

Anonymised version

Translation

C-574/21 – 1

Case C-574/21

Request for a preliminary ruling

Date lodged:

20 September 2021

Referring court:

Nejvyšší soud České republiky (Czech Republic)

Date of decision to refer:

29 June 2021

Applicant:

QT

Defendant:

02 Czech Republic a. s.

[...]

ORDER

The Nejvyšší soud (The Supreme Court, Czech Republic) has ruled [...] in the case of the applicant [...] QT [...] v. the defendant, **O2 Czech Republic a. s.**, [...], with respect to the payment of the amount of CZK 2,023,799 plus associated amounts and interest, conducted before the Obvodní soud pro Prahu 4 (District Court Prague 4, Czech Republic), under ref. no 60 C 100/2014, concerning the appeal on a point of law of the applicant against the decision of the Městský soud v Praze (Prague City Court, Czech Republic), of 27 November 2019, ref. no 72 Co 302/2019-939, as follows:

I. [...]

II. The Supreme Court hereby **submits** the following questions to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union:

Must the expression ‘the commission lost by the commercial agent,’ within the meaning of Article 17(2)(a), second indent, 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, be interpreted to the effect that such commissions include commissions for the conclusion of contracts which a commercial agent would have entered into had the commercial agency [contract] endured, with the customers that he or she brought the principal or with which he or she significantly increased the volume of business?

If so, subject to what conditions does this conclusion apply to ‘one-off commissions’ for the conclusion of a contract?

Grounds:

I.

Background of the proceedings and proceedings before Czech courts thus far

- 1 In the present case, the applicant was seeking the imposition of the obligation on the defendant to pay to the applicant CZK 2,023,799 plus default interest on the grounds of a commercial agent’s right to indemnification.
- 2 Initially, the Obvodní soud v Praze 4 (District Court Prague 4) granted the application in part in its judgment of 14 September 2015 [...], which was the first in the series, the Městský soud v Praze (Prague City Court), as the appeal court, ruled on 16 March 2016 [...] setting aside that decision on the basis of the defendant’s appeal, on grounds of inadequate finding of facts, returning the case to the court of first instance for rehearing.
- 3 In its second judgment, of 30 January 2019 [...], the District Court dismissed the application.
- 4 The facts found by courts of lower instances were as follows:

A commercial agency contract was concluded between the applicant and the defendant’s legal predecessor (‘the defendant’) on 1 January 1998, the subject of which were the terms and conditions of commercial agency, the offer and sale of telecommunications services provided by the defendant in the NMT 450 and GSM systems, the supply and sale of mobile telephones and accessories and other potential products, and customer care. As at 31 March 2010, the legal relationship between the parties terminated due to a notice of termination given by the defendant.

Pursuant to the commercial agency contract, the applicant was entitled to a one-off commission for each individual contract he concluded for the defendant. The applicant did acquire new customers for the defendant in 2006 and 2007, or entered into additional contracts with existing customers, for example, for other products or extending their existing contracts, but, even with a view to the duration of the maximum tariff commitment, which in the years concerned was a maximum of 30 months, they did not extend beyond the date of 31 March 2010, when the contractual relationship of the parties was terminated. In respect of the period between 2008 and 2009, a total of 431 commitments went beyond 31 March 2010, of which 155 were new contracts and 276 were changed commitments. Hence, the applicant has proven that it had brought new clients to the defendant and also developed business with existing ones. For such activities, the applicant received due pay from the defendant.

- 5 The court of first instance stated that it was up to the applicant to state clearly and definitely what advantages the defendant derives from those transactions, but the applicant failed to do so. Consequently, the Court concluded that the applicant had failed to demonstrate that the defendant derived substantial benefits from the customers acquired by the applicant after the termination of their cooperation. In view of that fact, it did not examine in further detail the other condition for the payment of indemnification, which is whether it was equitable. On those grounds, it dismissed the application as unfounded.
- 6 Upon the applicant's appeal, the Prague City Court confirmed the judgment of the court of first instance in its decision referred to in the introductory paragraph, having proceeded on the basis of the findings of facts made by the court of first instance.
- 7 The appeal court emphasised that the commission for the brokerage of transactions by the applicant were one-off and all had been duly paid out to the plaintiff, stating the opinion that the applicant's arguments based on the commission to which he would have hypothetically become entitled by the conclusion of further transactions, whether with existing or with new customers, does not support the right to indemnification under Paragraph 669 of zákon č. 513/1991 Sb., obchodní zákoník, (Law 513/1991, the Commercial Code), in effect until 31 December 2013 ('the Commercial Code'). Although the applicant brought in new customers and developed business with existing customers from which the defendant may have derived benefits after the termination of the commercial agency contract, the [defendant] had paid commissions to the applicant for such transactions pursuant to the commercial agency contract, and hence the payment of indemnification would not be equitable under Paragraph 669(1)(b) of the Commercial Code, and for that reason alone, the application should be dismissed.
- 8 The applicant filed an appeal on a point of law challenging the judgment of the appeal court.

