

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.07.1996
COM(96) 364 final

REPORT ON THE APPLICATION OF ARTICLE 17 OF COUNCIL DIRECTIVE ON THE CO-ORDINATION OF THE LAWS OF THE MEMBER STATES RELATING TO SELF-EMPLOYED COMMERCIAL AGENTS (86/653/EEC)

(Presented by the Commission)

REPORT ON THE APPLICATION OF ARTICLE 17 OF COUNCIL DIRECTIVE ON THE CO-ORDINATION OF THE LAWS OF THE MEMBER STATES RELATING TO SELF-EMPLOYED COMMERCIAL AGENTS (86/653/EEC)

This Report is made under Article 17(6) of Council Directive on the co-ordination of the laws of the Member States relating to Self-Employed Commercial Agents 86/653/EEC[1]. Article 17 of Directive requires Member States to take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified or compensated.

Article 17 represents a compromise between the Member States. It was therefore agreed that Member States should have the choice between the indemnity system and the compensation system and that the Commission would undertake a report to the Council on the practical consequences of the different solutions.

This report is made on the basis of responses to a questionnaire which was sent out, inter alia, to organisations representing agents and principals, chambers of commerce and federations of industry and legal practitioners specialising in agency law. The authorities of Member States were also invited to contribute with their views and experience.

THE TWO SYSTEMS

1. The Indemnity System

Under the indemnity system, the agent is entitled, after cessation of the contract, to payment of an indemnity if and to the extent that he has brought new customers to the principal or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from such customers after the cessation of the contract. The payment of the indemnity must be equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Finally, the Directive provides a ceiling on the level of indemnity of one year calculated from the agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the maximum is to be calculated on the average for the period in question.

The indemnity represents the continuing benefits to the principal due to the efforts of the agent. The agent, however, will only have received commission during the duration of the contract, which will not typically reflect the value of the goodwill generated for the principal. It is for this reason that the payment of a goodwill indemnity is commercially justified. An indemnity will only be payable if the agent has brought to the principal new customers or increased business with existing customers. If no goodwill has been generated or there is a group of customers whom the principal can derive no benefit from, no indemnity need be paid. Therefore, a principal should not be forced to pay an unreasonable amount of indemnity.

The indemnity system was modelled on Article 89b of the German Commercial Code which had provided for the payment of a goodwill indemnity since 1953 and concerning which a large body of case-law has developed regarding its calculation. This case-law and practice should provide invaluable assistance to the Courts of other Member States when seeking to interpret the provisions of Article 17(2) of the Directive.

---

[1] O.J. L 382 p. 17 of 31.12.1986

First it is necessary to ascertain whether an agent has a right to an indemnity having regard to the circumstances in which the agency contract was terminated. An indemnity is payable on termination of the contract except where one of the circumstances in Article 18 of the Directive applies. Clearly, the indemnity is payable on the end of a fixed term contract and in principle, an indemnity or limited indemnity is payable on the bankruptcy of the principal.

Secondly, the conditions set out in Article 17(2)(a) of the Directive have to be met, namely that either the agent has brought new customers or has substantially increased the volume of business with existing customers. As regards the volume of business with old customers, the German courts look to see if the increase in volume is such that it can be considered to be economically equivalent to the acquisition of a new customer. In relation to new customers, the addition of one new customer is sufficient. However, new customers from outside his territory for which the agent is not entitled to commission are excluded as there is no loss of commission for which the agent needs to be compensated. The agent must have acquired the new client and in this respect the instrumentality of the agent is crucial. A small level of involvement is sufficient and it is enough that the agent has merely contributed to bringing the new customer. However, the agent must have played an active role and therefore the existence of a new customer who falls within the territorial scope of an exclusive agency agreement will not automatically suffice.

Thirdly, the principal must continue after the end of the agency contract to derive substantial benefits with such customers. This is presumed to be the case even if the principal sells his business or client list if it can be shown that the purchaser will use the client base[2]. If the agent continues to meet the needs of the same clients for the same products, but for a different principal, the agent is prevented from seeking an indemnity[3]. It is also possible for the court to consider a fall in the turnover of the principal's business. Fourthly, the payment of an indemnity must be equitable.

As to the actual calculation of the indemnity, it is undertaken in the following way:

Stage 1

(a) The first stage in line with the second indent of Article 17(2)(a) is to ascertain the number of new customers and the increased volume of business with existing customers. Having identified such customers the gross commission on them is calculated for the last 12 months of the agency contract. Fixed remuneration can be included if it can be considered to be remuneration for new customers[4]. Special circumstances may justify departing from this, for example, where is a long start up period.

