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ESTABLISHMENT OF A TRIAL PERIOD IN AGENCY CONTRACTS: COMMENTS IN THE CONTEXT OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 19 APRIL 2018

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1. INTRODUCTION

Commercial agency contracts have a long tradition. Their economic importance in the cross-border space was a decisive factor for adopting Directive 86/653/EEC.[1] It is clear from the wording of the preamble that its primary objective is to protect commercial agents in their relationships with principals, to increase the security of economic transactions and to facilitate trade in products between the member states by approximating their legal systems. Although the explanatory memorandum to the act is not a source of law, it is relevant to the process of its interpretation. In agency contracts the principal is typically considered to have an economic and negotiating advantage. As such, there is a risk of the principal abusing its stronger position. Therefore, in the process of interpreting the regulations governing this matter, special emphasis is put on protecting the agent as a weaker party. As any generalisation, the above assessment may be affected by the risk of error due to the fact that the commercial agent, similarly to the principal, is a skilled, professional entity, often specialising in agency.[2] It is therefore questionable whether this inclina-

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[1] Dated 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (Polish special edition OJ EU 2004, Chapter 6, Vol. 1, pp. 177–181); henceforth the Directive.

[2] It is noted that in its Report of 23 July 1996 (concerning the application of Article 17 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the

tion of the Directive is justified in private law. Although the implementation of the Directive by the member states has been accompanied by considerable preliminary case law of the Court of Justice for several decades, there are various interpretative issues relating to its provisions. It is worth noting that the case law of the Court of Justice is also evolving from a formalistic approach in its interpretations of the EU regulations towards more in-depth analyses that meet the needs of modern trading.[3] This is partly understandable given the fact that the law is supposed to be a living matter, not just a static order. The practice of its implementation must keep in line with the changing environment and the needs of economic transactions. The increasing complexity of the relations existing in the contemporary exchange, and the intensification of market competition cause even the interpretation of the EU acts to be based on values by referring to axiology. In the context of the issue addressed herein, this will concern in particular the reading of the provisions of the Directive with reference to its objectives in terms of the widest possible application of the safeguard mechanisms provided for by the Directive, also to non-standard commercial agency contracts, i.e. those which do not necessarily fit into the stability of contractual relationships.

From this point of view, the CJEU judgment of 19 April 2018 merits attention.[4] It was issued in connection with the main proceedings pending before a court of a member state, in which the referring court had concerns regarding the classification of a commercial agency contract concluded for a trial period of twelve months, in the context of the assessment of its nature and legal effects, as defined by the Directive. The contract provided for the possibility of its early termination upon giving one month's notice (stating the reasons for termination). The principal (a party to the dispute) decided to terminate the creditor-debtor relationship after five months, subject to the prescribed period. The grounds for the early termination of the contract was the fact that the agent had caused only one contract to be concluded.[5] In the opinion

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Member States relating to self-employed commercial agents, COM(96) 364 final), the European Commission, with regard to the interpretation of the equity clause, set out circumstances such as diligence in the performance of the contract in question, the pursuit of activities for other entities and the relationship to the competition clause, see E. Rott-Pietrzyk, *Umowy odnoszące się do świadczenia usług. Umowa agencyjna*, [in:] J. Rajski (ed.), *Prawo zobowiązań – Część szczegółowa. System Prawa Prywatnego*, Vol. 7, Warszawa 2018, nb. 267.

[3] An example of changes in the approach and taking into account the axiological context in the study of phenomena in the protection of competition law is recent case law, including the CJEU judgment of 6 September 2017 in the case *Intel v. Commission*, C-413/14, ECLI:EU:C:2017:632. For example, the EU legislator had no intention to adopt the meaning of 'access to the file' in such a way as to allow the authority to apply a subjective approach to the collection of evidence and discretion in registering and disclosing the same to undertakings suspected of having violated the competition rules without any normative and evaluative justification. For more details, see W.P.J. Wils, *The Judgment of the EU General Court in Intel and the So-called 'More Economic Approach' to Abuse of Dominance*, World Competition: Law and Economics Review 4, 2014, p. 405 et seq.; I. Bodenstein, *Intel Corporation Inc. und Post Danmark II – Die Weichen für die zukünftige Bewertung von Rabatten nach Art. 102 AEUV sind so gut wie gestellt!*, Zeitschrift für Wettbewerbsrecht Vol. 4, 2015, p. 403 et seq.

[4] *Conseils et mise en relations (CMR) SARL*, C-645/16, ECLI:EU:C:2018:262.

[5] The reasons for termination should be sufficiently justified. On the other hand, whether such a situation has arisen in a particular case is subject to the discretionary power of the national

of the commercial agent, when terminating the contractual relationship, the principal failed to comply with the normative standards as to the reasons for termination. In those circumstances, it brought an action before the national commercial court for payment of compensation and damages.

