Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 25 October 2017[1]

**Case C-645/16**

**Conseils et mise en relations (CMR) SARL**
**v**
**Demeures terre et tradition SARL**

(Request for a preliminary ruling from the Cour de Cassation (France))

(Reference for a preliminary ruling – Directive 86/653/EEC – Article 17 – Self-employed commercial agents – Right of the commercial agent to an indemnity or compensation for damage following termination of the agency contract – National practice excluding the right to indemnity in the event of termination of the contract by the principal during the trial period provided for in the contract)

## Introduction

1. This request for a preliminary ruling, made by the Cour de Cassation (Court of Cassation, France), relates to the interpretation 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.[2]

2. The reference has been made in proceedings between Conseils et mise en relations (CMR) SARL and Demeures terre et tradition SARL ('DTT') concerning an application by CMR for payment of compensation for the loss arising from the termination of the commercial agency contract it had with DTT.

3. This case relates to the applicability of Directive 86/653, in particular of Article 17 thereof, where the parties to a commercial agency contract have provided for a trial period and the contract is terminated during that period by the principal. In addition to the question whether it is lawful for a provision for a trial period to have the effect of disapplying the provisions of Directive 86/653, and in particular Article 17, in the case of contracts normally governed by that Directive, this case will give the Court the opportunity to examine the broader question of which aspects of the agency contract are harmonised under that directive.

1 Original language: French.

2 OJ 1986 L 382, p. 17.

## Legal context

### *EU law*

4. The second and third recitals of Directive 86/653 state as follows:

'Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the [European Union] and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; … moreover, those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agents are established in different Member States;

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

5. Article 1(1) and (2) of that directive provides:

'1. The harmonisation 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.'

6. Articles 13 to 20 of Directive 86/653 are in Chapter IV thereof, which is entitled 'Conclusion and termination of the agency contract'. Article 14 of the Directive is worded as follows:

'An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period'.

7. Under Article 15(1) and (2) of Directive 86/653:

'1. Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

2. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.'

8. Article 17(1) to (3) of that directive provides:

'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. …

(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 amortise the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice'.

9. Article 18 of Directive 86/653 is worded as follows:

'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.'

10. Finally, Article 19 of that directive provides that 'the parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires'.

### *French law*

11. The French Republic transposed Article 17 of Directive 86/653 into its national law by opting for the regime set out in paragraph 3 of that provision.

12. In that connection, Article L134-12 of the Commercial Code provides as follows:

'In the event of termination of its relations with the principal, the commercial agent shall be entitled to compensation for loss suffered.

The commercial agent shall lose the right to compensation if he has not notified the principal within a period of one year from termination of the contract that he wishes to assert his rights.

The commercial agent's successors in title shall also be entitled to compensation where termination of the contract is occasioned by the death of the agent.'

## Facts, procedure and questions referred

13. On 2 December 2011, DTT, in its capacity as principal, entered into a commercial agency contract with CMR concerning the sale of individual houses. There was provision under the contract for a trial period of 12 months, at the end of which the contract would be deemed to be for an indefinite period, each party having the right to terminate during the course of the trial period, subject to the giving of 15 days' notice during the first month and one month's notice thereafter. The commercial agency contract laid down a target to be achieved of 25 sales per annum.

14. By letter of 12 June 2012, DTT notified CMR of its decision to terminate the contract in question at the end of the contractual notice period of one month. That decision was based on non-observance of the objective laid down in the contract, CMR having achieved only one sale in five months.

15. By a document dated 20 March 2013, CMR brought an action against DTT before the tribunal de commerce d'Orléans (Commercial Court, Orleans, France), for payment, inter alia, of compensation for the loss suffered as a result of termination of the commercial agency contract. By judgment of 30 January 2014, that court partially upheld CMR's application.

16. On 14 February 2014, DTT appealed against that judgment. By judgment of 18 December 2014, the cour d'appel d'Orléans (Court of Appeal, Orleans, France) set aside in part the judgment of the tribunal de commerce d'Orléans (Commercial Court, Orleans). In particular, it held that the compensation provided for under Article L134-12 of the Commercial Code was not payable where a commercial agency contract was terminated during the trial period.