(b) An estimate is then made as to the likely future duration of the advantages to the principal deriving from business with the new customers and such old customers with whom the business has been significantly increased (intensified customers) which is calculated in terms of years. The aim is to predict the likely length of time the business with the new and intensified customers will last. This will involve

---

2 Case 18 U 162/76 Oberlandesgericht Hamm of 14.3.1977
3 Case BB 605/60 Bundesgerichtshof of 25.4.1960
4 Case VII ZR 194/63 Bundesgerichtshof of 15.2.1965

considering the market situation at time of termination and the sector concerned. The fact that sales drop after termination of the contract does not automatically lead to a corresponding reduction in the level of indemnity as sales may decline due to lowering in quality of goods or competition[5]. The usual period is 2-3 years, but can be as much as 5 years.

(c) The next factor to consider is the rate of migration. It is acknowledged that over time customers will be lost as customers naturally move away. The rate of migration is calculated as a percentage of commission on a per annum basis and is taken from the particular experience of the agency in question. This clearly varies, but in one case the Bundesgerichtshof held that the rate of migration was 38%[6].

(d) The figure is then reduced in order to calculate the present value taking into account that there is an accelerated receipt of income. Such a calculation based on average interest rates is a concept found in other jurisdictions.

Stage 2

It is at this stage that the question of equity is considered as set out in Article 17(2)(a) second indent of the Directive. The figure is rarely adjusted for reasons of equity in practice. The following factors are taken into account:

- Whether the agent is retained by other principals;

- The fault of the agent;

- The level of remuneration of the agent. For example, did the principal recently reduce the rate of commission e.g. because he felt that agent's earnings were becoming too high or pay to the agent a large amount of commission on contracts with customers which the agent did not introduce or had little to do with ? Also, did the agent receive special compensation for keeping a consignment inventory, special bonuses for new clients, del credere commission, any special allowance for trade fairs or extra payments for sub-agents ? Did he incur costs regarding loss of sub-agents?

- Decrease in turnover of the principal;

- Extent of the advantage to the principal;

- Payment of pension contributions by the principal;

- The existence of restraint of trade clauses. Clearly, a principal will be required to pay a higher indemnity for this.

---

5 Case BB 227/70 Celle of 13.11.69

6 Case VIII ZR 94/93 Bundesgerichtshof of 23.2.1994

Stage 3

The amount calculated under Stages 1 and 2 is then compared with the maximum under Article 17(2)(b) of the Directive. This provision provides that the amount of the indemnity may not exceed a figure equivalent to remuneration for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question. The maximum is in fact therefore a final corrective, rather than as a method of calculating the indemnity[7].

In calculating the maximum, remuneration includes all forms of payment, not just commission and is based on all customers, not only new or intensified customers[8]. If the sum under stages 1 and 2 is less than the maximum then this sum is awarded. If however, the sum exceeds the maximum, it is the maximum which is awarded. It is unusual for the maximum to be reached unless the agent has procured all or most of the customers.

An example of stages 1 to 3 is set out:

Commission on new customers and/or intensified customers over last 12 months of agency			50,000 ECUs
Anticipated duration of benefits is 3 years with 20% migration rate			
Year 1	50,000 - 10,000	=	40,000 ECUs
Year 2	40,000 - 8,000	=	32,000 ECUs
Year 3	32,000 - 6,400	=	25,600 ECUs
Total lost commission			97,600 ECUs
Correction to present value say 10%. This figure being equal to the actual indemnity			87,840 ECUs

This figure might be adjusted for reasons of equity (stage 2 above)

A final correction must be made should the amount exceed the maximum under Article 17(2)(b) of the Directive.

---

7 Case VII ZR 47/69 Bundesgerichtshof of 19.11.1970

8 Case VII ZR 23/70 Bundesgerichtshof of 3.6.1971

Article 17(2)(c) states that the grant of an indemnity shall not prevent the commercial agent from seeking damages. This provision governs the situation where the agent under national law is entitled to seek damages for breach of contract or failure to respect the notice period provided for under the Directive. Annex B attempts to identify these provisions.

It can thus be seen that the method of calculation of the indemnity is extremely precise and should lead to a predictable outcome. Principals should therefore be able to ascertain their risks in advance and to be able to enter into agency contracts with some degree of assurance. From the agent's perspective, clearer rights make it easier for the claim to be made and established.

