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Commercial Agent as a Self-Employed Intermediary: A Gloss to the Judgment of the CJEU of 21 November 2018 in Case 452/17, Zako SPRL v. Sanidel SA

Dariusz Bucior
PhD, Assistant Professor, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; correspondence address: Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: dariusz.bucior@kul.pl
https://orcid.org/0000-0002-5474-836X

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Abstract: According to Article 1(2) of Directive 86/653, only a self-employed intermediary can be considered a commercial agent. The first and only judgment of the CJEU that deals with the interpretation of the condition of self-employment is the judgment of November 21, 2018, in Case 452/17, *Zako SPRL v. Sanidel SA*. In this judgment, the CJEU pointed to some general guidelines on how to assess self-employment (independence) and assumed that the premise of self-employment (independence) also applies to intermediaries who are legal persons. The gloss positively assessed the CJEU's indication that the assessment of self-employment (independence) should be made taking into account all the circumstances of the case, which seems to confirm that, in the CJEU's opinion, the typological method should be applied in this respect. There is also no doubt about the specific criteria indicated by the CJEU, such as the extent to which the intermediary is subject to the principal's instructions, the degree of freedom in organizing his activities, the degree of economic risk, and the method of calculating the remuneration. It can be assumed that the CJEU correctly took the view that it is the personal independence of the intermediary that matters, not economic independence. What raises the most doubts is the assumption that the condition of self-employment (independence) also applies to intermediaries that are legal persons. The meaning of the term "self-employed" and

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systemic argumentation (referring to the TFEU provisions on the freedom of establishment) justify the view that, according to the legislator's intention, the self-employment (independence) requirement was to apply only to natural persons. The position of the CJEU that this requirement also applies to legal persons has no functional justification (legal persons cannot be employees). In addition, it unnecessarily hinders the application of the regulations on agency agreements.

1. Introduction

The Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)[1] defines the term "commercial agent." According to Article 1(2) of Directive 86/653, a commercial agent is

> 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.

This provision is crucial for determining the scope of Directive 86/653.

The term "self-employed" used in the English version of Article 1(2) of Directive 86/653 also appears in some other language versions of this provision, e.g. in the Croatian (*samozaposleni pośrednik*), Latvian (*pašnodarbinātu starpnieku*) or Slovenian (*samozaposleni pośrednik*) version. In most other language versions, the term "independent intermediary" is used, e.g. in the French (*intermédiaire indépendant*), Spanish (*intermediario independiente*), Czech (*nezávislý zprostředkovatel*), Danish (*selvstaendig mellemmand*), Italian (*intermediario indipendente*), Swedish (*självständig agent*) or Portuguese (*intermediário independente*). In the German version, in addition to indicating the independence of the intermediary, there is a requirement that he be engaged in an economic activity (*selbständiger Gewerbetreibender*). In turn, in the Polish version, the legislator used the phrase "intermediary working on his own account" (*pośrednik pracujący na własny rachunek*).

[1] OJ L382/18, 31 December 1986.

The first – and so far only – judgment in which the CJEU ruled on the interpretation of the condition of self-employment (independence) of the intermediary is the judgment of November 21, 2018, *Zako SPRL v. Sanidel SA*, Case C-452/17[2].

2. The Dispute before the Commercial Court, Liege (Belgium) and Questions for a Preliminary Ruling

The commented CJEU judgment was issued in response to questions for a preliminary ruling referred by the Belgian Commercial Court of Liège (*Tribunal de commerce de Liège*). The background to the questions were the following facts.[3] In 2007, Zako SPRL (hereinafter: Zako) entered into an agreement with Sanidel SA (hereinafter: Sanidel). The agreement was not concluded in writing. Under this agreement, Zako was obliged to negotiate and conclude contracts for the sale and implementation of fitted kitchens on behalf of Sanidel. However, the scope of Zako's responsibilities was broader. It included the following activities performed on behalf of Sanidel: selection of products and suppliers, determination of commercial strategy, meeting clients, drafting kitchen plans, calculating quotes, negotiating prices, signing for orders, taking measurements off-site, settling disputes, managing staff in the department (secretary, salespeople and fitters), creating and managing of website for online sales, developing sales to distributors, real estate developers and contractors, negotiating and finalizing subcontracts on behalf of Sanidel. The agreement was implemented in such a way that André Ghaye, a representative of Zako, worked directly at Sanidel's premises, where he had access to a telephone line and e-mail. As a result, Zako negotiated and concluded contracts at Sanidel's premises. However, A. Ghaye performed his tasks independently.

