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A QUEST FOR CONSISTENCY IN THE LAW OF COMMERCIAL AGENCY. LOSS OF THE RIGHT TO REMUNERATION IN POLISH AND EUROPEAN LAW

1. INTRODUCTION

On 17 May 2017 the Court of Justice of the European Union handed down its judgment in the case of *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková*[1], where a helpful explanation was provided with regard to the exact meaning of Article 11 of 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, hereinafter referred to as "the Directive"). The provision specifies circumstances where a commercial agent's right to remuneration[2] may be extinguished. The judgment in *Barlíková* is a valuable addition to the vault of knowledge concerning the applicability of the Directive to long-term, continuing contracts. Notably, it answers the question whether a commercial agent stands to lose his right to commission (or, by analogy, may be compelled to partially refund the amounts already paid to him) where the contract between the principal and the third party client, which the agent helped to negotiate, was only partially executed. Finally, the Court addressed the important issue of the meaning of "blame" in Article 11(1) of the Directive to be taken into account when assessing whether non-execution (complete or partial) was due to the conduct of the principal. Relatedly, the Court had to decide whether "blame" encompasses merely legally qualified acts or perhaps also factual circumstances surrounding the principal's conduct that led to non-execution of the contract with the third party.

[1] Case C-48/16, full judgment available here: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0048&from=EN (accessed 25 June 2017).

[2] Principally commission, however other contractual arrangements are permissible, e.g. payment of a lump sum, mark-up, liquidated fees etc. For more on this, see: I. Mycko-Katner, *Umowa agencyjna*, Warszawa 2012, pp. 206–208; see also an English case in point, *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288.

In the paper I seek to expound upon the critical junctures of the argument of Advocate General Szpunar and the Court in the *Barlíková* case by reference to past CJEU case law on the subject as well as the pertinent provisions of Polish civil law as transposed and relevant judicial and academic analyses. Particularly, I will be looking at ways where Polish law, in the light of this recent development, may benefit in its regulation of commercial agents' loss of the right to remuneration.

2. ENTITLEMENT TO REMUNERATION

The agent's right to remuneration is typically cast in the literature in terms of correspondence (or symmetry) between the rights of the agent and the principal[3]. On the one hand, the agent is obliged, according to the conditions of the underlying agreement between the parties, to undertake certain work[4] for the benefit and on behalf of[5] the principal who, in return, shall provide remuneration. Article 6 of the Directive prescribes three ways in which an agent's remuneration is to be calculated: (1) an amount set by the contract between the parties; (2) remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities; (3) in the absence of a relevant customary practice – reasonable remuneration taking into account all the aspects of the transaction. The agency contract, it is argued in the literature, is result-oriented, that is commission, as confirmed by Article 10 of the Directive, becomes due once a contract between the agent (or between the principal, if the agent's task was merely to

[3] See, for example: H. N. Bennett, *Principles of the Law of Agency*, Oxford 2013, p. 85 *et seq.* T. Wiśniewski, *Umowa agencyjna według kodeksu cywilnego*, Warszawa 2001, p. 53 *et seq.*; E. Baskind, G. Osborne, L. Roach, *Commercial Law*, Oxford 2016, p. 83 *et seq.*

[4] It has been noted by Polish writers that the precise content of rights accorded to agents under the Directive and the Polish Civil Code differ rather markedly. Whilst the Directive is confined to intermediating in and performing, for the benefit and on behalf of the principal, transactions of sale and purchase of goods, the Polish Civil Code casts agents' rights more broadly, referring them to all types of contracts. *Cf.* E. Rott-Pietrzyk, *Agent handlowy – regulacje polskie i europejskie*, Warszawa 2005, p. 271; P. Mikłaszewicz, *Art. 758*, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017. See also: E. Wojtaszek-Mik, *Umowa agencji w dyrektywie o przedstawicielach handlowych na tle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2006, issue 1, pp. 4–11.

[5] Under Polish law, it is possible for a purported agent to not enter into legal relations on behalf of the principal, but instead to first come into the possession of a good to then transfer it to an intended third party (indirect representation). This is to be distinguished from a commercial agent within the meaning of the Directive and the corresponding provisions of the Polish Civil Code.

intermediate and not be a proxy) and a client is executed[6], and remuneration may also be contractually said to be predicated upon the occurrence of a given condition[7]. From an economic point of view, "remuneration through commission directly connects the commercial agent's incentive to increase his remuneration with the principal's goal of increasing the volume of his transactions"[8]. Under most jurisdictions, it is for the principal to clearly indicate in the agency contract the amount of commission (by a percentage, flat sum or otherwise, as long it is ascertainable) that is actually due. Courts have held in certain jurisdictions that references to the principal's discretion or phrases like "commission available" or "attainable" or "commission of up to X" did not give an absolute right to remuneration to agents[9]. It is therefore of the highest importance, from the perspective of legal certainty, to ascertain the true content and legal ramifications of contractual stipulations concerning agent remuneration. An agency contract is, by its nature, a contract for a pecuniary interest (remuneration constitutes the *essentialia negotii* of the legal act), therefore academic writers have written that where no remuneration is specified, we have to do with a different type of contract or no contract at all[10].