2. The Compensation System

Under Article 17(3) of the Directive, the agent is entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal. Such damage is deemed to occur particularly when the termination takes place in circumstances:

- depriving the agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the agent's activities.

- and/or which have not enabled the agent to amortize the costs and expenses he had incurred for the performance of the agency contract on the principal's advice.

There is no maximum level of compensation.

The compensation system was based on French law, which dated from 1958 and whose aim was to compensate the agent for the loss he suffered as a result of the termination of the agency contract. As for the indemnity system in Germany, a body of case-law has developed in France concerning the right and level of compensation. Various judgments of the French courts have justified the payment of compensation on the ground that it represents the cost of purchasing the agency to the agent's successor or on the ground that it represents the time it takes for the agent to re-constitute the client base which he has been forcefully deprived of.

By judicial custom the level of compensation is fixed as the global sum of the last two years commission or the sum of 2 years commission calculated over the average of last three years of the agency contract which conforms with commercial practice. However, the courts retain a discretion to award a different level of compensation where the principal brings evidence that the agent's loss was in fact less, for example, because of the short duration of the contract or where, for example, the agent's loss is greater because of the agent's age or his length of service.

The indemnity is calculated on all remuneration, not just commission. It is based on the gross figure. No distinction is made between old and new customers and it includes special commission. There is no practice to reduce for professional costs. Finally, outstanding commissions must also be included in the calculation.

The indemnity represents that part of the market lost to the agent and his loss is fixed at that moment. Accordingly, future occurrences are not taken into account, such as the principal ceasing to trade, the agent continuing to work with the same clients or developments in the market place. Similarly, the agent is not required to mitigate his loss.

The Directive has brought about a greater interest in claiming damages for failure to respect the proper notice period. The amount awarded is the highest of the period not respected calculated on commission received for the last two years or the commission received during the identical period the previous year.

Further, more specific comments on the system in France can be found in Annex B.

POSITION IN MEMBER STATES

All Member States have implemented the Directive and a list of the laws is annexed to this Report as Annex A. With the exception of France, the UK and Ireland, Member States have incorporated the indemnity option into their national law. The UK has permitted the parties to choose the indemnity option, but if they fail to do so, the agent will be entitled to compensation. Ireland has failed to make any choice at all in its legislation and accordingly the Commission has opened Article 169 proceedings. The Commission has also opened infraction proceedings against Italy for failure to implement Article 17 of the Directive correctly. Further details can be found in Annex B concerning Irish and Italian law.

In most Member States there has yet to be any reported court decision, whilst in other Member States there are only a small number of cases. This is explained by the fact that the laws in most Member States are still very new and that these laws have only applied to all contracts in operation as from 1 January 1994. In addition, in France and Germany where there are cases, many agencies are not international in nature and the law follows long established traditions.

The second reason for the lack of reported cases is the tendency for the parties to settle cases before the court hearing. Agents are not always in the financial position to pursue their claims through the courts and therefore are forced to accept settlements. In addition, the uncertainty linked to court proceedings, invariably in a different jurisdiction deters agents from pursuing their claims through the courts.

The cases in Germany and France show a continuity with the existing jurisprudence in these countries. In Portugal, where the Directive represents a change to the previous situation the case-law shows an approach which is different to that of the German courts with an attempt by the judge to apply directly the principle of equity. In Italy, where there has only been one judgment under the new Article 1751 of the Civil Code, the Viterbo Magistrate Court has ruled, that having regard to the lack of criteria for calculation of the indemnity in Article 1751 of the Civil Code, it would apply the collective agreement. The collective agreement follows a system of calculation based on the duration of the agency and is not related to the number of new customers brought. Thus, it also takes a different approach to the German courts. However, this is a single judgment of the Italian courts and has yet to be confirmed. In Denmark, only three judgments have been reported. A fourth judgment is now subject to appeal. The reported cases reveal a tendency to take over and follow German jurisprudence.

Having regard to the relative lack of jurisprudence and the nature of the subject matter, the Commission in its preparation for this Report sought to ascertain the practical as well as the legal situation. An outline of the legal and practical position is set out in more detail in Annex B.