2. TRIAL PERIOD CONTRACT AND LEGAL RELATIONSHIP OF THE AGENCY

In the law of the member state requesting a preliminary ruling, commercial agency contracts providing for a trial period binding on the parties were not covered by the safeguard mechanisms of Directive 86/653. The general principles of freedom of contract and the content of the concluded contract applied to the conditions governing their performance and termination. Although there is ample preliminary case law of the Court of Justice relating to the application of this secondary legislation, agency contracts containing trial period clauses have not yet been the subject of its interpretation. This does not mean, however, that this type of contract is ancillary and as such unworthy of legal consideration from the point of view of assessing the need to secure the protection of the agent in the light of the provisions of the act in question. There are some arguments supporting the conclusion of commercial contracts stipulating a trial period which the contracting parties, in particular service providers, take into account. Such a period allows verification of the usefulness of an agent, facilitates termination of such contract, and thus flexible shaping of the contractual terms. However, this formula can entail not only the indicated advantages but also negative phenomena such as attempts to circumvent the safeguard regulations concerning a commercial agent. This raises a question to what extent the mechanism conditionally binding the parties can be included in the protective safeguards of the Directive or whether it applies to such contracts altogether. Formally, it would be difficult to include such a contract in the definition of commercial agency whose constitutional element is the stability of a relationship.[6] However, the emphasis of the preliminary rulings to date has already been on the actual performance of the contracts rather than on their name.

In accordance with the general framework provided for the member states in the Treaty on the Functioning of the European Union,[7] the Directive binds them as to the result to be achieved. It leaves the national authorities leeway as regards the form and means, this being subject, however, to ensuring the effectiveness of

court before which the proceedings are pending. For more details on the legal position of the agent in the context of French law, see M. Kozak, *Umowa agencyjna w świetle artykułu 101 TFUE (Jak gonić króliczka, aby go nie złapać)*, internetowy Kwartalnik Antymonopolowy i Regulacyjny 4(1), 2012, p. 33, and also S. Majkowska-Szulc, *Prawo agenta do odszkodowania z tytułu rozwiązania umowy agencyjnej w świetle prawa francuskiego*, [in:] E. Bagińska (ed.), *Współczesne problemy prawa prywatnego*, Gdańskie Studia Prawnicze Vol. XXXIX, 2018, p. 387.

[6] Regarding agency in a broad sense, see T. Świerczyński, *Charakter prawny umowy o pośrednictwo*, Przegląd Prawa Handlowego 1, 1999, p. 15.

[7] Article 288, third paragraph, OJ C 326, 26.10.2012, p. 47 et seq.

that order. The CJEU's interpretation under Article 267 TFEU is based on the provisions of a Union act, which is intended to enable national courts to resolve legal uncertainties that have arisen in connection with specific proceedings pending in a member state. The Union law does not, in principle, interfere with the choice of instruments for implementing acts that are binding on the member states and cannot predetermine the appropriateness of the way in which it is implemented in the internal legal order. The Directive establishes for the member states shared minimum standards for the protection of a commercial agent.[8] This convergence is to be facilitated by the Directive's arrangements as regards the content of the key concepts and the nature of the institutions provided for therein. In the light of the considerations in this article, a departure from the definitions defining the subjective and objective scope of the Directive should be considered appropriate.[9] Pursuant to Article 1(2), the term 'commercial agent' means 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.[10] It has been consistently held in the case law of the Court of Justice that, in order to determine properly the object and role of individual provisions of a given act, their content, context and objectives must be taken into account.[11] From the perspective of the assumptions of the Directive under discussion and the CJEU case law interpretation of its provisions, the protection of a commercial agent comes to the foreground. It is not absolute, with its primary objective remaining the equality of opportunities and benefits.

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[8] In the reasons for the judgment of 17 July 2007 (P 16/06, 79/7/A/2007), the Constitutional Tribunal noted that the interpretation of the limits of freedom of contract, including the agency contract, should take into account the way of interpretation which is, as close as possible, in line with the solutions envisaged under the EU law.

[9] Among others, the CJEU judgments of 17 October 2013, *Unamar*, C-184/12, EU:C:2013:663, para. 37; of 3 December 2015, *Quenon*, C-338/14, EU:C:2015:795, para. 23, and the case law cited therein. See also D.C. Aguado, *Régimen jurídico de las operaciones internacionales de consumo en los servicios turísticos digitales*, Dykinson, Madrid 2018, p. 144; P. Hollander, *L'arrêt Unamar de la Cour de justice: une bombe atomique sur le droit belge de la distribution commerciale?*, Journal des tribunaux 2014, p. 297 et seq.; G. Rühl, *Commercial Agents, Minimum Harmonization and Overriding Mandatory Provisions in the European Union: Unamar*, Common Market Law Review 1, 2016, p. 216.

[10] The definitions of a commercial agency set out above are broadly in line with the provisions of *Draft Common Frame of Reference*, Book IV, part II, Chapter III, IV.E.-3:101, [in:] Ch. von Bar, E. Clive, H. Schulte-Nölke et al. (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) Outline Edition*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law, Munich 2009, p. 352.

