requires that advantages obtained by other companies in the same group as the principal be taken into account in the calculation of the indemnity for the purposes of Article 17(2)(a).

III — Conclusion

38. In the light of the considerations outlined above, I suggest that the Court give the following answers to the questions referred by the national court:

- (1) National legislation limiting the indemnity awardable to commercial agents to the amount of commissions lost by such agents following the termination of the contractual relationship with the principal, is not in itself incompatible with the meritocratic and future-oriented approach required by the system established by Article 17(2)(a) 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, provided that the method of calculating commissions lost is such as to reflect the true level of commissions lost in the period following termination of the contractual relationship, so as to take into account the benefits derived by the principal from the activity of the agent.
- (2) Article 17(2)(a) of Directive 86/653 does not require the calculation of the indemnity to take into account the advantages obtained by companies, other than that with which the agent had a contractual relationship, which are members of a larger corporate group.