3. ARTICLE 11 OF DIRECTIVE 86/653

Pursuant to Article 11 of the Directive, an agent's right to commission is extinguished only if and to the extent that it is established that the contract between the third party and the principal will not be executed, and that is due to a reason for which the principal is not to blame. Where no payment has been made, it remains non-payable, and, on the contrary, the agent must make a refund if he received the amount due. No derogations from this rule may be made to the detriment

[6] Although there are caveats to that, see Article 10(1)(b) and 10(2) of the Directive.

[7] N. Ryder, M. Griffiths, L. Singh, *Commercial Law: Principles and Policy*, Cambridge 2012, pp. 44–45.

[8] J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive: A Perspective from Law and Economics*, Berlin 2017, p. 113.

[9] A. P. Dobson, R. Stokes, *Commercial Law*, London 2012, p. 540.

[10] A. Żygadło, *Wynagrodzenie agenta za wykonywanie czynności outsourcingowych*, "Monitor Prawa Bankowego" 2011, issue 3, p. 80; K. Górny, *Art. 761*, (in:) M. Gutowski (ed.), *Kodeks cywilny. Tom II. Komentarz do art. 450–1088*, Warszawa 2016; K. Kruczalak, E. Rott-Pietrzyk, P. Zapadka, *Rozdział 8*, (in:) S. Włodyka (ed.), *System Prawa Handlowego. Tom 5. Prawo umów handlowych*, Warszawa 2011, side No. 63.

of the agent[11]. The agent has a right to receive information as to commission, and extracts from the principal's books[12].

Article 11 has not been a subject of intense litigation before the CJEU – the only case where it gained some prominence was Case C-19/07 *Heirs of Paul Chevassus-Marche v Groupe Danone*, *Société Kro beer brands SA (BKSA) and Société Évian eaux minérales d'Évian SA (SAEME)*. Here, Article 11 was used to interpret Article 10 of the Directive – the commercial agent's right to commission arises either when the principal has or should have carried out his obligation, or when the third party to the agency contract, that is the customer, has or should have carried out his obligation[13]. Specifically, by calling upon Article 11 the Court wished to underscore the significance of the institution of the principal and the connection between the moment when the right to remuneration arises and the circumstances under which the same right is liable to be extinguished[14]. A principal must, "directly or indirectly"[15], act in the conclusion of the underlying transaction between the agent and the third party client.

It has been surmised that imposing conditions capable of extinguishing an agent's remuneration proportionately to the value of the contract which was not concluded or performed has the aim of preventing agents from obtaining apparent or ostensible clients merely to scam the principal[16]. Since it would be difficult to prove that the agent consciously negotiated or concluded a transaction with an apparent client, remuneration is extinguished if and to the extent that the contract is not concluded due to reasons for which the principal may be deemed at fault[17]. Interestingly, while the Directive itself and the English transposition features the term "blame", the Polish regulation opted for "the circumstances for which the principal is not liable for". It does not seem, however, that the meanings differ as "The reference to 'blame' does not connote that the principal is legally at fault for the non-performance, but merely that the non-performance is attributable to the principal as a factual proposition"[18]. Therefore, a principal need not demonstrate a culpable mental approach or bring about the non-execution of a negotiated

[11] See an interesting argument in *Bowstead & Reynolds on Agency* as to the legal character of Article 11 which highlights the asymmetry between the arising of the right to commission and its extinction. The writers argue that since Articles 7 and 8 are *ius dispositivum*, "it is difficult to see why there should be an unexcludable right to commission in all situations where contracts are not performed bar specific exceptions, while the actual initial entitlement to commission in respect of contracts can itself be modified". *Cf.* P. G. Watts (ed.), *Bowstead & Reynolds on Agency*, London 2016, para 11-035.

[12] Article 761^5 § 2 of the Polish Civil Code.

[13] *Heirs of Paul Chevassus-Marche*, para 19.

[14] *Ibidem*, para 20.

[15] *Ibidem*, para 21.

[16] Judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex.

[17] Judgment of the Kraków Regional Court of 18 March 2014, ref. number IX GC 63/12, Lex.

[18] H. Bennett, *Principles*..., p. 132.

contract by reason of operation of law (e.g. legally relevant mistake, duress etc.). It suffices, it would appear, under all the mentioned regimes, that a constellation of facts materializes, one for which the principal shall bear the burden of responsibility (in more societal than strictly legal terms)[19]. This corollary, importantly, appears all the more evident after *Barlíková*.