In October 2012, Sanidel informed Zako that it was terminating the agreement without notice. Termination of the agreement resulted in two lawsuits. In the first lawsuit, A. Ghaye claimed, among other things, compensation from Sanidel, on the grounds that he had an employment

[2] CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, EU:C:2018:935.

[3] Facts based on: Opinion of Advocate General Szpunar delivered on 25 July 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:625, paras. 7–15; CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 9–17.

contract with Sanidel. The court of first instance (*Tribunal du travail de Marche-en-Famenne*) dismissed the action with its decision of February 21, 2014, stating that there was no employment relationship between A. Ghaye and Sanidel. This decision was upheld by the court of appeal (*Cour du travail de Liège*) with its decision of September 9, 2015.

After the first proceedings, Zako sued Sanidel (probably for damages) before the Commercial Court of Liège. The court had doubts about the legal nature of the agreement, i.e. whether it was an agency agreement or a specific-task contract (contract for work). This fact was important from the perspective of the statute of limitations. Claims arising from an agency agreement under Belgian law become time-barred one year after the termination of the agreement (Article 26 of the Belgian Commercial Agents Act of 1995). Zako's lawsuit was filed after this deadline, which Sanidel raised during the trial.

The Commercial Court of Liège, therefore, decided to refer three questions to the CJEU for a preliminary ruling:

> (1) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to seek and visit customers or suppliers outside of the business premises of the principal?
>
> (2) Must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out no tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal?
>
> (3) If the second question is answered in the negative, must Article 1(2) of [Directive 86/653] be interpreted as requiring the commercial agent to carry out tasks other than those relating to the negotiation of the sale or purchase of goods on behalf of the principal, or to the negotiation and conclusion of such transactions on behalf of and in the name of the principal, only secondarily?[4]

3. Judgment of the CJEU

The CJEU recognized that the essence of the questions referred by the Commercial Court of Liège boils down to two issues: (1) whether the

[4] Ibid., para. 17.

performance of activities by an intermediary from the principal's business premises prevents the intermediary from being classified as a commercial agent within the meaning of Article 1(2) of Directive 86/653[5]; (2) whether the fact that the intermediary carries out not only the activities indicated in Article 1(2) of Directive 86/653, but also, on behalf of the same person, activities of a different nature, which are not secondary to activities indicated in Article 1(2) of Directive 86/653, prevents the intermediary from being classified as a commercial agent within the meaning of this provision.[6]

The CJEU gave the same answer to both questions, i.e. it recognized that the above-mentioned circumstances do not *per se* exclude the possibility of classifying an intermediary as a commercial agent. In both cases, the CJEU provided similar reasoning.

Firstly, the CJEU pointed out that Article 1(2) of Directive 86/653 provides three conditions that are necessary and sufficient for a person to be considered a commercial agent: (1) the person must be a self-employed intermediary; (2) the contractual relationship between the intermediary and the principal must be of a continuing character; (3) the intermediary must conduct activities involving either negotiating the sale or purchase of goods for the principal, or negotiating and concluding these transactions on behalf and in the name of the principal.[7] There is no express requirement under Article 1(2) of Directive 86/653, or under any other provision of this Directive, for an intermediary to carry out its activities outside the principal's business premises.[8] Similarly, it does not follow from the wording of Article 1(2) of Directive 86/653 that an intermediary who performs additional tasks not mentioned in this provision, cannot be regarded as a commercial agent.[9] With regard to intermediaries performing additional tasks, the CJEU also referred to Article 2(2) of Directive 86/653, according to which: "Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State."[10]

5 Ibid., para. 20.
6 Ibid., para. 37.
7 Ibid., para. 23.
8 Ibid., para. 22.
9 Ibid., para. 38.
10 OJ L382/18, 31 December 1986.