[11] As regards the latter, see D. Bucior, *Komentarz*, [in:] M. Fras, M. Habdas (eds), *Kodeks cywilny. Komentarz. Zobowiązania. Część szczególna (art. 535–764(9))*, Vol. IV, Warszawa 2018, comment to Article 758 Civil Code, para. 6. The external creditor-debtor relationship is functionally related to the internal relationship, see R. Stefanicki, *Odpowiedzialność zakładu ubezpieczeń za szkodę wyrządzoną przez agenta*, Wiadomości Ubezpieczeniowe 7–8, 2004, p. 31, which affects the interpretation.

3. NATURE AND NORMATIVE EFFECTS OF ESTABLISHING A TRIAL PERIOD

It follows from the definition quoted above that agency contracts should be permanent. An integral element of such contracts is their durability and, in particular, their objectives that are expressed in the efforts to solicit and retain customers and, thus, also to benefit the principal after the termination of the contract and the agent's right to indemnity. On the other hand, the exclusion of contracts which contain a trial period clause from the scope of the Directive may give rise to a significant risk of harming the agent[12] as a result of 'early termination'. The national court, seeking a preliminary ruling, and the principal in a dispute with its commercial agent submitted that a contract providing for a trial period is not definitive and as such does not fall within the scope of the Directive. As the Advocate General rightly pointed out,[13] it does not contain any specific provisions as regards national measures for its implementation. Nor does it provide for a general exclusion of these contracts from its scope. In view of the essential purpose of the Directive and the content of its provisions, the context in which they occur, and the effect of the EU law cannot, in the opinion of the Advocate General, be 'negated' by the exclusion of the contracts at issue from its scope of application merely because they provided for a trial period. Such a negative effect could also arise if agency contracts are excluded from the scope of the Directive, where a commercial agency is only ancillary[14] or if the same parties are bound by other provisions that are not ancillary to the commercial agency in addition to the agency contract. The latter issue is touched upon in the interpretation of the act in question by the Court of Justice in its judgment of 21 November 2018,[15] in which the Court ruled, inter alia, that:

> Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person not only performs activities consisting in the negotiation of the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities,

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[12] That is considered the weaker party to this contract. It is even indicated that this is comparable to the protection enjoyed by an employee with regard to, inter alia, the termination of the employment contract, J. Huet, *Traité de droit civil*, [in:] G. Decocq, C. Grimaldi, J. Huet, H. Lécuyer, *Les principaux contrats spéciaux*, Paris 2012, p. 1099. Nowadays, the inclusion of 'employees' in the context of civil law in the protective standards is seen as an implementation of the principle of social justice, Z. Hajn, *Regulacja prawna zatrudnienia agentów*, [in:] Z. Kubot (ed.), *Szczególne formy zatrudnienia*, Wrocław 2000, p. 138; M. Szabłowska-Juckiewicz, M. Wałachowska, J. Wantoch-Rekowski (eds), *Umowy cywilnoprawne w ubezpieczeniach społecznych*, Warszawa 2015, pp. 20, 27 et seq., with statements by representatives of science, practitioners.

[13] Point 34 of the opinion submitted on 25 October 2017, *Conseils et mise en relations (CMR) SARL*, C-645/16, ECLI:EU:C:2017:806.

[14] This applies to situations where a member state has not exercised its discretionary power to exclude them in the implementation of the Directive. By setting common minimum standards for approximation, the Directive allows the exclusion in internal systems of persons who carry out agency activities on an ancillary basis. Few countries have made use of this clause, which means that agents carrying out activities ancillary to their main business are also covered by the safeguard mechanism of the Directive.

[15] *Zako SPRL v. Sanidel SA*, C-452/17, ECLI:EU:C:2018:935.

> does not preclude that person from being classified as a 'commercial agent' within the meaning of that provision, provided that this fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.

The Court of Justice has consistently emphasised in its preliminary case law that the Directive's provisions should be read by reference to its objectives. The literature on the subject[16] correctly argues that stressing the teleological argumentation in legal reasoning is to prevent formalism, and also the limitations of legal discourse and the weakening of ethical liability for the law. However, the setting of the law enforcement methodology is dependent on the regulation method. It would be difficult to do so, especially if the rules are excessively casuistic, and in particular when taking advantage of the closed nature of the element making up the regulation of a particular matter. The EU legislator has recently abandoned this technique, and rightly so. Having regard to the objectives of the Directive, the interpretation of its provisions in the preliminary rulings of the Court of Justice is targeted at the protection of commercial agents.[17] This does not mean, however, that the interpretation which would lead to an imbalance in the actual position of the parties to the relationship in question is correct.[18] The objective is to secure real standards of formal justice in the process of applying the law and provide safeguards in the field of substantive justice. In order to achieve such aims, the use of undefined phrases or equity clauses of a general nature should be used in structuring an act. The content of the latter serves the purpose of resolving a specific dispute. Such a regulatory model leads to an increased importance of case law.[19] The reasons of equity[20] have been placed in the structure of the act in question in the regulations governing the right of a commercial agent to indemnity.[21] Balancing on the basis of

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[16] A. Bator, P. Kaczmarek, *Kim ma być wychowanek akademii prawniczej? O perspektywach budowania edukacji prawniczej wokół konstytucji*, Krytyka Prawa Vol. 10(2), 2018, p. 22.