4. *ERGO POIST'OVŇA, A.S. V ALŽBETA BARLÍKOVÁ*

The claimant in *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková* was an insurance company who contracted with Ms Barlíková, an agent, with a view to carrying out "mediation in the insurance sector" on behalf and for the benefit of the company[20]. The agent's commission was to be paid out once every negotiated contract has been concluded, however "the entitlement to the commission was acquired definitively only if the insurance contract was not terminated before three or five years"[21]. Also, the right to commission was to be extinguished should a client terminate its insurance contract within three months, and a partial reduction of the amount due applied after that period. Ms Barlíková succeeded in bringing a number of clients to the company, however some of them ceased to pay their premiums at various points in time, many of which fell within the territory marked out by the 3 to 5 year period from the signing of an insurance contract. By virtue of Article 801 of the Slovak Civil Code, these contracts, following a failure, on the part of some of the clients, to respond to a written statement demanding payment, sent by ERGO, were automatically terminated. As a result, ERGO demanded that Ms Barlíková repay the advances she received on those contracts. Before a national court she argued that termination of the contracts, brought about by the clients' failure to made continuous premium payments, was a fault of ERGO. The CJEU recorded that it was the claimant's contention that, as evidenced by letters sent by numerous clients to the company, it "had not treated them properly, in particular by asking them to reply to numerous questions, even though the insurance contract had been concluded, and by sending them reminder letters for payment of premiums which had already been settled"[22].

Three questions on the interpretation of Article 11(1) of Directive 86/653 were posed before the Court: (1) whether the phrasing "the contract between the third

[19] See Munday's use of the term "reasons unattributable to the principal". R. Munday, *Agency: Law and Principles*, Oxford 2010, p. 206.

[20] Judgment of the Court of the European Union of 17 May 2017 in Case C-48/16 *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková* , para 17.

[21] *Ibidem*, para 18.

[22] *Ibidem*, para 22.

party and the principal will not be executed" in Article 11(1) of the Directive refer merely to complete non-execution or whether allowances should be made for partial non-execution and the agent's right to remuneration reduced proportionately; (2) if the agent has a duty to return a part of their remuneration proportional to the degree of non-execution of a negotiated contract, is this a "derogation to the detriment of the agent", barred by Article 11(3); (3) does the concept of "blame" featured in Article 11(1) denote that merely legal reasons should be considered in assessing whether the contract in issue was not executed due to reasons attributable to the principal, or whether the factual reality of the conduct of the principal in their dealings with the agent should also be examined[23].

In his Opinion, Advocate General Szpunar relied on the "to the extent that" part of Article 11(1) to argue there must be a distinction between partial and complete execution of a negotiated contract. Whilst, as he recognized, there are slight discrepancies in the wording of domestic transpositions of the provision (with the Slovak version in particular omitting the expression at all), he maintained EU law must be given a uniform interpretation to avoid disparate outcomes in cases before national courts[24]. The opinion also marked Szpunar's original reference to recital 2 of the Directive[25] to emphasize that it "aims to coordinate the laws of the Member States with regard to the legal relationship between the parties to a commercial agency contract"[26]. His reasoning drew heavily from the overall scheme as well as the purpose and internal coherence of the Directive. Importantly, he submitted that due to the likeness between the wordings of Article 10(1) and 11(1), the former dealing with the circumstances where commission becomes due, the two shall be constructed in a "parallel" manner[27]. The right to indemnity enshrined in Article 17 of the Directive is, in Szpunar's estimation, "closely linked to the right to commission in that it serves to reward the commercial agent

[23] *Ibidem*, para 25.

[24] Para 27 of Advocate General Szpunar's opinion. The opinion is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186708&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=626108 (accessed 26 June 2017).

[25] The recital ("Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States") was recently cited in Case C-507/15 *Agro Foreign Trade & Agency Ltd v Petersime NV*, where it was held that a Member State may decide to limit the application of the Directive to commercial agents whose principal place of business is in that member State, to the exclusion of situations where the principal is based in the Member State and the agent operates out of a non-Member State (Turkey), even if they explicitly chose to be governed by the law of the Member State.

[26] Para 34 of Advocate General Szpunar's opinion in *Barlíková*.

[27] *Ibidem*, para 31.

for the goodwill he has brought to the principal and continuing financial benefit from the commercial agent's actions"[28].