There are no statistics available in any of the Member States. The International Union of Commercial Agents and Brokers have now started to collect data. This is a helpful development, as IUCAB should be able to collect a good level of data through its member organisations in Member States and IUCAB has offered to present these statistics periodically to the Commission. The Portuguese authorities have also established a centralised method of collecting information from all courts on the nature and outcome of cases which involve EC law or the Lugano Convention, which of course, includes the Directive on Commercial Agents.

BUSINESS PRACTICE

The Commission sought to ascertain whether, as a result of the Directive and in particular the right to an indemnity or compensation, there had been any change in business practice. The Commission also wanted to establish whether, as a result of the different options, distortions in competition had arisen. The lack of statistics makes it more difficult to reach conclusions in this regard.

Overall, the Commission found that there had not been any change in business practice. There was some evidence that principals were moving to distributorship contracts in France, Germany, Luxembourg and Belgium. This can be partially explained by the fact that on lawful termination of distributorship contracts no indemnity or compensation is payable or a reduced level. In the UK, Ireland and Sweden it was reported that principals were now considering much more carefully whether agency contracts were the most appropriate business arrangements and were therefore taking a much more cautious approach. However, principals were not always actually moving away from agency contracts.

In the UK there appears to have been a specific reaction. First prior to the coming into force of the UK Regulations implementing the Directive, principals terminated their agency contracts and on the whole re-negotiated new contracts. There were, however, occasions where new agency contracts were not entered into or the agents were taken on as employees. This reflects the fundamental change brought about by the Directive to UK law and the fear of principals of the unknown. It is too soon to determine whether there will be a permanent shift away from agency contracts in the UK.

Under French law and practice, compensation awarded in the vast majority of cases amounts to 2 years commission which is twice the legal maximum provided for under the indemnity option. This clearly makes the appointment of an agent in France under French law a much more costly enterprise. This has led some principals seeking when appointing an agent in France to seek to apply a law other than French law or to avoid entering into agency contracts altogether. There is no evidence of any widespread problems or distortions in trade as regards those Member States who have opted for the indemnity system and those who have opted for the compensation option.

REACTIONS OF PRINCIPALS AND AGENTS

It can generally be said that agents have given a positive response to the Directive as it is considered to have increased their rights. This would be the case in Austria, Denmark, Finland, Ireland, Luxembourg, Sweden and the UK. French agents continue to feel positively about the system of compensation in France and do not wish for change.

The reaction of principals has been mixed. To some extent, principals are bound to feel negative about change as they now have to grant greater rights to agents. For other principals it is not that they are against paying an indemnity on termination, but rather there is a degree of discontent in that the system lacks clarity. French principals appear to support the compensation system and have not raised any objections regarding it.

There is no tendency amongst either agents or principals in the Member States who have implemented the indemnity option to favour anything other than the indemnity system. In the UK, where the parties are able to opt in favour of payment of an indemnity, no clear preference emerges although most contracts do not contain an indemnity provision. Principals are still unclear about what the differences between the two systems are. There is a certain level of interest in the indemnity amongst some principals because of the maximum limit, but other principals prefer the compensation option as agents must prove actual loss.

DIFFICULTIES

A number of difficulties have arisen in relation to Article 17 of the Directive.

(1) Interpretation difficulties

Many commentators and lawyers have pointed to the imprecise and uncertain nature of Article 17, which causes difficulty in trying to advise clients on the extent of an agent's rights on termination. This was reported in particular in Denmark, Ireland, Italy, Spain, Sweden and the UK.

a. Indemnity

As regards the indemnity option, there has been a tendency in some Member States to seek reliance on the maximum figure whereas under the German system, which influenced the Directive, the maximum has no bearing on the actual method of calculation of the indemnity. It is merely used at the end of the process as a final adjuster. In some Member States attempts are made to try and establish an equitable amount taking into account various different factors, which again is not the approach taken by the German courts. Denmark and Austria appear to follow the German model but in the case of Austria, the maximum limit is often reached, whereas in Germany it is very rarely reached except when all the customers have been brought by the commercial agent.

In Italy, it appears, at the moment, that the previous system continues to apply even though a new law was introduced. This has been re-enforced in the ruling in the Pretura Viterbo case in which the court held that the provision of Article 1751 of the Italian Civil Code, which implements Article 17(2) of the Directive, was so uncertain as to the method of calculation of the indemnity, it would apply the collective agreement. The method of calculation under the collective agreement does not correspond with the German model, but is based on the length of the contract, the level of commission and the percentages set out in the collective agreement.