[17] Judgment of 17 May 2017, *ERGO Poist'ovňa*, C-48/16, EU:C:2017:377, para. 41. The system established for this purpose in the Directive 86/653 is mandatory, see judgments of the Court of Justice: of 9 November 2000, *Ingmar*, C-381/98, EU:C:2000:605, para. 21; of 23 March 2006, *Honyvem Informazioni Commerciali*, C-465/04, EU:C:2006:199, para. 22.

[18] As regards the formalistic approach to law implementation (*Vorverständnisse*, *denkender Gehorsam*); for more details, see B. Hüpers, K. Larenz, *Methodenlehre und Philosophie des Rechts in Geschichte und Gegenwart*, Berlin 2010, pp. 354–355; N. Reich, *Full Harmonisation of EU Consumer Law*, [in:] R. Stefanicki (ed.), *Aktualne tendencje w prawie konsumenckim*, Wrocław 2010, p. 158.

[19] As regards its far-reaching role, see K. Topolewski, *Umowa agencyjna według Kodeksu cywilnego. Wybrane problemy de lege ferenda*, [in:] A. Olejniczak, J. Haberko, A. Pyrzyńska, D. Sokołowska (eds), *Współczesne problemy prawa zobowiązań*, Warszawa 2015, p. 712 et seq.

[20] One sees fairness, on the one hand, as a principle or grounds for judgment-giving formulated in the law, and on the other hand, as one of the 'most important directives for giving judicial decisions in civil cases', see A. Górski, *Słuszność w orzekaniu sędziego cywilisty*, Białostockie Studia Prawnicze 17, 2014, p. 115 et seq.; H. Ciepła, *Dochodzenie odszkodowań z czynów niedozwolonych na zasadzie słuszności*, Białostockie Studia Prawnicze 17, 2014, p. 57 et seq.; as well as comments in the context of Article 417^2 of the Civil Code in G. Bieniek, J. Gudowski, [in:] J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Vol. III, WKP, Warszawa 2018, in particular paras 7–8 with literature referred to therein.

[21] J. Jezioro, [in:] E. Gniewek, P. Machnikowski, *Kodeks cywilny. Komentarz*, Legalis 2017, commentary on Article 764^3 of the Civil Code, paras 1–2. It is, by all means, obligatorily taken into account in the process of examining the conditions for granting an indemnity to

these criteria allows a solution that is in line with the principles of legal axiology.[22] The equity criteria referred to in the regulations in question make it possible to find a flexible, taking into account all the circumstances,[23] approach to each individual case and avoid schematism.[24] The notion of all circumstances covers not only the grounds set out in the already cited provisions, relating to the conditions of indemnity, but also other components that are not expressly stipulated by the legislator. In that regard, the preliminary ruling of 3 December 2015[25] is worth noting, in which the CJEU held that Article 17(2) of Council Directive 86/653 must be interpreted as not precluding national legislation under which, as a result of the termination of an agency contract, an agent has the right to an indemnity following the acquisition of customers, limited to a maximum of one year's remuneration and, if that indemnity does not cover the entirety of the loss actually incurred, to the award of additional damages. However, the Court of Justice makes a reservation that this cannot lead to double compensation for loss of commission as a result of termination of the contract. Agent protection is not absolute. He is bound by certain standards of professional diligence and loyalty to the principal.[26] The latter requirement, identified as fairness in relationships with the other party,[27] is combined with a credit of trust,[28] which is also a decisive factor in reducing transaction costs.[29] Failure to comply with

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a commercial agent; see A. Konert, [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, commentary on Article 764^3 of the Civil Code, para. III.4.

[22] The reasons of equity may ultimately be the grounds for granting an indemnity to an agent, determining its amount or tilting the balance to the other party to the contract in question. It is a *sui generis* benefit, based on the principle of equity. This demonstrates that a commercial agent participates in the benefits resulting from the effects produced by it during the contractual term; see K. Kopaczyńska-Pieczniak, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz. Zobowiązania – część szczególna*, Vol. III, Warszawa 2014, para. 14. D. Bucior (*supra* n. 11, commentary on Article 758 Civil Code, para. 5) correctly points out that the Court of Justice applied the same premise of a loss to the compensation and the indemnity, whereas it is relevant only in the former case.

[23] M. Grochowski (*Umowa agencyjna w orzecznictwie sądów powszechnych*, Prawo w Działaniu. Sprawy Cywilne 20, 2014, pp. 362–363) points at the need to take into account the criterion of proportionality and, as such, the different circumstances of the relationship between the parties which would make the attribution of liability for a breach of an obligation economically unreasonable or inequitable. The set of economic interests typical of the agency relationship may be modified in various circumstances.

[24] T. Wiśniewski, [in:] J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część szczegółowa*, Vol. V, Warszawa 2017, para. 9.

[25] *Quenon*, C-338/14.

