

Commercial Agents (Council Directive) Regulations 1993

This document sets out the main aspects of the Commercial Agents (Council Directive) Regulations 1993 which came into force on 1st January 1994.

- 1 These Regulations apply to commercial agents. Commercial agent is defined as a "*self employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person ("the Principal") or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of the Principal*".

These Regulations do not apply to unpaid commercial agents and to those agents whose activities are considered to be secondary. It does not cover commercial agents who sell services on behalf of the Principal. The person who operates as a distributor of goods, in that he trades on his own account but also from time to time operates as an agent for a supplier, will not be covered by the Regulations as those activities are regarded as secondary.

- 2 Regulations 3 and 4 set out duties and obligations on behalf of both Principal and agent.

- 2.1 The duties of the commercial agent to his Principal are:

- a) He must look after the interests of his Principal and act dutifully and in good faith.
- b) He must make proper efforts to negotiate and where appropriate conclude the transactions as instructed by the Principal.
- c) He must communicate to his Principal all the necessary information available to him.
- d) He must comply with reasonable instructions given by his Principal.

- 2.2 The duties of a Principal to his commercial agent are as follows:

- a) A Principal must act dutifully and in good faith.
- b) He must provide his commercial agent with necessary documentation relating to the goods concerned.
- c) He must obtain for his agent the information necessary for the performance of the agency contract and in particular notify his agent with a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than the agent could normally have expected.
- d) He shall inform his agents within a reasonable period of his acceptance or refusal upon any non-execution by him of a commercial transaction which the commercial agent has procured for him.

These duties are implied into the terms of the agency contract and there is a prohibition to derogate from these Regulations.

- 3 Regulations 6, 7 and 8 deal with the agent's entitlement to remuneration.
- 3.1 Regulation 6 provides that if remuneration is agreed between the parties then those provisions will apply. However in the absence of any agreement as to remuneration, the commercial agent is entitled to the level of remuneration that would be appropriate according to local custom and practice for the goods of that type in that country.
- 3.2 Regulation 7 provides for entitlement to commission and transactions included during the agency contract. These are:
- a) where the transaction has been concluded as a result of the agent's action;
 - b) where the transaction has been concluded with previous customers of the agent whom he has previously acquired as a customer for the transaction of the same kind (whether or not the repeat order is placed through the agent);
 - c) where the agent has an exclusive territory or group of customers he is entitled to be paid on transactions in that area or with that group even where the agent has not been involved.
- 3.3 Regulation 8 provides for entitlement to commission on transactions concluded after the agency agreement has been terminated where:
- a) the transaction is mainly attributable to the agent's efforts during the period of a valid agency agreement and if the transaction was entered into within a reasonable period after the agreement had been terminated or;
 - b) the transaction is one which would have led to a commission if the agency had not been terminated and the order of the third party was received by the Principal or agent before the agency contract terminated.
- With regard to commission on transactions concluded after the agency contract, incoming and outgoing agents can both be entitled to commission under the Regulations. Where this happens the incoming agent does not share commission unless it is equitable for him to do so.
- 4 Regulation 9 provides apportionment of commission between new and previous commercial agents.
- 5 Regulation 10 provides when commission is due and the date for payment. The commission becomes due as soon as either:
- the Principal completes the transaction; or
 - should have completed the transaction; or
 - the customer has completed his side of the bargain.

6 The commission must be paid not later than on the last day of the month following the quarter in which it became due. The agent's right to commission can only be lost where the failure to conclude the transaction was not due to default of the Principal. The Principal is under a duty to provide his agent with a statement of commission due not later than the last day of the month following the quarter in which the commission has become due and calculations of the amount of the commission must be provided in the statement. A commercial agent is entitled to require the Principal to provide him with all information which is available to the Principal in order to check the amount of the commission due. This is covered by Regulation 12.

7 Regulation 15 provides for mandatory minimum notice to be given upon termination. The minimum periods of notice are:

- 1 month in the first year
- 2 months in the second year
- 3 months in the third and subsequent years

The parties can agree longer periods than those provided by the Regulations if a longer period is agreed. However the Principal cannot agree a shorter period than the mandatory minimum notice. Unless otherwise agreed by the parties, the end of the period of an agency must coincide with the end of the calendar month.