It therefore appears there is a divergence of approaches. However, there is of course still only a very limited jurisprudence of the courts of Member States concerning Article 17 outside Germany.

b. Compensation

As regards the compensation option, clearly this has not presented problems of interpretation in France where pre-existing jurisprudence has continued to be applied. However, as regards the UK which applies the compensation option in default of the choice of the parties, there is a fundamental difference in approach. At this stage, there is no UK case-law but the parties in practice are attempting to apply common law principles. These common law principles are directly opposed to the well-established method of calculation of compensation in France. For example, the English system will take account of future developments after termination of the contract and this results in the need to for the injured person to mitigate his loss. Whereas, under French law, events after the termination of the agency contract have no bearing on the compensation to be awarded. Under French Law, the standard award is two years commission which represents the value of the purchase of an agency or the period it will take the agent to re-establish his client base. It is difficult to see how the UK courts will reach this figure. This, no doubt, derives from the previous legal position in the UK, that agency contracts could be terminated on notice without any payment being due. This naturally has had consequences for business practices. There was no real concept of goodwill attaching to an agency to which the agent had a right to a share in. It is not possible to predict how the UK courts will interpret the Directive, but it seems likely that they will have regard to existing common law principles.

The same difficulties are likely to arise in Ireland if Ireland opts for the compensation option.

c. Consequences of uncertainty

The difficulties in interpretation have had an effect on the reactions of agents and principals to the Directive. For both it has entailed increased time being spent on negotiation since rights and levels of rights are not clearly established. This benefits neither party. It has also led to different amounts being awarded. Uncertainty and divergence also lead to a reluctance to create agencies and act as a barrier to principals to take on agents in other Member States. It is important that the Directive is uniformly interpreted and leads to predictable and clear results.

(2) Position of Agents

The Directive has led to an improvement in the position of agents vis-à-vis their principals. Nevertheless it appears that agents are not always able to enforce their rights to the full because they lack the resources to take court action. This is a problem of a general nature and not specific to the Directive. Possible remedies lie outside the remit of this Report. However, it is the view of the Commission that clarification of the provisions of the Directive and methods of calculation will be of assistance to agents and make the enforcement of rights easier.

(3) Choice of Law

Finally, certain problems have been encountered with regard to choice of law clauses in contracts and attempts have been made to avoid the application of certain laws by choice of law clauses or jurisdiction clauses. The Directive does not lay down any rules concerning private international law. The parties are therefore free to choose the law which is to govern the agency contract, subject to the rules contained in the Rome Convention 1980 on the law

applicable to contractual obligations. In the Commission's opinion Articles 17 and 18 of the Directive are mandatory rules and accordingly, the courts of the Member States can apply the law of the forum in accordance with the 1980 Rome Convention and thereby ensure the application of the Directive. The 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters will also assist in ensuring, that in so far as Community cases are concerned and the agent is carrying on his activities in the EC, that a court of a Member State will have jurisdiction[9]. Accordingly, there does not appear to be any need to amend the Directive in this regard.

CONCLUSION

The Commission notes that the indemnity option has been chosen by the vast majority of Member States and that this has received the support of agents and principals in those Member States. The Directive provides for a ceiling on the level of indemnity, but does not give precise guidance for its method of calculation. A clear and precise method of calculation would lead to greater legal certainty, which would be of advantage to both parties. As regards the compensation option, which has been maintained by France, it does not appear to have caused problems for agents and principals in France. The level of compensation in France is generally much higher than the level of indemnity. The implementation in the UK whereby the parties have the choice of the system has led to uncertainty, particularly as neither of the two options is known to the British legal system.

At this stage, there is very little jurisprudence concerning the Directive. Having regard to the information received, it appears that there is a need for clarification of Article 17. Any more further far-reaching conclusions are premature. The Commission considers that this Report, which gives detailed information, particularly concerning the method of calculation of the indemnity as it is carried out in Germany, provides further clarification of Article 17 of the Directive and secondly, by so-doing should facilitate a more uniform interpretation of Article 17 of the Directive.