[26] Considering the average moral level appropriate for a decent working and economic life; see A. Kraus, F. Zoll, *Polska ustawa o zwalczaniu nieuczciwej konkurencji – komentarz*, Poznań 1929, p. 173.

[27] See the comments of the European Commission in its Report of 23 July 1996 (*supra* n. 2) on the presentation of a faithful, clear increase in the value of the principal's business obtained through the work of a commercial agent through a commission.

[28] A. Konert, [in:] M. Załucki, *supra* n. 21, commentary to Article 764^3 of the Civil Code, para. VII.12.

[29] See in this respect Article 3 of the Directive, which makes direct reference to the requirements to be met by a commercial agent. The general rule binding on counterparties is not only their assumed professionalism in operation (G. Kühne, *Rechtswahl und Eingriffsnormen in der Rechtsprechung des EuGH*, [in:] J.Ch. Cascante, A. Spahlinger and S. Wilske (eds), *Global Wisdom on Business Transactions*, International Law and Dispute Resolution, München 2015, p. 451 et seq.),

the above requirements may justify termination of the contract by the principal, whether or not a trial period is provided for in the contract. The requirement of loyalty also binds the other party to the agreement in question.[30] However, if the requisite standards of fairness in a commercial agent's activities are met – which should be established by the national court on the basis of all the circumstances – it would be contrary to the axiology of the Directive to exclude it a priori from the safeguard guaranteed by that Community (now the EU) legislation.[31]

4. EFFECTIVENESS OF STANDARDS SET BY DIRECTIVE 86/653

The Directive lays down minimum standards common to the member states for commercial agency contracts. In order to ensure the transparency of the scope of its impact, the regulation also points out the derogations which the member states are free to make use of when transposing this instrument. The discretionary power of the member states lies in the possibility of including agency contracts other than the commercial representation defined therein in the special safeguard mechanisms under the Directive. The main focus of the EU case law is on safeguarding actual and not only potential standards in the national order.[32] A derogation to the detriment of the agent would be the general adoption of the principle that the establishment of a trial period in an agency contract means that such an agent is excluded from the rights guaranteed by the Directive, including as regards the compensation and indemnity provided for in Article 17 thereof. With the same results in the performance of the agency contract, the agent could be granted or refused compensation on the sole ground that a trial period has been stipulated in the agency contract. In that regard, the Court of Justice has already ruled[33] that Articles 17 and 18 of the

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but also compliance with the requirements of loyalty, understood as compliance with ethical standards of professional integrity (I. Mycko-Katner, *Umowa agencyjna*, Warszawa 2012, p. 170). It is correctly assumed that the requirements of fair trading essentially permeate into all elements of the relationship between the parties to the contract in question, for instance, they are relevant in assessment of indemnity granted to the agent by reference to the principles of equity; see E. Rott-Pietrzyk, *supra* n. 2, nb. 267.

[30] See the grounds for the Supreme Court judgment of 25 May 2018, I CSK 478/17, LEX No. 2504292.

[31] Thus, it makes it possible to find a common point of reference for the member states' acquis, which in turn serves to approximate standards for the implementation of agency contracts in a cross-border space. See *Unamar*, C-184/12, judgment (*supra* n. 9) in which the CJEU referred to Articles 3 and 7(2) of the Convention on the law applicable to contractual obligations; more generally in G. Rühl, *supra* n. 9, p. 216; M. Mataczyński, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Kraków 2005, II.1.4. Regarding special jurisdiction, see M. Świerczyński, [in:] J. Gołaczyński (ed.), *Jurysdykcja, uznawanie orzeczeń sądowych oraz ich wykonywanie w sprawach cywilnych i handlowych. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1215/2012. Komentarz*, Warszawa 2015, p. 34 et seq.

[32] The Supreme Court was right to hold in its judgment of 25 May 2018 that the implementation of the Directive gives rise to an obligation on the part of the Polish courts to interpret it in such a way as to make its wording and objectives effective to the fullest possible extent.

[33] Judgment of 17 October 2013 in *Unamar*, C-184/12, para. 39.

Directive are of crucial importance as they define the level of protection which the European Union legislature considered reasonable to grant commercial agents in the course of the creation of the single market. The standards set by these provisions are present in the context of Article 19 of the Directive. The latter stipulates that the parties may not derogate from the provisions of Articles 17 and 18 to the detriment of the agent before the expiry of the agency contract. Similarly to its counterpart in the Civil Code, this provision constitutes *ius semidispositivum*.[34]

It should be borne in mind that the equity criteria apply not only to the granting of the indemnity itself or not, but also to the methodology for determining the amount of benefits. These requirements perfectly fit in with the view of the Supreme Court presented in the statement of reasons for the judgment of 25 May 2018, in which the Court stated that fulfilment of the requirements of effective security of indemnity claims, resulting from the Directive in question, to the same extent depends on the adoption of the method of calculation of the benefit amount and the use of Article 322 of the Civil Procedure Code only exceptionally. As such, the requirements of fair trading essentially permeate into all elements of the relationship between the parties to the contract in question, including they are relevant in measuring the granting of indemnity to the agent by reference to the principles of equity. This is an illustration of a more reflective approach to the diversity of forms of conclusion and performance of agency contracts and the assessment of their admissibility through the prism of the axiology of the EU law, which is not to exclude from its scope the benefits accruing to commercial agents of contracts concluded and performed in good faith.[35] The safeguard standards focused on the rights of the commercial agent apply to both potential rights and actual guarantees which determine the effectiveness, i.e. the results of the EU order. The latter is apparently affected by the methodology of providing indemnities.[36] There are some symptoms of making the law open to its ethical dimension. A huge role in reaching for the axiology of law rests in judicial decisions.