17. CMR appealed against that judgment to the Cour de Cassation (Court of Cassation). As stated by the Cour de Cassation in its reference for a preliminary ruling, first, the judgment of the cour d'appel d'Orléans (Court of Appeal, Orleans) applied the settled case-law of the economic, financial and commercial chamber of the Cour de Cassation under which there is, by way of exception, no right to compensation where the commercial agency contract is terminated during the trial period. Secondly, the Cour de Cassation noted that Directive 86/653 does not refer to any trial period so that such period may be provided for by the parties to a commercial agency contract without that constituting an infringement of EU law. Finally, and thirdly, it pointed out with reference to the Court of Justice's case-law that Directive 86/653 sought to protect the commercial agent in his relations with the principal and that Article 17(2) and (3) were to be interpreted in such a way as to contribute to that protection.

18. In those circumstances, the Cour de Cassation decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 17 of [Directive 86/653] apply where termination of the commercial agency contract occurs during the trial period provided for in that contract?'

19. Written observations have been submitted by DTT, the French and German Governments and the Commission.

## Analysis

20. By its reference for a preliminary ruling, the national court is asking about the applicability of Article 17(2) and (3) of Directive 86/653. More generally, the national court's question seeks clarification of whether its case-law on commercial agency contracts –– according to which the status of commercial agent, as provided for in Directive 86/653, takes effect only at the end of the trial period –– is compatible with Directive 86/653.

### *Preliminary observations*

21. It must first of all be recalled that Directive 86/653 is applicable in a dispute between two parties to a commercial agency contract which are resident in France and have no other 'foreign element'. [3]

22. In that connection it is undisputed that, as is apparent from Article 1(1), Directive 86/653 is intended to harmonise the laws of the Member States in relation to the legal relations between the parties to a commercial agency contract. [4] The initial logic of Directive 86/653 was to place on an equal footing principals carrying on their activities in the internal market by having recourse to commercial agents; thus, in order to invest and carry out their commercial activities, principals have to know the rules to which they will be subject concerning the compensation and remuneration payable to the commercial agents used by them. [5]

23. It was against that background that the Court held, first, that Articles 17 and 18 of Directive 86/653 are of crucial importance because they determine the level of protection that the EU legislature regarded as reasonable to be accorded to commercial agents in the context of the creation of the single market. Secondly, it ruled that the regime laid down in that connection by the directive is mandatory. [6]

### *The purpose of the compensation regime provided for in Article 17 of Directive 86/653*

24. As a preliminary point, a question should be raised as to the purpose of the compensation regime provided for in Article 17 of Directive 86/653. The Court has already had the opportunity in *Honyvem Informazioni Commerciali* [7] and *Marchon Germany* [8] of providing a certain number of clarifications on this. [9]

3 See in this regard judgment of 13 July 2000, *Centrosteel* (C-456/98, EU:C:2000:402, paragraph 13), in which the Court held that Directive 86/653 'is intended to harmonise the laws of the Member States governing the legal relationship between the parties to a commercial agency contract, irrespective of any cross-border elements. Its scope is therefore broader than the fundamental freedoms laid down by the EC Treaty'.

4 See in particular judgment of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 18 and the case-law cited).

5 See also my Opinion in *Agro Foreign Trade & Agency* (C-507/15, EU:C:2016:809, point 56).

6 Judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraphs 39 and 40).

7 Judgment of 23 March 2006 (C-465/04, EU:C:2006:199).

8 Judgment of 7 April 2016 (C-315/14, EU:C:2016:211).

9 In addition to the purpose provided for in Article 17 of Directive 86/653, the Court has already been seised of several other questions concerning the interpretation of that article: namely, with regard to the applicability of that directive where one of the parties is established in a non-Member State, see judgments of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605), and of 16 February 2017, *Agro Foreign Trade & Agency* (C-507/15, EU:C:2017:129); with regard to calculation of the indemnity and permissibility of an award of additional damages and interest, see judgments of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195), and of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795) or with regard to the extinction of the commercial agent's entitlement where the agent has failed to fulfil obligations or in cases of non-performance of a contract with a third-party customer, see judgments of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647), and of 17 May 2017, *ERGO Poist'ov ňa* (C-48/16, EU:C:2017:377).