---

9 Arcado Sprl v Haviland SA Case N° 9/87 [1988] ECR 1539 the Court held that right to compensation was contractual in nature and therefore Article 5(1) of the 1968 Brussels Convention applied thus opening the possibility of an additional basis of jurisdiction

ANNEX A

LIST OF MEMBER STATES LAWS IMPLEMENTING THE DIRECTIVE ON COMMERCIAL AGENTS (86/653/EEC)

Expiry of implementation period : 31.12.89
(United Kingdom and Ireland : 31.12.93)
(Italy, concerning article 17 : 31.12.92)

1. Belgium
Law of 13.4.1995
published in Moniteur Belge of 2.6.1995, pg. 15621
entry into force : 12.6.1995

2. Denmark
Law n° 272 of 2.5.90
publication : Lovtidende A. 1990 p. 922
entry into force : 4.5.90
application to contracts in operation : 1.1.92

3. Germany
Law of 23.10.89
publication : Bundesgesetzblatt 1989 I 1910
entry into force : 1.1.90
application to contracts in operation : 1.1.94

4. Greece
Presidential Decree n° 219 of 18.5.1991
publication : OJ of the Greek government n° 81 of 30.5.1991 and n° 136 of 11.9.1991 as amended by Decrees n° 249/93, 88/94 and 312/95.
entry into force : 30.5.1991
application to contracts in operation : 1.1.94

5. Spain
Law 12/1992 of 27.5.1992
publication : BOE n° 129 of 29.5.1992
entry into force : 19.6.1992
application to contracts in operation : 1.1.94

6. France
Law n° 91-593 of 25.6.1991
publication : OJ of the French Republic 17.6.1991 p. 8271
entry into force : 28.6.1992
Decree 92-506 of 10.6.1992
Publication: OJ of the French Republic 12.6.1992 p. 7720
entry into force : 1.1.1994
application to contracts in operation : 1.1.94

7. Ireland
Statutory Instrument : SI N° 33 of 1994 of 21.2.1994
Entry into force : 1.1.1994
application to contracts in operation : 1.1.94

8. Italy
Legislative Decree n° 303 of 10.9.1991
publication : Gazetta ufficiale n° 57 of 20.9.1991.
entry into force : 1.1.1993
application to contracts in operation : 1.1.94

9. Luxembourg
Law of 3 June 1994
publication : Memorial A-N° 58 of 6.7.1994, p. 1088
application to contracts in operation : 1.1.94

10. Netherlands
Law of 5.7.89
publication : Staatsblad 1989 n° 312
entry into force : 1.11.89
application to contracts in operation : 1.1.94
Re-enacted by Law n° 374 of 1993 as Articles 400-445 of Title 7 of the Burgerlijk Wetboek

11. Austria
Federal Act of 11.2.1993
published in Federal Gazette 88
entry into force : 1.3.1993
application to contracts in operation : 1.1.1994

12. Portugal
Decree n° 178/86 of 3.7.86
publication : Diário da República, I série, 1986, p. 1575
entry into force : 2.8.86
application to contracts in operation : 2.8.86
amended by law No 118/93 of 13.4.93 published Diário da República No 86 p.1818 of 13.4.93
application to contracts in operation : 1.1.94

13. Finland
Law n° 417 of 8.5.1992
published in Gesetzblatt of 14.5.1992
entry into force : 1.11.1992
application to contracts in force : 1.1.1994

14. Sweden
Law n° 351 of 2.5.1991
entry into force : 1.1.1992
application to contracts in force : 1.1.1994.

15. UK
Statutory Instrument SI 1993 n° 3053 of 7.12.93
and SI 1993 n° 3173 of 16.12.1993
entry into force : 1.1.94
application to contracts in operation : 1.1.1994
Northern Ireland :
Statutory Rules of Northern Ireland 1993 n° 483 of 17.12.1993
entry into force : 13.1.1994
application to contracts in operation : 13.1.1994

ANNEX B

BELGIUM

The law on Commercial Agent Contract only came into force on 12 June 1995. Accordingly, there are no cases decided by the courts on the new law.

Article 20 of the law introduced the right to a goodwill indemnity. Prior to the new law, the right to a goodwill indemnity had been rejected by the main decisions of the Belgian courts as goodwill was considered to attach to the principal more than to the agent. Accordingly, the new law has brought about an important change to the law.

The law contains no guidance as to how the indemnity is to be calculated, but it is argued by most commentators that is for judge to determine the amount taking into account various factors such as level of commission in last years of the contract, level of development of customers, extent to which principal will continue to derive benefits, duration of contractual relations, level of involvement of the principal, existence of a pension financed by the principal or whether the agent's contract with the principal is his sole agency. One author has specifically drawn on the German method of calculation.