5. CONCLUSION

It can be concluded from the interpretation of agency contracts by the Court of Justice for the purposes of a court of a member state that the assumption that no indemnity is payable in the event of termination of the agency contract during a trial period

[34] Similar principles result from Article 764^5 of the Civil Code; see P. Mikłaszewicz, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, commentary on Article 764^3 of the Civil Code, para. 4.

[35] As regards the origin, see M. Pilich, *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej*, Studia Prawnicze 4, 2006, p. 49.

[36] In this respect see, inter alia, the CJEU judgment of 26 March 2009, *Turgay Semen*, C-348/07, ECLI:EU:C:2009:195, and the opinion of the Advocate General of 19 November 2008 presented in this case, ECLI:EU:C:2008:635. It stated, inter alia, that the method of calculation of lost commissions is to reflect the actual amount of the commissions in the period following the termination of the contract, thus making it possible to take into account the benefits derived by the principal from the agent's activities. See also N. Godin, P. Kileste, *Contrat d'agence commercial*, Bruxelles 2017, p. 32, and the above-mentioned Supreme Court judgment of 25 May 2018.

is incompatible with the mandatory nature of the system established by Article 17 in conjunction with Article 19 of the Directive 86/653. The interpretation of the act in question, which consists in making the commercial agent's safeguard mechanisms dependent on the nature of the contract itself – with the general exclusion of contracts providing for a trial period – regardless of the agent's performance, is an interpretation which is not justified in the light of its objectives. The agent cannot be a priori deprived of the benefits to which it is entitled, simply because the contract binding the parties stipulated the trial period. In its reply to the member state's request, the Court of Justice stated that the interpretation of Article 17 of the Directive, according to which no compensation or indemnity is payable if the agency contract is terminated during the trial period, is contrary to its purpose. The interpretation of the act in question given by the Court of Justice in the present judgment, as in its earlier case law on the classification of various forms of agency activity, seeks to cover as broadly as possible the scope of the Directive in question, different commercial agency contracts, irrespective of the name of the contract and the clauses contained therein, if agency activities are actually carried out on such basis. These considerations of the Court of Justice overshadow the efficiency and reliability of the agent that are relevant to the other party. These issues remain under examination at the national level. The requirements of equity in the implementation of the Directive are not limited to a reference, expressed explicitly in the provision governing the conditions for granting the indemnity, but also permeate all the matters governed by it. The general principles that are enshrined in the basic law set out a general framework for axiological choices aimed at an equitable outcome, including those relating to contracts containing a trial period clause. The decision of the Court of Justice on that point constitutes an important indication for the national decision.

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ESTABLISHMENT OF A TRIAL PERIOD IN AGENCY CONTRACTS: COMMENTS IN THE CONTEXT OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 19 APRIL 2018

Summary

Commercial agency contracts are of great economic importance and have a long tradition of normative regulation. Minimum standards of protection common to the EU member states are laid down in the Directive 86/653/EEC on self-employed commercial agents. The constant changes in the legal environment mean something more than just 'interpretation of a norm', the need to reach for its well-established, uniform, common understanding expressed in the case law and judicial decisions. The importance in this respect must unquestionably be attached to the preliminary rulings of the Court of Justice. An interesting point in its case law is the recent reference to the question of whether agency contracts concluded for a trial period are bound by the provisions of that act. Although this is the first time when the Court of Justice has addressed this issue, the direction of the interpretation, presented in favour of resolving the national court's doubts, is more broadly based on the desire to extend the protective mechanisms of the Directive to commercial agents that are bound by contracts which do not fully comply with the classic agency format. Based on the analyses carried out in the paper, it can be concluded that the trend to deformalise the law is correct and should be the subject of broader legal discourse.

Keywords: commercial agent, agency contract, trial period contract, teleological interpretation, indemnity

USTANOWIENIE OKRESU PRÓBNEGO W UMOWACH AGENCYJNYCH – UWAGI NA TLE WYROKU TRYBUNAŁU SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ Z 19 KWIETNIA 2018 R.