- 9 The appellant refers to the court hearing the appeal on a point of law a question which the first-instance appeal court did settle in line with the decision-making practice of the court hearing the appeal on a point of law; nevertheless, the appellant is convinced that the question should be resolved differently. The appellant disagrees with the legal conclusion of the Supreme Court, according to which lost commissions, under Paragraph 669(1)(b) Commercial Code, are those commissions that the agent ‘would otherwise have received from already transacted business’ (comp. Supreme Court judgments of 26 October 2011, file no 32 Cdo 3359/2011, ECLI:CZ:NS:2011:32.CDO.3359.2011.1, of 17 December 2013, file no 32 Cdo 534/2012, ECLI:CZ:NS:2013:32.CDO.534.2012.1, of 27 October 2015, file no 23 Cdo 1531/2015, ECLI:CZ:NS:2015:23.CDO.1531.2015.1, as well as related decisions). On the contrary, the appellant advances the conclusion that lost commissions include those commissions that the commercial agent would have hypothetically gained, i.e., lost, on business transacted by the principal after the termination of the commercial agency with the customers brought to it by the commercial agent or those with whom he had significantly developed business.

II.

Applicable national legislation

Law 513/1991, the Commercial Code, version applicable until 31 December 2013:

Paragraph 669

(1) A commercial agent shall be entitled to indemnification in the event of the termination of the contract if:

a) he has brought the principal new customers or significantly developed business with existing customers and the principal continues to derive substantial benefits from business with such customers; and

b) the payment of this indemnification 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; such circumstances also include the application or otherwise of a restraint of trade clause, within the meaning of Paragraph 672a.

III.

Applicable European Union legislation

- 10 **Council Directive [86/653/EEC] of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (‘the Directive’):**

Article 17

(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. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

IV.

Grounds for the preliminary reference

- 11 The Directive aims to coordinate the laws of the Member States as regards the legal relationship between the parties to a commercial agency contract. In particular, therefore, it seeks to protect commercial agents in their relations with their principals and, to that end, establishes, inter alia, rules governing the conclusion and termination of an agency contract, in Articles 13 to 20 (comp. Court of Justice of the EU of 23 March 2006, *Honyvem Informazioni Commerciali*, C-465/04, ECLI:EU:C:2006:199, paragraphs 18 and 19, and also judgment of the Court of Justice of the EU of 26 March 2009, *Turgay Semen*, C-348/07, ECLI:EU:C:2009:195, paragraph 14). In view of that fact, established decision-making practice of the Court of Justice of the EU deduces that any interpretation of Article 17 of the Directive which may prove to be detrimental to the commercial agent is not permissible (comp. to other references, e.g., judgment of the Court of Justice of the EU of 19 April 2018, *Conseils et mise en relations [CMR] SARL*, C-645/16, ECLI:EU:C:2018:262, paragraph 35).
- 12 The legislation in the Czech Republic is based on the indemnification system, having transposed the solution set out in Article 17(2) of the Directive. The system is, among other things, embodied in applicable and effective laws of the Federal Republic of Germany (see judgment in *Turgay Semen* C-348/07, cited above, paragraph 16).