It seems that the CJEU considered this provision as an indirect confirmation that the agent's activities indicated in Article 1(2) of Directive 86/653 may be combined with other activities.[11]

Secondly, the CJEU referred to the objectives of Directive 86/653, indicating that one of these objectives is the protection of commercial agents in their relations with principals.[12] In the context of intermediaries performing activities from the principal's business premises, the CJEU argued that making the application of Directive 86/653 dependent on conditions not expressed in Article 1(2) of the Directive, concerning the place or manner in which the intermediary conducts business, would limit the scope of protection granted by the Directive and would jeopardize the achievement of the objective pursued by the Directive.[13] With regard to intermediaries who perform an additional task, the CJEU also stated that an interpretation of Article 1(2) of Directive 86/653, according to which this provision excludes such intermediaries, would be contrary to the objectives of this Directive.[14] In particular, such interpretation would allow the principal to circumvent the mandatory provisions of Directive 86/653 by providing in the agreement for tasks other than those related to the activities of commercial agents.[15]

However, the CJEU recognized that the fact that an intermediary carries out activities in the principal's premises or performs additional tasks may affect the independence of the intermediary. This independence may be undermined both by subordination to the principal's instructions and by the way in which the intermediary performs his duties.[16] Elaborating on this idea, the CJEU first pointed out that the presence of an intermediary in the principal's premises and the resulting proximity to the principal may

11 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 41–43. In this regard, the CJEU referred, among other things, to paragraph 49 of the Opinion of Advocate General Szpunar delivered on 25 July 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:625, where such position was stated more clearly.

12 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, para. 26.

13 Ibid., para. 27.

14 Ibid., para. 44.

15 Ibid., para. 45.

16 Ibid., para. 32.

make the intermediary subject to the principal's instructions.[17] In addition, the material benefits associated with the presence in the principal's premises, such as the provision of a workplace or access to the organizational facilities of the principal's premises, may make it difficult for the intermediary to pursue his activity independently, either from the point of view of the organization of this activity or the associated economic risk. In particular, this can lead to a reduction in the agent's operating costs and, thus, to a reduction in his economic risk if the reduction in costs is not reflected in the level of commissions paid to the agent.[18] In the context of performing additional tasks by the intermediary, the CJEU pointed out that the referring court should examine whether performance of such tasks has the effect, taking account of all of the circumstances of the case, such as the nature of the tasks performed, the manner in which they are carried out, the proportion those tasks represent with regard to the overall activities of the intermediary, the method of calculating the remuneration, or the reality of the financial risk incurred, of preventing the intermediary from performing the activities indicated in Article 1(2) of Directive 86/653 in an independent manner.[19]

With all this in mind, the CJEU decided to give the following answers to the questions referred for a preliminary ruling:

> (1) Article 1(2) 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 must be interpreted as meaning that the fact that a person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that person, performs his activities from the latter's business premises does not prevent him from being classified as a "commercial agent" within the meaning of that provision, provided that that fact does not prevent that person from performing his activities in an independent manner, which is for the referring court to ascertain.
>
> (2) 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

17 Ibid., para. 33.
18 Ibid.
19 Ibid., para. 50.

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, does not preclude that person from being classified as a "commercial agent" within the meaning of that provision, provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.[20]

4. Commentary

The CJEU judgment leads to several conclusions concerning the requirement under Article 1(2) of Directive 86/653 for an intermediary to be self-employed (independent). However, their assessment varies.

4.1. A Method of Assessment of the Agent's Independence

The CJEU expressed the correct view that the assessment of the agent's independence should be made taking into account all the circumstances of the case.[21] It seems that in this way the CJEU indirectly confirmed that such an assessment should be made using the typological method. This method is used in Member States such as Germany,[22] Austria[23] or Poland[24] to distinguish between an agency agreement and an employment agreement. In general, according to this method, the determination of whether an intermediary is independent is made on the basis of the entire content of the agreement and its actual performance. A number of specific criteria are

20 Ibid., para. 52.

21 Ibid, para. 50.

22 Raimond Emde, "Commentary to § 84," in *Staub Handelsgesetzbuch. Großkommentar*, eds. Stefan Grundmann, Mathias Habersack, and Carsten Schäfer (Berlin: De Gruyter, 2021), 493–8; Dariusz Bucior, "Handlowy charakter umowy agencyjnej," *Kwartalnik Prawa Prywatnego* 20, no. 1 (2011): 184–6.