In regards to question 2, it was logical for Szpunar to state that as long as the requirements laid down in Article 11(1) are met, there is no derogation to the detriment of the agent. This implies there must be "something else", an additional burden levied on the agent, either contractually or otherwise, that makes the position of the agent fall below the standard specified by the Directive. Particularly, an express contractual stipulation of time periods during which the principal may require the agent to return part of their remuneration[29] appeared not to hold much relevance in Szpunar's view. To answer question 3, the Advocate General again made comparisons with the agent's right to an indemnity for any loss he suffers as a result of the termination of his relations with the principal. Article 18, which determines the circumstances where an indemnity is not due, avails itself of the term "default", distinct from "blame" in Article 11. "Default", I submit, points, at least to a greater extent, to the factual circumstances surrounding one's entitlement to a legal instrument (or lack thereof). "Blame" bears more resemblance to legal constructs such as "fault" or "guilt", and indicates a certain deplorable mental attitude to one's actions. Interestingly, one may be in default of one's obligations without necessarily bearing attributes capable of being qualified as "blame" or "guilt" – one's "failure to do something required by law, usually failure to comply with mandatory rules and procedures"[30] may be inadvertent, accidental or forced by an outside third party or other unforeseen circumstances which prohibit a court from ascribing "blame" or "guilt"[31]. Szpunar, however, focused more on the part where a default prompting termination would not create an entitlement to an indemnity or compensation if it were to "justify immediate termination of the agent contract under national law". Having established that "blame" should, on account of a lack of a reference to national law in Article 18, receive a wider meaning than "default" when applied to agents[32], he again called upon the aims

[28] *Ibidem*, para 33.

[29] Both Szpunar and the Court, opined, intimated that the length of those periods is of secondary importance. In the immediate case these were relatively long (3–5 years), however the court did not devote space nor attention to the propriety thereof. This may imply that the prohibition on derogations detrimental to agents applies merely to the substantive content of the agent's obligations (i.e. the duty to return part of remuneration should a negotiated contract not be executed), and not circumstances incidental thereto, such as the period during which remuneration is subject to potential refund. I beg to differ, and my argumentation is elaborated upon, albeit concisely, in the final paragraph of the paper.

[30] The definition of "default" found in: J. Law, E. A. Martin (eds.), *A Dictionary of Law*, Oxford 2013, p. 160.

[31] Szpunar refuses to delve into the linguistic and semantic scope of "default" and "blame" – see para 57 of his Opinion.

[32] I believe Szpunar chose this route for his argument because, under Slovak law, non-payment of premiums on the part of clients (which occurred on the facts of the case) results in an immediate termination of the underlying contract. Such a consumer-friendly provision is absent from many

the Directive intended to pursue. Ultimately, he decided that a "principal is to blame for risks originating within his sphere of influence. This can and should be determined by taking into account all factual elements of the case at issue. In carrying out such an assessment, the national court should take relevant commercial custom into account"[33].

The CJEU agreed with Szpunar in all important respects. It drew direct parallels between the interpretation of provisions regulating a commercial agent's entitlement to commission, specially Articles 7(1) and 10(1), and 11(1) which pertains to the extinguishment of the right. In doing so it followed Szpunar's suggestion. Just as commission becomes payable in the proportion to which negotiated transactions are executed, it is consistent to say that the right to commission is extinguished only to the extent of non-execution of the transactions in question[34]. In relatively strong terms, the Court opined that to interpret Article 11(1) as pertaining solely to cases of complete non-execution of the negotiated contract "would run counter to the purpose of [Articles 3(1), 4(1) and 10(1) of the Directive – author's note] and of [the Directive] in general, if, for long-term contracts, such as the insurance contracts at issue in the main proceedings, the agent were to be guaranteed all his commission from the beginning of the execution of those contracts, without any account being taken of a possible partial non-execution of those contracts"[35]. A reference to Articles 3(1) and 4(1) is worth noting – these provisions mandate that both the principal and the agent act dutifully and in good faith in their mutual dealings. Perhaps to say that granting the agent additional protections in case a contract negotiated thereby is not executed is unwarranted would be reading too much into the judgment, but, as Szpunar asserted in his Opinion, it surely is an expression of the EU law's attempt to strike an adequate balance between the rights of the parties involved[36].

With regard to the agent's duty to refund any commission already received in the event of his right to commission being extinguished (which, in practice, means that a contract the agent negotiated was not executed between the principal and a third party), the court drew a logical conclusion from its interpretation of Article 11(1) of the Directive. Since the right to commission may be extinguished in case of even partial non-execution of the contract, it is clear that the agent shall be obliged to return an appropriate amount he obtained in advance for a contract which eventually did not materialize. However, the court cared to

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a civil codification, and it would be interesting to see whether the Advocate General would be more inclined to follow a more semantics-centered reasoning, as proposed in this paper, in a case where non-payment merely triggered unjust enrichment liability and no immediate cause of action against the commercial agent involved.

[33] Para 60 of Advocate General Szpunar's opinion.

[34] *Barlíková*, para 40.

[35] *Ibidem*, para 43.