25. First of all, certain characteristics of the operation of a commercial agency contract must be borne in mind. Although the work of the commercial agent essentially consists in negotiating commercial transactions and establishing new commercial relationships for the principal, the commercial agent is, as a rule, entitled to commission only when a specific transaction is concluded as a result of his action (Article 7(1)(a) of Directive 86/653). Conversely, once established, a customer relationship may result in a series of transactions without the agent having to intervene again. The prior work is thus remunerated as and when subsequent transactions are concluded. It is in that context that the nature of the compensation regime provided for in Article 17 of Directive 86/653 falls to be assessed.

26. It is clear from the foregoing that economic damage within the meaning of Article 17(3) of Directive 86/653 may arise as a result of the contract being terminated at a time when the commercial agent has obtained a new customer. In that situation commission paid until termination will not reflect the amount of added value generated for the principal.[10] It follows that the compensation mechanism seeks not to penalise termination of the contract or to grant subsistence payments to the agent, owing to termination of the contract, but to remunerate the prior work carried out by the commercial agent. The commercial agent's entitlement to compensation for loss suffered, as provided for in Article 17(3) of Directive 86/653, is therefore dependent on the agent's performance during the course of the contract and on the benefits which the principal continues to derive from the work carried out.[11] Thus, indemnifying or compensating the commercial agent after termination of the contract forms a further part of the consideration to be paid by the principal. Conversely, it goes without saying that no compensation will be payable to the agent where he has not provided services giving rise to an economic advantage for the principal.

### *Nature and legal effects of the provision for a trial period*

27. Secondly, the nature and legal effects of the provision for a trial period must be examined in general.

28. Although the Court has not yet had an opportunity to express its view on the nature of a trial period in the context of commercial agency contracts, it is however clear from its case-law in relation to employment law and, in particular, from *Nisttahuz Poclava*,[12] that a trial period is intended to enable the employer to ascertain the aptitude and capacities of the employee for performing the tasks with which he is entrusted. Unlike a commercial agency contract, a contract of employment is characterised by the obligation on the employee to provide not a result but a service. The commercial agent carries on his occupation autonomously whereas the contract of employment entails a relationship of subordination as between the employer and the employee. That is why, under contracts of employment, a trial period enables the new employee to be trained and guided. There is no such requirement in the relationship between principal and commercial agent.

29. These two types of contract are nonetheless comparable as to their nature *intuitu personae*. The commercial agency contract likewise establishes a permanent contractual relationship[13] characterised by a relationship of trust between the contracting parties. It follows from the foregoing that facilitating termination of a commercial agency contract, should the need arise, in order that a party is not tied to a contracting party who fails to meet his expectations may even be the sole purpose of the trial period. Finally, it seems to me important to emphasise that the contractual commitment itself,

10 See my Opinion in *Marchon Germany* (C-315/14, EU:C:2015:585, point 27) and the report — clearly not mandatory but nonetheless instructive — of the European Commission of 23 July 1996 on the application 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 (COM(96) 364 final).

11 See in this connection judgment of 7 April 2016, *Marchon Germany* (C-315/14, EU:C:2016:211, paragraph 33), and Opinion of Advocate General Poiares Maduro in *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2005:641, paragraph 26).

12 Judgment of 5 February 2015 (C-117/14, EU:C:2015:60, paragraph 36).

13 See also Article 1(2) of Directive 86/653.

that is to say, the mutual obligations to perform a service and to pay commission, is not affected by the fact that a trial period is provided for. In other words, the commercial agency contract cannot be deemed to be not 'definitively entered into' for as long as the trial period has not been completed. The contract is definitively entered into upon its signature.

### *Legality of the provision for a trial period in commercial agency contracts*

30. First of all, one must deal briefly with the question whether a trial period may be provided for –– generally –– by the parties to a commercial agency contract governed by Directive 86/653. Although the referring court has not formulated its question to that effect, the grounds of its order for reference, and the written observations of DTT, essentially focus on this aspect.

31. The referring court and DTT appear to proceed on the basis that the compensation scheme provided for in Article 17(2) and (3) of Directive 86/653 is not applicable where a contract is terminated during the trial period. More specifically, they take the view that a contract providing for a trial period has not been definitively entered into, which is the reason why the status of commercial agent is not yet applicable. In accordance with the referring court's settled case-law, a commercial agent may not, for the whole duration of any trial period, rely on the rights conferred on him by Directive 86/653.