23 Michael Nocker, *HVertrG. Handelsvertretergesetz 1993. Mit ausführlichen Berechnungsbeispielen zum Ausgleichsanspruch* (Vienna: Verlag Österreich, 2015), 66; Alexander Petsche and Simone Petsche-Demmel, *Handelsvertretergesetz. Praxiskommentar* (Vienna: LexisNexis, 2015), 6–7; Peter Jabornegg, *Handelsvertreterrecht und Maklerrecht* (Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1987), 47–8.

24 Kazimierz Jaśkowski, "Komentarz do art. 22," in *Komentarz aktualizowany do Kodeksu pracy*, eds. Kazimierz Jaśkowski and Eliza Maniewska (LEX/el., 2025); Bucior, "Handlowy charakter," 204–5.

taken into account, which can speak for or against the independence of the intermediary. Their weight and intensity in the specific case are examined and, taking into account all the criteria, an assessment is made of where the emphasis lies. If the elements typical of an independent intermediary prevail, an agency agreement is assumed to exist. If, on the other hand, the characteristics of an employee prevail, then it is an employment agreement.[25]

When applying the typological method, it is crucial to first determine what features characterize a typical (ideal) independent intermediary and what features characterize a typical (ideal) employee. Certain guidelines can be derived from the commented judgment in this regard. The CJEU pointed to a number of criteria that should be taken into account when assessing independence of an intermediary, namely: the extent to which the intermediary is subject to the principal's instructions, the degree of freedom in organizing their activities, the degree of economic risk, the method of calculating the remuneration, the nature of additional tasks entrusted to the intermediary, the manner in which such tasks are performed and the proportion of the intermediary's activities represented by such tasks.[26] On this basis, it is possible to formulate a (very general) conclusion that the characteristics of a typical (ideal) independent intermediary include: not being subject to the instructions of the principal (subject to the obligation arising from Article 3(2)(c) of Directive 86/653), freedom to organize his activities, bearing the economic risk associated with his activities and – as it seems – receiving remuneration in the form of commission.[27] In contrast, a typical (ideal) employee is characterized by: subordination to the employer's instructions, lack of freedom in organizing his activities, lack of bearing economic risk, and receiving a fixed salary. Due to the brevity of the CJEU's statement, it is difficult to draw any concrete conclusions as to the significance of the other criteria mentioned (the nature of the additional

[25] Bucior, "Handlowy charakter," 184–5 (the author provides a summarized description of the method used in Germany).

[26] CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 32, 33, 50.

[27] The CJEU did not specify how the method of calculating remuneration affects the assessment of independence. It can, therefore, only be assumed that the CJEU meant a link between the method of remuneration and the economic risk of the intermediary. Commission-based remuneration is related to such risk, as it depends on the performance of the intermediary.

tasks entrusted to the intermediary, the manner in which these tasks are performed, and the proportion these tasks represent in the intermediary's overall activities).

At a general level – corresponding to the general nature of the CJEU's statement – the independence criteria presented regarding: subordination to instructions, freedom to organize activities, economic risk and method of remuneration, do not raise significant doubts. From the perspective of Member States applying the typological method presented above, they are not a novelty anyway.[28]

4.2. Agent's Personal Independence vs Economic Independence

Legal literature correctly points out that the independence referred to in Article 1(2) of Directive 86/653 means personal independence, not economic independence. If it were to be assumed that an intermediary must be economically independent in order to be considered a commercial agent, the protective provisions of Directive 86/653 would lose their justification. After all, they were adopted in view of the economic advantage of the principal over the agent, which is typical for agency agreements.[29] The commercial agent is perceived as the weaker party to the agreement requiring protection.[30]

The fact that the CJEU indicated in the commented judgment the criterion of subordination to the principal's instructions allows us to assume that the CJEU perceives the condition of independence as personal independence.