[36] Paras 37, 43 of Advocate General Szpunar's opinion.

stress that "the obligation to refund the commission must be strictly proportionate to the extent to which the contract has not been executed"[37]. Provided that this reservation is obeyed, no derogation to the detriment of the commercial agent, in violation of Article 11(3), arises. Importantly, the Court asserted that an opposite derogation, namely to the advantage of the agent, "consisting in requiring the refund of a part of the commission proportionally smaller than the extent of the non-execution of the contract"[38] is conceivably permissible. The judges also reminded, in line with Article 11(1), that the agent's right may be extinguished (be it wholly or partially) only if non-execution of the contract between the principal and the client was caused by no fault of the former[39]. Interestingly, the philosophy adopted here diverges markedly from the freedom of contract-inspired policy on commission applied in common law jurisdictions, predominantly England[40].

Question 3 was answered by the CJEU, predictably, by reference to the broader aim of the Directive, however less attention was paid to balancing the rights and duties of agents and principals. Instead, the Court explicitly stated that the Directive intends to "protect the commercial agent and refers, moreover, to the relations, based on fairness and good faith, between the commercial agent and the principal"[41]. Agreeing with Szpunar's view, the Court took notice of the fact that non-payment of premiums of clients resulted in a termination of the relevant insurance contracts. More generally, whether the principal is to blame is to be assessed by reference to the appropriate national rules governing the termination of contracts and the causes and consequences thereof. The CJEU's answer to the question on the facts of the case, however, is very interesting and may give rise to conceptual difficulties in the future. For the Court stated that situations are conceivable "in which the principal might evade payment of the com-

[37] *Barlíková*, para 49.

[38] *Ibidem*.

[39] Academic writers have noted that whilst Article 11(1) is mandatory, 11(2) is merely a default rule that may be contractually altered by the parties to an agency contract. See: M. W. Hesselink [*et al*.], *Commercial Agency*, *Franchise and Distribution Contracts*, Berlin 2006, p. 187

[40] See the judgment of the House of Lords in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, where it was held that where the contract between the principal and the client does not proceed (in that case it was due to fraud and misrepresentations on the part of the principal), the agent is not entitled to remuneration if this was not explicitly envisaged in the agency contract. The stringent interpretation in *Cooper* and its effects have been grappled with by English judges ever since. For instance, in *Alpha Trading Ltd. v Dunnshaw-Patten Ltd* [1981] QB 290, the Court of Appeal identified that there was an implied term that an agent would be paid should the principal not proceed with the case. In *John D Wood & Co (Residential & Agricultural) Ltd v Craze* [2007] EWHC 2658 (QB), *Cooper* was distinguished on the grounds that there should be an implied term that the principal not make fraudulent representations such as would render any contract for sale of property unenforceable and thus prevent a sale. Therefore, implied terms have been invented either to ensure remuneration is paid or to prevent the principal from scuppering a negotiated contract.

[41] *Barlíková*, para 56.

mission, when that termination results from his own conduct"[42]. This was, it was asserted, the case in *Barlíková*. The insurance company's clients ceased to pay their premiums which resulted in having their contracts terminated by virtue of the provisions of the Slovak Civil Code. This is why, despite ERGO's alleged inappropriate conduct against their clients, it was difficult for the Court to attribute blame for the termination of those contracts to the company – "[u]nder such legislation the termination of the contract is due to the non-execution of the contractual obligations by the third party who ceases to pay the premiums relating to that contract, without however account being taken of the cause of the termination of payment"[43].

The judgment, on the one hand, broadens the array of reasons that may lead to the conclusion that a negotiated contract did not eventuate due to the principal's fault, however, on the other hand, a new fervently litigious area of private law may have been born. For principals will now be safe in the knowledge that they can return any advances they paid to their agents in the event of the final contract not materializing. It remains to be seen how courts approach this conundrum, particularly where difficulties arise in assessing what part of remuneration already paid to the agent is refundable. It appears clear that commission covering the agent's work on the executed part of the contract is non-recoverable. However, would the agent's effort spent on negotiations, business meetings, organizing, networking and all other incident expenses of both physical and monetary nature be recoverable by the principal if it pertained to a part of the contract that was ultimately non-executed? It appears so. Additional problems are given rise to where commission is expressed as a percentage of the value of the transaction. The Court in *Barlíková* held that among the examples of partial execution are non-compliance with the volume of transactions or the duration envisaged by the contract between the principal and the client[44]. Suppose an agent was paid an advance of 15% of sum X, which was expected to represent the value of the final transaction. It so happened that, after a final period of negotiations between the principal and the client, in the absence of the agent, the value of the transaction was lowered. It is difficult to say that partial non-execution occurred due to any fault of the principal. Engaging in negotiations should not be considered, on its face, liable to give rise to liability (also, it is unclear whether liability in negligence, if at all applicable here, could lead a court to infer there was fault within the meaning of Article 11 of Directive 86/653). The sheer meaning of "volume" of transactions could be challenged to test the Court's adherence to its own principles.