32. DTT thus asserts that, in the absence of a prohibition in Directive 86/653 of a provision for a trial period, the status of commercial agent does not apply, owing to the legal effects attributed to that trial period by national law. In that context, DTT submits that neither Directive 86/653, nor the Court's case-law relating thereto, make reference to any trial period and that such a period may therefore be provided for by the parties to a commercial agency contract in a manner which complies with EU law.

33. It should be pointed out that, in regard to EU law, under Article 288(3) TFEU, Directive 86/653 is binding only as to the result to be achieved, but leaves to the national authorities the choice of form and methods. As is apparent from the second and third recitals of Directive 86/653, and from the Court's case-law, the directive seeks, in particular, to protect commercial agents in their relationships with their principals.[14] In that connection, the Court has on several occasions stressed the mandatory nature of the compensation regime provided for in Articles 17 to 19 of Directive 86/653,[15] whose objective is — in conjunction with the rules laid down in Articles 14 to 15 of that Directive[16] — to complement the system of protection for commercial agents laid down in the directive.[17] Moreover, the Court has stated that the compensation rules laid down in Articles 17 and 18 of the directive are of crucial importance, as they define the level of protection which the EU legislature considered reasonable to grant commercial agents in the context of the creation of the single market.[18] It follows that the provisions of national law must contribute to the attainment of the mandatory objective of Directive 86/653, which is to secure a high level of protection for the commercial agent.

34. However, Directive 86/653 contains no mention of any trial period. As long as EU law expresses no view as to its permissibility, I would be inclined to the view — shared by DTT, the French and German Governments, and the Commission — that to include a provision for a trial period is, as a matter of principle, a matter falling within the scope of the parties' freedom of contract. Nonetheless, in view of

14 Judgment of 23 March 2006, *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 19).

15 Judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 21).

16 In fact all the provisions cited above are in Chapter IV of Directive 86/653, entitled 'Conclusion and termination of the agency contract'.

17 See my Opinion in *Marchon Germany* (C-315/14, EU:C:2015:585, point 24).

18 Judgment of 17 October 2013, *Unamar* (C-184/12, EU:C:2013:663, paragraph 39).

the harmonisation objective pursued by Directive 86/653, the legal effects attributed to a trial period under domestic law may not negate that directive and the effectiveness of the rights conferred therein. If it were otherwise, the applicability of the mandatory rules of Directive 86/653 would depend on national law. [19]

### *The effects of a trial period on Article 17 of Directive 86/653*

35. It is therefore appropriate to examine the possible effects of a trial period on a commercial agent's right to compensation under Article 17 of Directive 86/653 and to determine the limits which may be applicable to them in the light of the mandatory rules of the directive.

36. In determining the scope and extent of Article 17 of Directive 86/653, its wording, context and objectives must all be taken into account. [20] In that regard it should be stressed that, under the Court's case-law, Article 17 of Directive 86/653 must be interpreted in the light of the objective pursued by the directive and of the system introduced by it. [21]

#### *The wording of Directive 86/653*

37. In order to interpret that provision, one must, first of all, go by its wording. Under Article 17(1) of Directive 86/653 the Member States are to take the measures necessary to ensure that the commercial agent, 'after termination of the agency contract', is indemnified or is compensated for damage. Termination of the contract is therefore the condition triggering the commercial agent's entitlement. That occurs where the parties bring an end to performance of the contract, that is to say, to their reciprocal obligations.

38. Such effect is produced where one party decides to terminate, on easier terms where they exist, [22] a commercial agency contract during the trial period. As already stated, the provision for a trial period is intended to facilitate termination of the contract so that one party to the contract is no longer tied to another contracting party who does not meet his requirements. Equally, performance of the commercial agency contract may not be deemed to commence only on completion of the trial period.

39. In that regard, the wording of several of the provisions of Directive 86/653, including Article 17, precludes the trial period from being interpreted under national law as a period during which performance of the contract has not yet commenced and the status of commercial agent does not obtain. Under Article 1(1), Directive 86/653 applies to the laws governing the relations between commercial agents and their principals, the commercial agent being an intermediary who has continuing authority, inter alia, to negotiate the sale or purchase of goods on behalf of another person. Relations between a commercial agent and a principal as defined in Directive 86/653 therefore subsist as from the time when a contract, the purpose of which is the sale or purchase of goods by one party to the agency contract on behalf of the other, has been entered into, irrespective of whether that activity occurs during a trial period or not.

