

Commercial Chamber : the commercial agent's power to negotiate

02/12/2020



Commercial agent status: the commercial agent's power to negotiate does not necessarily imply that he has the power to change the price of products or services.

Ruling no 735 of 2 December 2020 (18-20.231) - Cour de cassation (Court of Cassation) - Commercial, Financial and Economic Chamber - ECLI:FR:CCASS:2020:CO00735

Partial quashing

Only the french version is authentic

Summary

In a judgment of 4 June 2020 (Trendsetteuse, C-828/18), the EUCJ ruled that Article 1(2) of Directive 86/653, on the coordination of the laws of the Member States relating to self-employed commercial agents, must be interpreted as meaning that a person need not necessarily have the power to alter the prices of the goods which he sells on behalf of the principal in order to be considered a commercial agent within the meaning of that provision.

Violates Article L. 134-1 of the Commercial Code, as interpreted in the light of the aforementioned Article 1, the cour d'appel (Court of Appeal) which, in order to declare that the self-employed intermediary did not have the status of commercial agent and to reject his claims for compensation for damages for breach of the contract concluded with the principal, is based on the inability of the self-employed intermediary to negotiate prices.

Appellant(s) : M. H... O...

respondent(s) : Editions Atlas Company

Facts and procedure

1. According to the ruling under appeal (Paris, 3 May 2018), Editions Atlas, a company specialising in the publication and marketing of leisure goods, entered into an agreement on 20 December 2006 with Mr O..., for an indefinite period, for the purposes of prospecting for customers in a geographical area within the district of Sens.

2. Mr O... ceased to perform his contract with Editions Atlas on 1 July 2011. He entered into an employment contract as an exclusive sales representative with a third party company for an indefinite period on 4 July 2011. Claiming the status of commercial agent, Mr O... sued Editions Atlas for breach of contract and for payment of damages.

Reviewing of plea

Statement of plea

3. Mr O... takes issue with the court of appeal for having stated that the ruling stating that he does not have the status of commercial agent and dismisses his claim for damages for breach of the contract concluded with the Editions Atlas on 20

December 2006, whereas

“Pursuant to Article L. 134-1 of the Commercial Code, transposing into French law Article 1(2) of Directive 86/653/EEC of 18 December 1986, a self-employed commercial agent has the authority to negotiate provided he has continuing authority to conclude transactions on behalf of another person (the “Principal”) and to sell or purchase goods on behalf of the Principal, even if he does not have the authority to modify rates or contractual conditions.

He claims that the cour d’appel (Court of Appeal) deprived its decision of any legal ground with in view of the aforementioned legal provision in ruling that Mr R... did not demonstrate that he had the power to negotiate and therefore could not claim the commercial agent status and basing its decision on the sole criterion of the absence of a minimum margin of manoeuvre on part of the economic transaction concluded, in particular with regard to prices, discount margins and general terms and conditions of distribution and sale, all of which were defined by the Principal, without examining, as it was asked to do so, if the exact nature of Mr O...’s mission, as evidenced in the “sales plan” given to each agent was not in fact to select from all the Editions Atlas products available, the one most likely to interest the prospect, to present that preferred product to the customer and to convince the customer to purchase it, and finally, in view of the different sales solutions possible, to ascertain the best suited financial arrangements to the customer’s economic situation and the agreement to the highest possible price, all of which qualify as the capacity to negotiate within the meaning of the abovementioned directive..”

Court’s response

In view of Article L. 134-1 of the Commercial Code :

4. A commercial agent is a self-employed intermediary who, while not bound by an employment contract, is permanently responsible for negotiating and possibly concluding contracts of sale, purchase, rental or provision of services, in the name of and on behalf of producers, industrialists, traders or other commercial agents. A commercial agent may be a natural person or a legal entity.

5. These provisions result from the law no. 91-593 of 25 June 1991 on relations between commercial agents and their principals which transposed into French law 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.

6. Article 1 of this Directive provides that “the commercial agent is the person who, as an independent intermediary, is permanently entrusted either with negotiating the sale or purchase of goods for another person, hereinafter referred to as the “principal”, or with negotiating and concluding such transactions in the name and on behalf of the principal”.

7. While the Directive does not define the term “negotiate”, the Cour de cassation (Court of Cassation) has adopted a strict interpretation of this term, resulting, accordingly, in a strict appreciation of the status of commercial agent. To distinguish the commercial agent from other commercial intermediaries, who do not enjoy the protective status of the former, it has held that “negotiation” presupposes that the intermediary has the ability to influence the elements of the agreement prior to the conclusion of the contract with the customer. (Com, 14 June 2005, N°03-14.401 ; Com 10th October 2018, Appeal N°17-17.290). It concluded that the term negotiation could not be considered as meaning the mere marketing of the product, nor as simply prospecting customers or acting as a passive intermediary, but rather the ability of the intermediary to modify the contractual clauses initially envisaged by the principal, in particular with regard to the pricing and commercial terms.

8. However, in a judgment of 4 June 2020 (Trendsetteuse, C-828/18), the EUCJ ruled that Article 1(2) of Directive 86/653 must be interpreted as meaning that a person need not necessarily have the power to alter the prices of the goods which he sells on behalf of the principal in order to be considered a commercial agent within the meaning of that provision.

9. Accordingly, a commercial agent must now be defined as a self-employed natural or legal person who, while not bound by an employment contract nor having the power to change the prices of such goods or services, has the

continuing authority to negotiate and to possibly conclude contracts relating to purchase, hire or provision of services in the name of and on behalf of producers, industrialists, traders or other commercial agents.

10. In holding that Mr O... did not have the status of commercial agent and in dismissing his claims for damages for breach of contract against Editions Atlas, the court ruled that, based on the catalogues of goods and sales prices from June to December 2011, Mr O... was not in a position to modify any of the elements of Editions Atlas' commercial terms with regard to quantities, prices and payment terms. It further held that given that the sale price, the discount rates the general terms and conditions of distribution and sale were defined by the principal, Mr O... did not prove that he had any leeway whatsoever with regard to at least some aspect of the economic transaction nor did he demonstrate that he actually had the power to negotiate the contracts in the name and on behalf of his principal. Accordingly his application for the status of commercial agent could not be granted.

11. In so ruling, on the basis of Mr O...'s inability to negotiate the prices, the cour d'appel (Court of Appeal) violated the aforementioned text.

ON THESE GROUNDS, the Court :

QUASHES AND SETS ASIDE the ruling handed down on 3 May 2018, between the parties, by the cour d'appel of Paris (Paris Court of Appeal), but only in so far as it states that Mr O... does not have the status of commercial agent, dismisses his claims for compensation for breach of contract with the company Editions Atlas and rules on costs and on the application of Article 700 of the Civil Procedure Code.

On these points, restores the matter and the parties to the status quo ante that existed prior to this judgment and remands them to the cour d'appel of Paris (Paris Court of Appeal), otherwise composed.

Président : Mme Mouillard

Reporting Judge : Mme Le Bras, conseiller référendaire

Advocate-General : M. Debacq

Lawyer(s) : SCP Le Griel – SCP Yves et Blaise Capron

[➤ Read the french version](#)

Translated rulings