8 Regulation 16 enables a party to immediately terminate the agreement if one party is in breach in carrying out all or part of his obligations or where exceptional circumstances arise. There is no definition in the Regulations as to the meaning of "*exceptional circumstances*". A Principal may immediately terminate the contract provided the breach is a fundamental breach of the terms of the agreement.

9 Regulation 17. This is one of the most important aspects of the new agency laws. The agent is entitled to either an "*indemnity payment*" or a "*compensation payment*". It is up to the Principal and the agent to decide which is to apply but if they fail to do so then compensation payment will apply. In order for indemnity payment to apply it must be provided in writing.

9.1 The commercial agent is entitled to an indemnity for lost income to the extent that it is attributable to new customers, or an increase in business achieved by the agent with existing customers and the Principal continues to derive substantial benefits from the business. The maximum amount of indemnity is one year's commission based on the agent's average earning or remuneration in the last five years. If the contract is less than five years, the indemnity will be calculated on the average for the period in question.

An agent entitled to an indemnity is not prevented from seeking damages also.

9.2 An agent is entitled to compensation upon termination where "the agent is deprived of commission which proper performance of the agency contract would have procured for him whilst providing his Principal with substantial benefits linked to the activities of the commercial agent or has not enabled the commercial agent to amortise the costs and expenses that he had incurred in the performance of the agency contract on the advice of his Principal".

Unfortunately the Regulations do not define "*substantial benefits*" or "*proper performance*".

There is nothing in the Regulations which provides that the agent has a duty to mitigate any losses he claims by way of compensation. Any claim for compensation may therefore be regarded as a loss of goodwill payment to the agent.

The Regulations do not give guidance as to how compensation is to be calculated however there have been authorities which have held that in deciding compensation payment the Court must look to the French Courts for guidance as this is where the compensation payment in the Regulations stems from. In France two years commission averaged over the last three years commission payment is a starting point. Where the contract was only for a short period, the Courts have power to reduce the level of compensation accordingly.

- 10 Two more recent authorities however have moved away from this approach. They have indicated that the "2 out of 3" calculation is a guideline only, not a rule and certainly not to be adopted where to do so would result in an agent receiving a windfall or an unacceptably large payment.

In those situations the Courts, certainly of late, have encouraged a "mini valuation" approach; the agency is valued much as if it was a business, being sold as a going concern. The price paid, that is the level of compensation in question, will be determined by the duration of the agency, whether it is in writing, the territory, number of customers originally and so forth. In addition, this mini valuation approach has as its core, the discounting of any expenses incurred by the agency in earning its commission; so far as possible the valuation exercise is designed to produce a net earnings figure.

- 11 Compensation under Regulation 17(8) is payable even where the termination is as a result of death of the commercial agent.
- 12 Regulation 17(9) provides that the agent must notify his Principal within one year following termination of his agency contract that he intends to pursue his entitlement to indemnity or compensation.
- 13 Regulation 18 provides grounds for excluding payment of indemnity or compensation under Regulation 17. Compensation under Regulation 17 may not be paid to the Commercial Agent where:
- the Principal has terminated the agency contract because of the default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to Regulation 16, or
 - the commercial agent has himself terminated the agency contract unless such termination is justified by circumstances attributable to the Principal, or
 - on the grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities, or
 - the commercial agent with the agreement of his Principal assigns his rights and duties under the agency contract to another person.

In other words if the agent terminates on the grounds of constructive dismissal or age, infirmity or illness he may still be entitled to compensation under Regulation 17. Only if summary termination is justified will the agent not be entitled to Regulation 17 compensation.

- 14 Regulation 19 prohibits the parties from derogating from Regulations 17 and 18 to the detriment of the commercial agent.
- 15 Regulation 20 provides that a restraint of trade clause shall only be valid if it is in writing and it relates to the geographical area or the group of customers and geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract. Further, a Principal may not restrict the agent for more than two years after termination of the contract. That said, the reasonableness test presently applied as to the enforceability of a restraint of trade clause would still apply. Whether two years therefore would be reasonable is questionable.

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