Streszczenie

Umowy przedstawicielstwa handlowego mają duże znaczenie gospodarcze i długie tradycje normatywnego ich regulowania. Wspólne dla państw członkowskich minimalne standardy ochrony zostały ustanowione dyrektywą dotyczącą przedstawicieli handlowych działających na własny rachunek. Dokonujące się ustawicznie zmiany otoczenia prawa oznaczają coś

więcej niż tylko „odczytanie normy", potrzebę sięgania po utrwalony, jednolity, powszechny sposób jego rozumienia wyrażony w judykaturze. Niewątpliwe znaczenie w tym zakresie przypisywać należy wyrokom prejudycjalnym Trybunału Sprawiedliwości. Interesującym wątkiem w tym orzecznictwie jest podjęcie ostatnio kwestii związania postanowieniami tego aktu umów agencji zawartych na okres próbny. Wprawdzie Trybunał Sprawiedliwości zajął się tym zagadnieniem po raz pierwszy, ale kierunek interpretacji, przedstawiony na rzecz rozstrzygnięcia wątpliwości sądu krajowego, ma znaczenie szersze, wiąże się bowiem z dążeniem do objęcia mechanizmami ochronnymi dyrektywy przedstawicieli handlowych, związanych umowami nie do końca wpisującymi się w klasyczną formułę agencji. Z analiz przeprowadzonych w poniższym materiale wypływa wniosek, że kierunek na odformalizowanie prawa jest trafny i powinien być przedmiotem szerszej dyskusji prawniczej.

Słowa kluczowe: przedstawiciel handlowy, umowa agencyjna, umowa na okres próbny, wykładnia celowościowa, świadczenie wyrównawcze

LA FIJACIÓN DE PERIODO DE PRUEBA EN CONTRATO DE AGENCIA, COMENTARIOS A LA LUZ DE LA SENTENCIA DEL TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA DE 19 DE ABRIL 2018

Resumen

Los contratos de representación mercantil tienen significado económico importante y larga tradición normativa de su regulación. Los estándares mínimos de protección son establecidos para los Estados Miembros mediante la directiva relativa a los representantes comerciales que actúan por su propia cuenta. El cambio permanente del entorno legal significa algo más que sólo la "lectura de la norma", es necesario utilizar la interpretación común, uniforme, consolidada, expresada en la jurisprudencia. Sin duda alguna, las sentencias prejudiciales del Tribunal de Justicia de la Unión Europea son importantes. Últimamente se ha tratado la cuestión relativa a estipulaciones de contrato de agencia por el periodo de prueba. Es la primera vez que el Tribunal de Justicia de la Unión Europea trata este problema, sin embargo la interpretación de dudas del tribunal nacional tiene significado más amplio, ya que trata de incluir en los mecanismos de protección de la directiva a los representantes comerciales con contratos que no exactamente vistan la forma de contrato de agencia. Del análisis llevado a cabo en esta obra resulta que dejar de formalizar el derecho es un rumbo acertado y debe de ser objeto de discurso legal más amplio.

Palabras claves: representante comercial, contrato de agencia, contrato por periodo de prueba, interpretación teleológica, prestación compensatoria

УСТАНОВЛЕНИЕ ИСПЫТАТЕЛЬНОГО СРОКА В РАМКАХ АГЕНТСКИХ ДОГОВОРОВ: ЗАМЕЧАНИЯ НА ФОНЕ РЕШЕНИЯ СУДА ЕВРОПЕЙСКОГО СОЮЗА ОТ 19 АПРЕЛЯ 2018 ГОДА

Аннотация

Договоры о коммерческом представительстве имеют большое значение для экономической деятельности, и поэтому неудивительно, что законодательное регулирование таких договоров

имеет давние традиции. Минимальные стандарты защиты, общие для государств-членов ЕС, изложены в Директиве в отношении независимых коммерческих агентов. В условиях постоянно изменяющейся правовой среды недостаточно просто «понять» ту или иную норму права; необходимо постоянно обращаться к устоявшемуся, унифицированному, общепринятому пониманию данной нормы, выраженному в судебной практике. Несомненно, большое значение в этом отношении имеют преюдициальные постановления Суда Европейского союза. Особый интерес вызывает недавнее рассмотрение Судом ЕС вопроса о том, применимы ли положения Директивы к агентским договорам, заключенным на испытательный срок. Суд впервые обратился к этому вопросу, отвечая на преюдициальный запрос суда одной из стран-членов. Тем не менее, заданное Судом направление толкования имеет значение и в более широком контексте, так как в нем отражено стремление распространить защитные механизмы, предусмотренные в Директиве, на коммерческих агентов, работающих по договорам, которые не вполне соответствуют классической формуле агентских отношений. Из приводимого в статье анализа можно сделать вывод, что тенденция к деформализации права является шагом в правильном направлении и заслуживает более широкого обсуждения в рамках юридического дискурса.