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[28] For example, in Germany, circumstances indicating the independence of an intermediary include, among others: independence from the instructions of the principal, owning one's own enterprise, performing activities in one's own premises, bearing the economic risk, including that related to receiving remuneration in the form of a commission; Michael Stöber, "Commentary to § 84," in *Heymann Handelsgesetzbuch. Kommentar. Erster Band. Einleitung, §§ 1 bis 104a*, eds. Norbert Horn et al. (Berlin: De Gruyter, 2019), 779–82.

[29] Till Fock, *Die europäische Handelsvertreter-Richtlinie. Kompetenzgrundlage, Systematik, Angleichungserfolg* (Baden-Baden: Nomos Verlagsgesellschaft, 2001), 103; Bucior, "Handlowy charakter," 201.

[30] Ewa Rott-Pietrzyk and Mateusz Grochowski, "Ochrona pośredników handlowych jako słabszej strony umowy (o wspólnych założeniach i mechanizmach ochrony agenta i konsumenta)," in *Wyzwania dla prawa konsumenckiego w wymiarze globalnym, regionalnym i lokalnym*, eds. Monika Namysłowska, Krzysztof Podgórski, and Elżbieta Sługocka-Krupa (Warsaw: C.H. Beck, 2022), 279.

4.3. Self-Employment (Independence) of Legal Persons

However, what raises the most doubts is the assumption that underlies the commented judgment. Namely, the CJEU assumed that the condition of self-employment (independence) also applies to intermediaries that are legal persons. The dispute pending before the Commercial Court of Liège concerned an agreement in which Zako, a Belgian limited liability company, acted as an intermediary. The CJEU found it expedient to consider its status from the perspective of the condition of independence and indicated that this issue should be examined by the referring court.[31]

The CJEU did not provide any justification for the assumption that the condition of independence applies to legal persons acting as intermediaries. The CJEU did not even raise this issue as an interpretative problem. However, it is in fact a significant interpretative problem that requires clarification. Several arguments can be made in favor of the thesis that the self-employment (independence) requirement was designed with intermediaries that are natural persons in mind.

Firstly, the term "self-employed" used in Article 1(2) of Directive 86/653 in English and several other language versions refers to natural persons, to indicate the opposite of being in an employment relationship. It means: "not working for an employer but finding work for yourself or having your own business"[32] or "earning income directly from one's own business, trade, or profession rather than as a specified salary or wages from an employer."[33]

Secondly, the terminology of Article 1(2) of Directive 86/653 in this respect is similar to the terminology used by the legislator in the provisions of the Treaty on the Functioning of the European Union concerning freedom of establishment.[34] This is not surprising, as the preamble to Directive 86/653 cites Article 57(2) of the Treaty establishing the European Economic Community, which deals with the freedom of establishment, as one of the legal bases of the Directive. The term "self-employed person" appears

31 CJEU Judgment of 21 November 2018, Zako SPRL v. Sanidel SA, Case C-452/17, ECLI:EU:C:2018:935, paras. 35, 50.

32 *Cambridge Dictionary*, s.v. "self-employed," accessed June 9, 2025, https://dictionary.cambridge.org/dictionary/english/self-employed.

33 *Merriam-Webster*, s.v. "self-employed," accessed 9 June 2025, https://www.merriam-webster.com/dictionary/self-employed.

34 Treaty on the Functioning of the European Union (OJ C202, 7 June 2016).

primarily in Article 49(2) TFEU, according to which "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms (...)." "Self-employed persons"[35] should be understood to mean only natural persons. This is confirmed by the combination of Article 49(2) and Article 54 TFEU. The latter provision requires companies and other legal persons to be treated as natural persons for the purposes of the application of the provisions on the freedom of establishment. If legal persons were included in the concept of a "self-employed person," Article 54 TFEU would be superfluous.

In the case law of the CJEU concerning the freedom of establishment and the freedom of movement of workers, the concept of a self-employed person is explained as follows: it refers to natural persons who perform activities outside of an employment relationship. Therefore, any person who does not have a relationship of subordination is considered self-employed within the meaning of the regulations on the freedom of establishment.[36] The premise of self-employment (independence), therefore, serves to distinguish the employment relationship from other legal relationships, the implementation of which is an element of the economic activity of natural persons.

