

SUMMARY

ECJ 7 April 2016, case C-315/14 (Marchon Germany), commercial agency

<p>This case involves the right of a self-employed commercial agent, following termination of the contract with his principal, to an indemnity for having brought in new business. This right may not be interpreted restrictively.</p>

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Facts

Marchon is a company that sells spectacle frames. It does this in Germany through self-employed commercial agents. Ms Karaszkiwicz was such an agent for a certain area of Germany. Her work consisted of negotiating with opticians in that area and selling them spectacle frames in the name of Marchon, for which she received a commission. A peculiarity of the case is that Ms Karaszkiwicz was entrusted with the sale, not of all of Marchon's spectacle frames, but only three brands. Other agents in her area, with whom she competed, sold Marchon's other brands.

When Ms Karaszkiwicz was engaged in 2008, she was given a list of opticians in her area with whom Marchon already had business dealings in respect of its other brands.

Following termination of her contract, Ms Karaszkiwicz brought a claim against Marchon, demanding compensation on the basis of Paragraph 89b(1) of the German Handelsgesetzbuch (Commercial Code). It states that:

“The commercial agent may, after termination of the contractual relationship, demand from the principal, a reasonable indemnity if and to the extent that:

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the principal continues to derive substantial benefits, even after termination of the agency contract, from the volume of business from new customers which the commercial agent has brought in; and

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

This provision is the German transposition of Article 17 of Directive 86/653, which provides:

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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.

- 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.

National proceedings

Ms Karaszkiwicz claimed compensation, arguing that the opticians who had purchased spectacle frames of the brands she offered for sale were to be regarded as “new customers” within the meaning of Paragraph 89b(1). The court of first instance awarded half of the amount claimed, holding that although the opticians were indeed “new” customers, her business dealings had been facilitated by the fact that those customers were already aware of

Marchon as a provider of spectacle frames. The judgment was upheld on appeal. Marchon applied to the Bundesgerichtshof. It referred a question to the ECJ on the correct interpretation of Article 17 of Directive 86/653.

ECJ's findings

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The wording of Article 17 (2) of the Directive, in that it differentiates between new customers and existing customers, might suggest that only customers with whom the principal had, until the commercial agent's involvement and generally speaking, maintained no business relations, are to be regarded as new customers. However, those words, by themselves, do not establish for certain whether the 'new' or 'existing' nature of a customer must be assessed in relation to the principal's entire range of goods or in relation to certain goods in particular. Article 17(2) must consequently be interpreted by taking account of the context of that provision and the objectives pursued by the directive (§28-29).

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As for the context, the purpose of a commercial agent's activity depends on the terms of the contract which binds him to the principal and, in particular, on the agreement between the parties with regard to the goods which the principal intends to sell or purchase through the mediation of that commercial agent (§30-32).

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As for the objectives pursued by the directive, it is important to note that that directive seeks, inter alia, to protect the commercial agent in his relations with the principal. It is therefore necessary to interpret the wording of Article 17(2) in a manner which contributes to the protection of the commercial agent and which therefore takes full account of the merits of the latter in carrying out the transactions assigned to him. The concept of 'new customers', within the meaning of that provision, may not therefore be construed restrictively (§ 33).

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In light of the foregoing, the view must be taken that it is in relation to the goods in respect of which the commercial agent was assigned by the principal to negotiate and, if applicable, to

conclude the sale or purchase that it is necessary to determine whether a customer is new or existing within the meaning of Article 17(2). Thus, in a situation such as that in the main proceedings, in which the commercial agent is assigned to negotiate the sale of a portion of the principal's range of goods and not all of that range, the fact that a person already maintained business relations with the principal in respect of other goods does not exclude that person from being regarded as a new customer brought in by that commercial agent when the latter has managed, through his efforts, to initiate business relations between that person and the principal for the goods which the agent has been assigned to sell. The mere fact that, in circumstances such as those in the main proceedings, customers brought in by a commercial agent for his principal had already purchased from the principal goods comparable in nature to those in respect of which that commercial agent had negotiated the sale to those customers cannot suffice as a basis for taking the view that the latter goods already formed part of the pre-existing business relations with those customers (§ 34-37).

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It is necessary to examine whether the sale of the goods in question required, on the part of the commercial agent, particular negotiating efforts and sales strategy, leading to the establishment of specific business relations, particularly insofar as those goods relate to a different portion of the principal's range. In that regard, the fact that the principal entrusted a commercial agent with the marketing of new goods to customers with whom the principal already maintained certain business relations may indicate that those goods relate to a different portion of the range to that which those customers had purchased up to that point and that the sale of those new goods to the latter customers would require that commercial agent to set up specific business relations, this, however, being a matter for the referring court to determine (§ 38-39).

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The sale of goods generally takes place in a different setting depending on the brands to which they belong. In that regard, the Court has already held that a brand is often, in addition to being an indication of the origin of the goods or services, an instrument of commercial strategy used inter alia for advertising purposes or to acquire a reputation in order to develop consumer loyalty. Thus, circumstances such as those in the main proceedings, in which the offer of the principal's goods is divided up into different brands, each of its commercial agents being entrusted with negotiating the sale of one or more brands only, tends to suggest — this, however, being a matter for the referring court to determine — that those commercial agents are required to establish, with each customer, business relations specific to the brands

assigned to them (§ 40-41).

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As regards Marchon's argument that it is easier for commercial agents to place new goods with persons who already have business relations with the principal, that assertion, even if considered to be proven, should be fully taken into account by the national court in the course of its analysis seeking to ascertain the equitable nature of the indemnity claimed (§ 42).

Judgment

The first indent of Article 17(2)(a) of Council Directive 86/653 [...] must be interpreted as meaning that customers brought in by the commercial agent for the goods that he has been assigned by the principal to sell must be regarded as new customers within the meaning of that provision, in the case where, even though those customers already had business relations with that principal in relation to other goods, the sale, by that agent, of the first goods required the establishment of specific business relations, this being a matter for the referring court to determine.

Creator: European Court of Justice (ECJ)

Verdict at: 2016-04-07

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