[42] *Ibidem*, para 57.
[43] *Ibidem*, para 58.
[44] *Ibidem*, para 44.

5. TRANSPOSITION OF ARTICLE 11 INTO POLISH LAW

The key provision transposing Article 11 of Directive 86/653 into Polish law is Article 761^4 of the Polish Civil Code which states that: "The agent may not demand the commission where it is obvious that the contract with the client will not be performed due to the circumstances which the principal is not liable for, and where the commission has already been paid to the agent it shall be subject to reimbursement. A provision of the contract of agency less favourable to the agent shall be invalid". The provision institutes an exception from the rule laid down in Article 761^3, under which, once the maturity date of the claims arising from a contractual relationship between a principal and on agent has elapsed, the right to commission obtains, independently of whether either the principal or the client performed their part of the bargain[45].

One may conceive of a number of circumstances which are capable of preventing a negotiated contract from being executed. One writer lists public law restrictions on transport of goods (e.g. a prohibition on driving motor vehicles at a time of an extreme heat wave) or on the movement of people (e.g. in times of an epidemic)[46]. E. Rott-Pietrzyk has maintained that the provision applies exclusively to existing and valid contracts, that is such that are not affected by absolute invalidity by virtue of contractual performance being impossible (Article 387 § 1 of the Civil Code), the contract having been entered into by a person lacking capacity (Article 14 § 1) or defects in consent (see Article 82 *et seq.*)[47]. However, the provision is applicable to ex-post impossibility, economic impossibility and taking advantage of the forced circumstances, infirmity or inexperience of the other party (Article 388 of the Code)[48].

Notwithstanding the discrepancies in the views of eminent Polish academics as to the exact scope of application of Article 761^4, it is an example of an accurate transposition of EU law. Article 761^4 of the Civil Code, in one instance of slight divergence, does not contain an equivalent of "to the extent that". That could suggest that Polish courts may find difficulty with interpreting the provision where the agent's right to remuneration is to be only partially extinguished. However, Polish courts have managed to apply (consciously or unconsciously) a purposive

[45] On a side note, K. Górny has argued that, pursuant to Article 761^3 § 3, the moment when the agent's claim for the payment of commission becomes mature is separate from the moment when the agent acquires a right to commission (K. Górny). Conversely: E. Rott-Pietrzyk, *Agent handlowy...*, p. 329.

[46] P. Mikłaszewicz, *Art. 761⁴*, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017.

[47] E. Rott-Pietrzyk, (in:) J. Rajski (ed.), *System Prawa Prywatnego. Tom 7. Prawo zobowiązań – część szczegółowa*, Warszawa 2011, pp. 665–683.

[48] J. Jezioro, *Art. 761⁴*, (in:) E. Gniewek (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016.

construction so that agents have been compelled to refund or waive their right to part of their remuneration entitlement[49].

However, on at least two occasions a highly-ranked Polish court relied on the laws of unjust enrichment rather than on Article 761[4] of the Civil Code to allow recovery of commission paid in advance to agents where ultimately a contract was not concluded[50]. Therefore, this is yet another area of private law where the courts have struggled with the systemic distinction between contract and other liability. Unjust enrichment is generally codified in Article 405 of the Polish Civil Code, and the provisions that follow specify numerous heads of that liability. Pursuant to Article 410 § 2 in conjunction with Article 6 of the Civil Code, the complainant must prove that the defendant obtained a benefit at their expense. Article 410 § 2 deals with a head of unjust enrichment liability couched under Polish law as undue performance. Performance shall be undue if a person who rendered it had not been obliged at all or had not been obliged towards the person to whom he rendered the performance, or if the basis for the performance has ceased to be binding or if an intended purpose of the performance has not been achieved or if a juridical act obliging to perform had been invalid and has not become valid after the performance was rendered.

Such a development is all the more startling because the complainant in a notable case before the Poznań Regional Court had a perfectly valid contractual claim under Article 761[4]. The defendant acted as an insurance agent for the benefit of the claimant. Intermediating was conducted through individual brokers contractually linked with the defendant. By virtue of their work the defendant received commission representing a percentage of premiums due from clients for every year their insurance contract was in force, also where the premiums were paid monthly. The parties gradually increased the amount of commission, first to 105% of the initial number, then to include a discretional bonus contingent upon the financial performance of the defendant between 1 January and 31 December 2014. Between March and June 2014 the claimant started noticing a surge in the number of insurance contracts being terminated by clients before 12 months following signing. The contract between the parties was explicit in holding that the agent's remuneration was subject to a refund "proportionately to every month since the moment premiums stopped being paid, to the moment of termination of the respective insurance contract". The defendant was to acquire their right to commission proportionately, gradually, along with their progress in executing

[49] Judgments which applied this solution or envisaged it include: judgment of the Rzeszów Regional Court of 2 June 2015, ref. number VI Ga 110/15, Lex; judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex; judgment of the Kraków Regional Court of 18 March 2014, ref. number IX GC 63/12, Lex.