Practising Belgian lawyers considered that regard would be had to the law on commercial representatives and to the German experience. Under the Law on Commercial Representatives of 3 July 1978, however, the indemnity is calculated on the basis of 3 months wages for a commercial representative who has acted for the same principal for a period of one to five years. This period is increased by one month for each further five years.

Under Article 18(3) of the Belgian law, it is possible to claim damages for lack of notice, which amounts to lost commission in accordance with method of calculation set out in this Article.

Finally, under Article 21 of the Belgian law, an agent who has a right to an indemnity can claim in addition damages for the harm actually suffered. It is not clear in what circumstances is this payable and whether entitlement to an indemnity gives automatically a right to seek damages. In the view of the Commission this latter interpretation would be contrary to Article 17(1) of the Directive as the effect of such an interpretation would be that the two options would apply cumulatively.

DENMARK

With the implementation of the Directive in Denmark and the introduction of the right to an indemnity under Section 25 of Law N° 272 of 2 May 1990, a new right was granted which had not existed under the previous law.

To date, only three judgments have been reported[10]. In Lope Handel the principal was ordered to pay losses for the failure to respect the contractual period of notice and to pay an indemnity of 1 years commission on the new customers acquired for the principal by the agent. It was proved that the new customers were lost one year after termination of the agency contract. In S&L, the principal was ordered to pay an indemnity equivalent to the maximum. It was proved that practically all the customers were brought by the agent. In Cramer, the court found that a substantial number of customers were once-only customers with whom the principal could expect no further business. The principal was ordered to pay an indemnity amounting to DKK 150,000. For comparison the maximum would have been 400,000.

In practice it appears that agents seek the maximum amount and principals try to argue the figure down. At present, although there is no set picture, there is no tendency to pay the maximum figure. Calculations appear to follow the German model.

As for other Member States, no useful statistics are available.

Section 6 of the law implements Article 17(2)(c) of the Directive and provides that if an agent or principal is in breach of his obligations to the other, the other is entitled to compensation for any damage caused thereby.

GERMANY

Article 89b of the Handelsgesetzbuch sets out the agents right to an indemnity. The method of calculation is set out in the Report itself.

In practice it appears that there has been no change in Germany as to the method of calculation of the indemnity following the implementation of the Directive in Germany as the indemnity provision of the Directive did not require change to German law. The change noted by industry was in relation to contracts with other EU countries, which prior to the Directive did not provide for an indemnity.

GREECE

The implementation of Article 17 of the Directive by Article 9 of Presidential Decree 219 of 18 May 1991 did not conform with the Directive, in particular, in that it did not implement the second indent of Article 17(2)(a) which requires that the indemnity be equitable. Greece has following correspondence with the Commission introduced a new law in 1995 which implements Articles 17(2)(a).

---

10 Lope Handel v GE Lighting (Commercial Court of Copenhagen of 25.9.1995); S&L v Eskimo (High Court Western Division of 14.11.1995); Cramer v B&B (Commercial Court of Copenhagen of 15.12.1995)

Article 9(1)(c) states that the right to seek an indemnity does not prevent an agent from seeking damages under the Civil Code. Damages are payable and awarded according to whether the contract was fixed term or of indefinite duration.

An agent may also seek damages for lack of proper notice.

SPAIN

Article 28 of law N° 12/1992 of 27 June 1995 provides for the payment of an indemnity. Article 29 of the law provides for the award of damages if the principal unilaterally breaks an agency contract which is for an indefinite period. The Directive has filled a legal gap in Spanish law in that prior to the law implementing the Directive there was no specific law covering commercial agents or commercial agency contracts. However, Article 29 is not restricted merely to breach of contract and by virtue of this Spain has seemingly implemented both options contained in Article 17 of the Directive unless the Court interprets the scope of Article 29 narrowly.

Owing to the recent coming into force of the law there is a lack of jurisprudence in this area. The case-law prior to the new law may be of relevance for the future since some of the principles may act as guidance for future judgment by the Spanish courts.

Under the old law, it was also possible to claim both damages and a goodwill indemnity and agents used to cumulate both claims. The difference between both remedies was sometimes blurred in practice. The Supreme Court has repeatedly recognised the possibility of obtaining an indemnity for goodwill. The judge is given a wide discretion to fix the level of the indemnity and in general it is calculated depending on the agent's earnings[11]. As regards damages, the courts considered a number of different matters in arriving at the award, including the level of the last commission, the nature of the activity, loss of prestige and whether the contract was exclusive or not[12].