- 13 In its judgment of 26 October 2011, file no 32 Cdo 3359/2011, the Supreme Court stated the view (even though merely in the form of *obiter dictum*) that if a commission is to be one that a commercial agent has lost by the termination of the commercial agency agreement, it must be a commission that he or she would otherwise (i.e., had the commercial agency endured) have received on business already transacted, i.e., transactions concluded by him or her or substantially developed by him or her. The Supreme Court upheld that opinion in its judgments of 17 December 2013, file no 32 Cdo 534/2012, of 27 October 2015, file no 23 Cdo 1531/2015, as well as in other judgments, thereby establishing a settled decision-making practice.
- 14 The opposite trend can be traced in German case-law and literature. There, the opinion prevails that the commission lost by a commercial agent includes commissions for the conclusion of contracts that the commercial agent would have otherwise, had the commercial agency relationship endured, obtained from future transactions between the principal and the customers he or she had brought to the principal or with whom he or she significantly developed business (comp. to references to the case-law of the Federal Court of Justice by Busche in OETKER, Hartmut a kol. Kommentar zum Handelsgesetzbuch (HGB). 4. Aufl. München: C. H. Beck, 2021, HGB Section 89b, marg. no 22; Strobl in Mühener Kommentar zum HGB 5 Aufl., 2021, HGB Section 89b, marg. no 104; and from case-law, e.g., decision of the Federal Court of Justice of 13 May 1957, file no II ZR 19/57, also published in the Neue Juristische Wochenschrift magazine (1957, 1028). After all, such a conclusion flows from the text of Paragraph 89b(1), point 2 of the German commercial code prior to the 2009 amendment, which explicitly referred to business transacted in the future.
- 15 It follows from German case-law as well as specialised literature that a commercial agent does not lose any commission in the case of one-off commissions (*Einmalprovisionen*). For example, the Munich Regional Court concluded in its decision of 23 February 2011, file no 10 HK O 3966/10, that one-off commissions for arranging cable connections for customers are not commissions that the sales representative loses. But the Regional Court reached that conclusion on the basis of the nature of the one-off commission: ‘by negotiating a one-off commission, the disadvantages for the commercial agent normally associated with the termination of a commercial agency contract, are to be offset.’ A similar conclusion was also reached by the Higher Regional Court, Cologne, in its decision of 19 June 2015, file no 19 U 109/14, also available in the Beck-online.de information system under the abbreviation BeckRS 2015, 19345 (comp. chiefly margin numbers 44, 45), although it expressly emphasised that, despite the absence of lost commissions, a claim for compensation could be awarded. Similarly, the German commentary literature states: ‘If a one-off commission was granted, then in any event according to previous views [i.e., views prior to the amendment of Paragraph 89b of the German Commercial Code in 2009 on the basis of the judgment in *Turgay Semen* C-348/07], there was no loss of commission if no further business could prospectively be expected with the customers brought in by the agent. This problem arises predominantly in long-

term contracts, the brokerage of which is rewarded once and for all with a commission at the time of the conclusion of the contract,' (also see other references to other literature: EMDE, Raimond. Vertriebsrecht: Paragraphs 84 – 92c HGB. *Handelsvertreterrecht -Vertragshändlerrecht – Franchiserecht*. 3. neu bearbeitete und erw. Aufl. Berlin: De Gruyter, 2014, HGB Paragraph 89b, marg. no 228).

- 16 With a view to the case-law and literature cited in previous paragraphs which runs counter to the established decision-making practice of the Supreme Court [of the Czech Republic], there is thus undeniable doubt with regard to the interpretation of Article 17(2)(a), second indent, of the Directive that only the Court of Justice of the European Union is authorised to resolve, as the tribunal established by law pursuant to Article 47(2) of the Charter of Fundamental Rights of the European Union and pursuant to Article 36(1) of the Charter of Fundamental Rights and Freedoms of the Czech Republic, by which the Supreme Court is bound.
- 17 Whereas the interpretation of Article 17(2)(a), second indent, of the Directive is essential to the decision concerning entitlement of a commercial agent to indemnification in the case at hand, the Supreme Court is a court against whose decisions there is no judicial remedy under national law, within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union ('TFEU'), and none of the exceptions due to which it would not have to make a preliminary reference to the Court of Justice in respect of interpretation (the interpretation of the expression used in Article 17(2)(a), second indent, of the Directive cannot be deemed to constitute an *acte clair* or *acte éclairé* – see judgment of the Court of Justice in *CILFIT*, C-283/81) exist, the Supreme Court is obliged to make a reference to the Court of Justice of the European Union, proceeding in line with Article 267 TFEU.

[...]