[50] Judgment of the Appellate Court for Warsaw of 26 November 2016, ref. number I Aca 335/15; judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex.

the contract by bringing clients into the insurance company. The case is very similar to *Barlíková* and I do not think it was necessary to engage in a discussion on unjust enrichment liability where Article 761^4 (and Article 11 of the Directive) was designed to govern cases of exactly this calibre. Falling squarely within the scope of those provisions, the defendant was liable to refund commission they received as insurance contracts negotiated thereby were not executed (and one could have doubts as to the conditions for the "execution" of the contract stipulated by the company, i.e. the long periods during which the agent's remuneration was potentially subject to a refund) due to no fault on the principal's part. The result may be morally questionable as the agent must have made efforts to negotiate contracts with those clients who later defaulted, however this area of the contractual relationship of agency has been ;left, both at the EU and domestic levels, to the discretion of the parties.

6. CONCLUSIONS – POLISH VS. EU REGULATIONS

Whilst the Poznań court envisaged relying on Article 761^4 as an alternative possibility, concurrent opening of the unjust enrichment avenue may give rise to some questions in the context of the ratio in the *Barlíková* case. One must pose the question what happens if the parties do not exclude unjust enrichment liability in their contract[51]. Whilst, as it appears, it is in principle possible and within the bounds of the law[52], should the parties neglect or overlook it, one could potentially be held liable in unjust enrichment even where contractual liability is not available due to the parties' agreement to that effect. It is also a tempting avenue for devious principals who may craft their contracts in a manner that preserves potential liability in unjust enrichment. The Poznań Regional Court in its judgment of 21 November 2016 found in favour of the complainant and awarded compensation under unjust enrichment proportionate to the volume of transactions which, in defiance of the agreement concluded between the parties, were terminated in a way that extinguished the agent's claim to remuneration in part. The flexibility shown by the judges makes it so that the practical effect of resorting to any of the claims, be it by virtue of contract or undue performance, is comparable.

[51] There is no obstacle to assuming that, by virtue of Article 353^1 of the Civil Code in conjunction with Article 58, they could do it.

[52] See Article 353^1 of the Civil Code: "Parties entering into a contract may determine the legal relation at their own discretion, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of community coexistence".

The examined Slovak provisions appear to mirror the wording of the Polish regulations (art. 761[4] of the Civil Code in particular) strikingly faithfully[53]. However, importantly for question 3 answered by the Court, Polish law does not contain a provision that would hold a contract terminated due to a client's failure to pay the premiums due[54]. In such an event the client is subject to contractual liability (unless, of course, an express contractual condition to that effect is in place or relevant consumer legislation concerning unfair terms in consumer contracts renders non-inclusion of such a term impermissible) under the general terms laid down in the Civil Code[55]. Therefore, it is uncertain whether the outcome of the case would be the same against the background of the Polish law of obligations. More weight could have been accorded to the fact that it appears ERGO did take actions that adversely affected their clients' willingness to stay with the company.

Barlíková has, on its face, clarified the law concerning the extinguishment of an agent's right to commission. Notably, the Court seems to have accepted Advocate General Szpunar's analogies between, first, the circumstances where the right to remuneration arises and those where it is extinguished, and, second, the existence of the agent's right to indemnity contrasted with his duty under Article 11 to repay his commission, if only in part. In this way a subtle balance has been struck between the agent's entitlements and duties. The pronunciation that in determining whether the reasons for non-execution of a negotiated contract are attributable to the principal all attendant facts must be considered – and not only legal acts – also goes a long way to strengthen the position of the agent and compensate for his often underprivileged bargaining position. Above all, however, *Barlíková*, for the first time, confirmed the Directive's envisaged degree of flexibility it injects into the remuneration arrangements of principals and agents in the contemporary world of commerce. Inasmuch as this means a whole lot of trouble should disputes arise – think of the evidentiary problems that are inevitable where, for example, the exact extent to which the agent's right to remuneration should be said to have been extinguished – it is an emphatic attempt at making the law of commercial agency fairer.