19 One may also wonder as to the need for a trial period in the event of the latter not relaxing the conditions under which the contract may be terminated — by reducing the notice period — in the knowledge that termination does not have to be supported by a statement of reasons in all cases.

20 Judgment of 16 April 2015, *Angerer* (C-477/13, EU:C:2015:239, paragraph 26 and the case-law cited).

21 See, inter alia, judgment of 3 December 2015, *Quenon K.* (C-338/14, EU:C:2015:795, paragraph 21 and the case-law cited).

22 Although not easier in relation to the mandatory provisions of Directive 86/653.

40. Under Article 1, the protection conferred by Directive 86/653 operates mandatorily with effect from the date of conclusion of the contract and cannot be displaced by any contractual arrangement made by the parties, as Article 19 of the directive makes clear: under that provision the parties to the commercial agency contract cannot derogate from Articles 17 and 18 of the directive to the detriment of the commercial agent. National law cannot therefore classify that contract as anything other than a commercial agency contract. There can be no exclusion from the scope of EU law.

41. Moreover, the 'continuing' authority of the commercial agent under Article 1(2) of Directive 86/653 is not called in question by a provision for a trial period. That qualifying term excludes from the scope of Directive 86/653 single orders which are not intended to give rise to any repeat transactions in the future.[23] Moreover, the possibility of termination of the contract does not call in question the continuing nature of the authority because it is enough for the commercial agent to be *enabled* to perform the task entrusted to it on a permanent basis, even if that possibility is not achieved owing to termination of the contract by the principal. It follows that a trial period is not intended, as a rule, to create a solely temporary situation. A short trial period should not therefore be regarded as falling outside the scope of the indemnification and compensation mechanism that is provided for in Article 17 of Directive 86/653, on the ground that the authority conferred is not 'continuing'. In view of the purpose of that mechanism and of the objective of Directive 86/653, the regime is applicable if termination of the contract is liable to entail a financial loss for the commercial agent.

42. Termination of the contract during the trial period must therefore be regarded as giving rise, in the same way as in the case of a contract for an indefinite period, to a 'termination' within the meaning of Article 17 of Directive 86/653, entailing the expiry of the principal contractual obligations.

*The general system of Directive 86/653*

43. This conclusion is borne out by a systematic interpretation of Article 17 of Directive 86/653. The trial period concerns not the obligations under the contract but the rules governing its termination. It therefore belongs to the same category of rules as those in Articles 14 and 15 of Directive 86/653 governing the conclusion and termination of the commercial agency contract. Whereas a contract for a definite period comes to an end at the end of its term, a contract for an indefinite period may be terminated subject to a period of notice being given. The same is true of a contract entered into with a trial period, the sole difference being that the conditions governing termination may be easier if termination takes place within that period.[24] The mechanism and effect of termination, however, remain the same.

44. For all the potential cases in which a contract may be terminated, as provided for in Articles 14 and 15, Directive 86/653 lays down in Article 17, without distinction, a single regime for indemnification and compensation after termination of the contract. It therefore follows from the general scheme of Directive 86/653 that this regime applies, whatever procedure may have led to the termination of the contract.

45. Moreover, the trial period does not feature among the exceptions, listed exhaustively in Article 18 of Directive 86/653, to the applicability of the indemnification and compensation regime. Under that provision, the compensation referred to in Article 17 of that Directive is not payable in three situations: (i) where there has been a failing attributable to the commercial agent which would justify

23 See, to that effect, judgment of 16 March 2006, *Poseidon Chartering* (C-3/04, EU:C:2006:176, paragraphs 25 and 26), in which the Court principally considered the number of transactions entered into by the agent to be a relevant criterion for determining 'continuing authority'. See, in the same vein, Rott-Pietrzyk E., 'Komentarz do Dyrektywy Rady no 86/653 z 18 grudnia 1986 roku w sprawie harmonizacji praw państw członkowskich dotyczących niezależnych agentów handlowych', Problemy Prawne Handlu Zagranicznego, Uniwersytet Śląski, t. 19/20, 2000, p. 245.