All this justifies the view that the requirement in Article 1(2) of Directive 86/653 that the intermediary be self-employed (independent) was intended by the legislator to apply only to natural persons – as a criterion for distinguishing commercial agents from employees.

The inclusion in the definition of a commercial agent of the requirement of self-employment – intended to apply only to natural persons – should be seen as an example of a flawed legislative technique. It may suggest that

35 The German version of Article 49(2) TFEU refers to the pursuit of independent gainful activities (*selbstständiger Erwerbstätigkeiten*), the French version refers to non-salaried persons (*non salariées*), and the Polish version refers to the pursuit of an activity on one's own account (*działalność prowadzona na własny rachunek*).

36 CJEU Judgment of 27 June 1996, Asscher v. Staatssecretaris van Financiën, Case C-107/94, ECLI: EU:C:1996:251, paras. 25, 26; CJEU Judgment of 20 November 2001, Jany and Others v. Staatssecretaris van Justitie, Case C-268/99, ECLI:EU:C:2001:616, para. 34; CJEU Judgment of 26 February 2019, Wächtler v. Finanzamt Konstanz, Case C-581/17, ECLI:EU:C:2019:138, paras. 45, 46.

Directive 86/653 shall apply only to intermediaries who are natural persons.[37] However, this suggestion should be rejected. The legislator's intention was to include legal persons in the scope of Directive 86/653. First of all, this is evidenced by the content of Article 2(1), third indent of the Directive, which states that the Directive does not apply to the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries. This provision would be superfluous if the legislator's intention was to exclude all entities that are not natural persons from the scope of Directive 86/653. Secondly, this is evidenced by the first proposal of the directive from 1976.[38] Although the definition of a commercial agent included the requirement of self-employment, Article 33(1) of the proposal also included a provision directly referring to agents who are companies or legal persons, which confirmed that the proposed directive was intended to apply to them. Thirdly, exempting intermediaries that are legal persons from the scope of Directive 86/653 would seriously limit the harmonizing effect of the Directive, which is one of the main objectives of the Directive.

In the case law of the CJEU, the thesis that Directive 86/653 also applies to intermediaries that are legal persons has never been questioned. In a number of judgments, the CJEU has answered questions referred for a preliminary ruling in cases where the intermediary was a legal person.[39] The CJEU treated such situations as covered by Directive 86/653, i.e. it did

[37] Such doubts arose under the British Commercial Agents (Council Directive) Regulations 1993. The provision of Article 2(1) of this regulation contains a definition of a commercial agent corresponding almost literally to Article 1(2) of Directive 86/653. However, the argument that the condition of self-employment excludes legal persons from the scope of the regulation has been rejected in British case law, see: Séverine Saintier and Jeremy Scholes, *Commercial Agents and the Law* (London: LLP, 2005), 29, and the rulings cited there.

[38] Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (Submitted by the Commission to the Council on 17 December 1976) (OJ C13/2, 18 January 1977).

[39] For example: CJEU Judgment of 13 October 2022, Rigall Arteria Management sp. z o.o. sp.k. v. Bank Handlowy w Warszawie S.A., Case C-64/21, ECLI:EU:C:2022:783; CJEU Judgment of 4 June 2020, Trendsetteuse SARL v. DCA SARL, Case C-828/18, ECLI:EU:C:2020:438; CJEU Judgment of 16 February 2017, Agro Foreign Trade & Agency Ltd v. Petersime NV, Case C-507/15, ECLI:EU:C:2017:129.

not justify its jurisdiction as it usually does when a case falls outside the scope of the Directive.[40]

The use of a flawed legislative technique[41] in Article 1(2) of Directive 86/653, when defining a commercial agent, raises the question of how this definition should be applied to intermediaries that are legal persons. Two solutions are possible here.

The first solution is to apply the premise of self-employment (*mutatis mutandis?*) also to legal persons. This was the position taken by the CJEU in the commented judgment. However, it is difficult to indicate what the purpose of applying the self-employment premise in relation to legal persons would be. In the case of natural persons, this premise has a clear role. It serves to separate commercial agents from employees. At the same time, it serves to separate the protective regime of the agency agreement regulations from the protective regulation of labor law. In the case of legal persons, the self-employment premise is not able to fulfil such a function, because legal persons cannot have the status of employees.