I wish to signal, however, one alarming feature of both the contract in dispute in *Barlíková* but also in the Poznań Regional Court case. In both cases the prin-

[53] Compare Article 761[4] of the Polish Civil Code (see the first paragraph of section IV) with Paragraph 662(1) and (3) of the Slovak Commercial Code: "(1) The entitlement to commission shall cease only if it is clear that the contract between the principal and the third party will not be performed and its non-performance is not the consequence of circumstances for which the principal is responsible, unless some other consequence follows from the contract. (…) (3) The ceasing of the entitlement to commission in accordance with subparagraph 1 may be regulated otherwise by agreement, to the advantage of the commercial agent only".

[54] See Article 812 of the Civil Code.

[55] The problem is, admittedly, more theoretical than practical as most, if not all, insurers insert appropriate stipulations into their contracts that terminate the insurance arrangement should no premium be paid within, typically 30 days since payment becomes mature.

cipal stipulated long periods during which the agent's remuneration was subject to a refund (1 year in the Poznań case, 3 to 5 years in *Barlíková*). These are the conditions for the "execution" (within the meaning of Article 11 of the Directive) of the contract, after which the agent becomes fully entitled to his commission. The courts in the cases analyzed in the paper showed a good deal of understanding to those rather stringent, I submit, contractual terms. Such arrangements would be hardly defensible in relations between a business and a consumer (if only by virtue of the unfair terms in consumer contracts legislation) but, understandably, the law is more demanding and often less interventionist when it comes to dealings between businesses.

A QUEST FOR CONSISTENCY IN THE LAW OF COMMERCIAL AGENCY. LOSS OF THE RIGHT TO REMUNERATION IN POLISH AND EUROPEAN LAW

Summary

In a recent judgment in *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková*, the Court of Justice of the European Union attempted to clarify the ambit of Article 11 of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, that is the circumstances where a commercial agent's right to remuneration may be extinguished should a negotiated transaction not be executed between the principal and the client. Notably, the Court held that in the event of even partial non-execution of a negotiated contract between the principal and the third party client, provided it happened due to no fault on the part of the principal, the agent's right to commission is proportionately extinguished. The paper discusses the judgment in the light of previous CJEU case law and the Polish transposition of the said European standards with a view to finding any potential divergences between the two. The paper notes two problems. First, Polish law, as opposed to Slovak law, does not recognize an automatic termination of an insurance contract in the event of default on the part of the customer. Conversely, whether such an effect eventuates is left to contractual discretion of the parties. Second, Polish courts have been recently willing to substitute unjust enrichment for contractual liability even where, it appears, complainants have valid claims under Article 761^4 of the Civil Code.

BIBLIOGRAPHY

Baskind E., Osborne G., Roach L., *Commercial Law*, Oxford 2016
Bennett H. N., *Principles of the Law of Agency*, Oxford 2013

Bidziński M., Jagiełło D. (eds.), *Prawo gospodarcze – zagadnienia wybrane*, Warszawa 2016
Dobson A. P., Stokes R., *Commercial Law*, London 2012
Engelmann J., *International Commercial Arbitration and the Commercial Agency Directive: A Perspective from Law and Economics*, Berlin 2017
Gniewek E. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016
Górny K., *Art. 761*, (in:) M. Gutowski (ed.), *Kodeks cywilny. Tom II. Komentarz do art. 450–1088*, Warszawa 2016
Hesselink M. W. [*et al.*], *Commercial Agency, Franchise and Distribution Contracts*, Berlin 2006
Jezioro J., *Art. 761*^{4}, (in:) E. Gniewek (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016
Kruczalak K., Rott-Pietrzyk E., Zapadka P., *Rozdział 8*, (in:) S. Włodyka (ed.), *System Prawa Handlowego. Tom 5. Prawo umów handlowych*, Warszawa 2011
Law J., Martin E. A. (eds.), *A Dictionary of Law*, Oxford 2013
Mikłaszewicz P., *Art. 758*, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017
Mikłaszewicz P., *Art. 761*^{4}, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017
Munday R., *Agency: Law and Principles*, Oxford 2010
Mycko-Katner I., *Umowa agencyjna*, Warszawa 2012
Rott-Pietrzyk E., *Agent handlowy – regulacje polskie i europejskie*, Warszawa 2005
Rott-Pietrzyk E., (in:) J. Rajski (ed.), *System Prawa Prywatnego. Tom 7. Prawo zobowiązań – część szczegółowa*, Warszawa 2011
Ryder N., Griffiths M., Singh L., *Commercial Law: Principles and Policy*, Cambridge 2012
Watts P. G. (ed.), *Bowstead & Reynolds on Agency*, London 2016
Wiśniewski T., *Umowa agencyjna według kodeksu cywilnego*, Warszawa 2001
Wojtaszek-Mik E., *Umowa agencji w dyrektywie o przedstawicielach handlowych na tle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2006, issue 1
Żygadło A., *Wynagrodzenie agenta za wykonywanie czynności outsourcingowych*, "Monitor Prawa Bankowego" 2011, issue 3

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