24 Although not easier in relation to the mandatory provisions of Directive 86/653.

immediate termination of the contract under national law; (ii) where the commercial agent has terminated the contract; and (iii) where, with the agreement of the principal, the commercial agent assigns his rights and obligations under the agency contract to a third party. Termination of the contract during a trial period does not come within any of those categories. Moreover, the Court has already had occasion to point out that the exceptions to Article 17 of Directive 86/653, set out in Article 18, must be interpreted strictly[25] and may not therefore be extended to a new category, such as termination of the contract during a trial period.

*The aim of Directive 86/653*

46. In view of the objective of Directive 86/653, as described in point 33 of this Opinion, the indemnity and compensation scheme at issue clearly does not admit of any interpretation of Article 17 of the directive which could be detrimental to the commercial agent.[26] As regards the application by the referring court of Article 17 of Directive 86/653 in the event of termination of a commercial agency contract during the agreed trial period, allowing provision to be made for such a trial period cannot lead to a situation in which the commercial agent is deprived of the rights conferred on him by Article 17 of Directive 86/653. It thus follows that it is not appropriate to exclude, as a matter of principle, all rights of the commercial agent to indemnification and compensation under the rules laid down by Article 17 of Directive 86/653, where termination of the commercial agency contract occurs during the trial period provided for therein.

47. The mandatory nature of the mechanism protecting the rights of the commercial agent is borne out by Article 19 of Directive 86/653, which prohibits the parties from derogating from Articles 17 and 18 of that directive to the detriment of the commercial agent.[27] To amend the contract by providing for a trial period during which Articles 17 and 18 of Directive 86/653 do not apply clearly amounts to such derogation.

48. Moreover, and as the German Government and the Commission have correctly pointed out, to set aside the application of the indemnity and compensation mechanism provided for in Articles 17 and 18 of Directive 86/653, simply by providing for a trial period, would open the door to abuses. That would be liable to encourage circumvention of the rules on the protection of the commercial agent by principals who would provide for long trial periods at the end of which no compensation would be payable in respect of transactions brokered by the commercial agent on behalf of his principal.

49. That result would be contrary to the mandatory provisions of Directive 86/653 in two respects: namely refusal of any compensation in the event of termination of the commercial agency contract during the trial period would result in the exceptions –– exhaustively set out in Article 18 of Directive 86/653 –– to enjoyment of the rights conferred being extended and the level of protection sought by the directive at the same time being lowered.

50. Finally, the fact that the indemnity and compensation mechanism provided for in Article 17 of Directive 86/653 is applicable from the beginning of the trial period does not mean that the commercial agency relationship can never be terminated without payment of compensation and that, consequently, the principal's interests are not sufficiently taken into account. In fact Article 17(2)(a) of Directive 86/653, mandatorily and without any a priori exceptions, provides for an indemnity to be paid, but only 'if and to the extent that' the agent's activity has led to a significant development in the principal's commercial business enduring beyond the term of the agency contract. The payment of this indemnity must also be equitable having regard to all the circumstances.[28] In that connection it should

25 Judgment of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraph 42).

26 Judgment of 26 March 2009, *Semen* (C-348/07, EU:C:2009:195, paragraph 21).

27 See also judgment of 9 November 2000, *Ingmar* (C-381/98, EU:C:2000:605, paragraph 22).

28 Judgment of 28 October 2010, *Volvo Car Germany* (C-203/09, EU:C:2010:647, paragraph 44).

be pointed out that, as stated at point 26 above, the indemnity scheme is remuneratory in nature and based on the performance of the commercial agent. Therefore, if, on those criteria, an indemnity has to be paid, the fact that the contract was terminated during the trial period is not sufficient to obviate the need for the indemnity payment. Finally, termination of the contract during the trial period is likely to have the same effect as termination of a contract entered into for an indefinite period, that is to say, financial loss. Conversely, if the conditions laid down in Article 17(2) and (3) of Directive 86/653 are not met, no indemnity is to be paid to the commercial agent, whether or not termination of the contract occurred during the trial period. That is also clear from the fact that the purpose of the indemnity scheme is not to penalise termination of the contract but rather to indemnify the agent for the past performance of services which will continue to have an effect on the principal's future transactions.

## Conclusions

51. In the light of all the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Cour de Cassation (Court of Cassation, France) as follows:

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 must be interpreted as meaning that Article 17 thereof applies where termination of the commercial agency contract occurs during the trial period provided for in that contract.