Moreover, the thesis that the self-employment premise applies to legal persons unnecessarily complicates the application of the laws on the agency agreement. The assessment of the self-employment of an intermediary must be made using the typological method. The application of this method is not an easy task. It requires an assessment of all the circumstances of a given case. Like any typological method, it does not provide certain results, primarily due to the lack of precise methods for measuring individual features.[42] On the one hand, it may lead to disputes between the parties to the agreement and, on the other hand, it may make it difficult for the court to assess the legal nature of the concluded agreement. However, the effort put in by the court to determine the legal nature of the agreement would

[40] For example, the CJEU specifically justifies its jurisdiction in cases where the agency agreement concerns the provision of services. Such agreements are not subject to Directive 86/653. See, e.g.: CJEU Judgment of 13 October 2022, Rigall Arteria Management sp. z o.o. sp.k. v. Bank Handlowy w Warszawie S.A., Case C-64/21, ECLI:EU:C:2022:783, paras. 24–27.

[41] The correct solution would be as follows: (a) the definition of commercial agent in Article 1(2) of Directive 86/653 does not indicate a requirement of self-employment, (b) Article 2(1) of the Directive indicates that it does not apply to intermediaries in an employment relationship.

[42] Zbigniew Radwański, *Teoria umów* (Warsaw: Państwowe Wydawnictwo Naukowe, 1977), 213.

only serve to possibly not apply the provisions on the agency agreement due to the possible lack of independence of the intermediary.

It is, therefore, regrettable that the CJEU did not consider a second possible solution, which could be inspired by German and Austrian experiences with the interpretation of the regulations defining a commercial agent. Both in § 84(1) of the German Commercial Code[43] and in § 1(1) of the Austrian Independent Commercial Agents Act 1993,[44] the legislator introduced the premise of the agent's independence. It is assumed that this premise should be examined only in the case of natural persons – as a criterion for distinguishing a commercial agent from an employee. Intermediaries who are entities other than natural persons (e.g. companies) are always considered independent by virtue of their legal form, as they cannot be employees.[45] This interpretation has been affirmed in the jurisprudence of the German Federal Court (*Bundesgerichtshof*).[46]

Adopting a similar solution with regard to Article 1(2) of Directive 86/653 would mean that the Directive would apply to any intermediary that is a legal person, regardless of whether it is independent of the principal. On the one hand, it would ensure that the protective provisions of Directive 86/653 would be applied to a wider range of entities. On the other hand, it would be a simpler solution free from complications arising from the typological method. Therefore, it is reasonable to expect that the CJEU will revise its position at the earliest opportunity and depart from the interpretation adopted in the commented judgment.

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43 Commercial Code (*Handelsgesetzbuch*) of 10 May 1897, a consolidated text available at: www.gesetze-im-internet.de/hgb.

44 Independent Commercial Agents Act 1993 – Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter (Handelsvertretergesetz – HVertrG 1993), a consolidated text available at: www.ris.bka.gv.at.

45 Emde, "Commentary to § 84," 503; Stöber, "Commentary to § 84," 778; Joachim N. Stolterfoht, *Die Selbständigkeit des Handelsvertreters: ein Beitr. z. Abgrenzung nach Handels-, Arbeits-, Steuer- u. Sozialversicherungsrecht* (Düsseldorf: Verlag Handelsblatt, 1973), 260; Nocker, *HVertrG*, 71; Wendelin Moritz, "Der Handelsvertreter," in Wendelin Moritz and Thomas Schneider, *Praxishandbuch Vertriebsrecht. Handelsvertreter – Franchising – Vertragshändler* (Vienna: Linde, 2024), 4.

46 German Federal Court, Judgment of 12 March 2015, Ref. No. VII ZR 336/13, available at: www.bundesgerichtshof.de.

It should be emphasized that it is not necessary for Member States – especially those such as Germany or Austria – to adapt their understanding of the premise of independence to the interpretation adopted by the CJEU in the commented judgment in reference to legal persons. The scope of entities covered by national regulations concerning agency agreements may be broader in relation to the Directive 86/653 – this does not constitute a violation of the Directive. Existing German and Austrian practice can be maintained.

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