Ключевые слова: коммерческий представитель, агентский договор, договор с испытательным сроком, телеологическое толкование права, компенсационная выплата

DIE VEREINBARUNG EINER PROBEZEIT IN HANDELSVERTRETERVERTRÄGEN, ERWÄGUNGEN VOR DEM HINTERGRUND DES URTEILS DES GERICHTSHOFS DER EUROPÄISCHEN UNION VOM 19. APRIL 2018

Zusammenfassung

Handelsvertreterverträge haben außerordentlich große wirtschaftliche Bedeutung und blicken auf eine lange Tradition der normativen Regulierung zurück. Den Mitgliedstaaten gemeinsame Mindestschutzstandards wurden durch die europäische Richtlinie über selbständige Handelsvertreter festgelegt. Durch das ständigen Änderungen unterworfene rechtliche Umfeld ist mehr als ein reines „Ablesen der Norm" gefordert und es bedarf eines fest etablierten, einheitlichen und allgemein geltenden Verständnisses, das in der Rechtsprechung zum Ausdruck kommt. Zweifellos ist den Vorabentscheidungen des Europäischen Gerichtshofs diesbezüglich große Bedeutung beizumessen. Ein interessanter Aspekt dieser Rechtsprechung ist die kürzlich aufgegriffene Frage, ob die Bestimmungen dieses Gesetzes auch auf Agenturverträge anwendbar sind, die für eine Probezeit abgeschlossen wurden. Zwar hat sich der Gerichtshof dieses Themas zum ersten Mal angenommen, doch kommt der präsentierten Auslegung, die vorgelegt wurde, um Zweifel des einzelstaatlichen Gerichts zu beseitigen, eine breitere Bedeutung zu, da sie mit dem Streben verbunden ist, die Schutzmechanismen der Richtlinie auf Handelsvertreter auszudehnen, die an Verträge gebunden sind, die nicht ganz dem klassischen Modell der Handelsvertretung entsprechen. Aus den durchgeführten Analysen lässt sich ableiten, dass die eingeschlagene Richtung einer Informalisierung des Rechts richtig ist und Gegenstand eines breiter angelegten juristischen Diskurses sein sollte.

Schlüsselwörter: Handelsvertreter, Handelsvertretervertrag, Vertrag auf Probezeit, teleologische Auslegung, Ausgleichszahlung

STIPULATION D'UNE PÉRIODE D'ESSAI DANS UN CONTRAT D'AGENCE COMMERCIALE, OBSERVATIONS DANS LE CONTEXTE DE L'ARRÊT DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE DU 19 AVRIL 2018

Résumé

Les accords de représentation commerciale ont une grande importance économique et une longue tradition de réglementation. Les normes minimales de protection communes aux États membres ont été établies par la directive sur les agents commerciaux indépendants. Un environnement juridique en constante évolution signifie plus que la simple «lecture de la norme», la nécessité de parvenir à une manière bien établie, uniforme et commune de la comprendre exprimée dans la jurisprudence. Il ne fait aucun doute que l'importance à cet égard doit être attribuée aux décisions préjudicielles de la Cour de justice. Un fil intéressant de cette jurisprudence est la récente question de lier les contrats d'agence conclus pour une période d'essai aux dispositions de cette directive. Bien que cette question ait été traitée par la Cour de justice pour la première fois, la direction d'interprétation présentée pour résoudre les doutes de la juridiction nationale a une signification plus large, car elle est liée à la volonté d'étendre les mécanismes de protection de la directive aux représentants commerciaux liés par des contrats pas tout à fait conformes à la formule classique de l'agence. D'après les analyses effectuées dans ce document, il s'ensuit que la direction de la déformalisation du droit est appropriée et devrait faire l'objet d'un discours juridique plus large.

Mots-clés: représentant commercial, contrat d'agence, contrat de période d'essai, interprétation téléologique, prestation compensatoire

ISTITUZIONE DEL PERIODO DI PROVA NEI CONTRATTI DI AGENZIA, NOTE SULLO SFONDO DELLA SENTENZA DELLA CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA DEL 19 APRILE 2018

Sintesi

I contratti di agenzia commerciale hanno una grande importanza commerciale e una lunga tradizione normativa che li regolamenta. Gli standard minimi di tutela comuni per gli Stati membri sono stati stabiliti nella Direttiva sugli agenti commerciali indipendenti. Le modifiche che avvengono continuamente nel quadro giuridico significano qualcosa di più di una semplice "rilettura delle norme", indicano la necessità di raggiungere una modalità costante, uniforme e universale di comprensione, espressa nella giurisprudenza. Un'importanza indubbia in tale ambito va attribuita alla sentenza pregiudiziale della Corte di giustizia. Un tema interessante in tale sentenza è l'aver ultimamente trattato la questione legata alle norme dei contratti di agenzia stipulati per un periodo di prova. In effetti la Corte di giustizia si è occupata di tale questione per la prima volta, ma la direzione interpretativa, presentata per risolvere i dubbi del tribunale nazionale, ha un'importanza più ampia e si lega infatti al tentativo di comprendere i meccanismi di tutela della direttiva sugli agenti commerciali indipendenti, legati da contratti che non del tutto rientrano nella formula classica del contratto di agenzia. Dall'analisi condotta nel materiale seguente emerge la conclusione che la direzione per la deformalizzazione del diritto è cogliente, e dovrebbe essere oggetto una più ampia discussione giuridica.

Parole chiave: agenti commerciali, contratto di agenzia, contratto per un periodo di prova, interpretazione teleologica, indennità

Cytuj jako:

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