Finally, damages are payable for failure to respect the correct notice period which is the amount of commission the agent would have received if the notice period had been respected[13].

However, despite these judgments it is still difficult to reach general conclusions, particularly as in Spain the level of indemnity is fixed after the hearing and the decision is not published.

---

11 Supreme Court judgments of 22 March 1988 and 19 September 1989

12 Judgment of Court of Appeal of Lugo of 4.6.1994; Court of Appeal Valence of 14.7.1993 and Court of Appeal Barcelona of 30.1.1995

13 Judgment of Supreme Court of 19.9.1989

FRANCE

Unlike for many other Member States, the Directive has not brought about radical change to the pre-existing law in France. Under Article 12 of Law N° 91/593 of 25 June 1991, French law continues to give a right to compensation on termination of the agency contract. The change brought about relates to the circumstances in which compensation is payable and not in its calculation. The right to compensation now exists for the non-renewal of the contract and termination by the agent for reasons of old age, sickness or infirmity and on death.

Compensation is calculated as before according to the jurisprudence as neither the old law or the present law sets out the method of calculation. In the vast majority of cases it amounts to two years gross commission which is calculated from the agent's average remuneration over the preceding three years or the global sum of the last two years commission. This sum has become the customary award and is confirmed with court decisions applying the new law[14].

The indemnity is calculated on all remuneration, not just commission. It is based on the gross figure. No distinction is made between old and new customers and it includes special commission. There is no practice to reduce for professional costs. Finally, outstanding commissions must also be included in the calculation.

The indemnity represents that part of the market lost to the agent and his loss is fixed at that moment. Accordingly, future occurrences are not taken into account, such as the principal ceasing to trade, the agent continuing to work with the same clients or developments in the market place. Similarly, the agent is not required to mitigate his loss.

The French courts do not order the payment of two years gross commission as compensation where it can be shown that the loss suffered by the agent is less, for example, because of the short duration of the contract. Similarly, the level may be increased, where, for example, an agent's loss is greater because of his age or length of the agency contract.

The Directive has brought about a greater interest in claiming damages for failure to respect the proper notice period. The amount taken is the highest of the period not respected calculated on commission received for the last two years or the commission received during the identical period the previous year.

---

[14] See for example: Court of Appeal Toulouse 20.12.1994 Les Annonces de la Seine, N° 39 1.6.1995 p.28; Court of Appeal Dijon, 16.6.1994 Les Annonces de la Seine, N° 39, p.26; Court of Appeal Paris, 17.1.1995, Les Annonces de la Seine 1.6.1995, N° 39. p.8.

IRELAND

Ireland has not implemented this provision and therefore agents do not have either a right to compensation or an indemnity. Under the common law, an agent can seek damages for breach of contract. In a fixed term contract, this will allow the agent to claim the commission he would have received until the end of the contract, subject to the agent's duty to mitigate his loss. However, this is not sufficient for the purposes of implementing the Directive. In cases of contracts of indefinite period the claim is usually for remuneration during the notice period to be respected. In addition, in both cases, he may claim for the economic loss suffered as a result of the breach of contract.
To date there are no reported cases.

ITALY

Italy amended Article 1751 of the Civil Code by Article 4 of legislative Decree N° 303 of 10 September 1991 to introduce the indemnity system set out in the Directive. However, in the view of the Commission the implementation by Italy is incorrect in that Italy has treated the two indents in Article 17(2)(a) of the Directive as alternative conditions whereas they are in fact cumulative. Accordingly the Commission has opened infraction proceedings.

It appears that the old system of collective agreements continues to apply. The Enasarco agreement of 30.10.1992 was agreed to by both principals and organisations representing agents. By doing so they have de facto re-introduced the criteria which were applicable under the previous text of Article 1751.

In its judgment of 1 December 1994, the Viterbo Magistrate Court applied the collective agreement. The court held that Article 1751 of the Civil Code could not be applied in practice as it does not fix any criteria for calculating the indemnity except the maximum. Accordingly, the court considered it appropriate to apply the collective agreement. The Court also stated that the circumstances in Article 1751 were not intended for calculating the amount of indemnity, but for determining whether an indemnity was justified if at least one of the circumstances applied. Further, the court considered that wisely the social partners, in order to avoid practically insoluble problems, had replaced the old collective agreement thereby enabling Article 1751 of the Civil Code to be applied in practice. It is not clear at this stage whether this judgment will be followed.

The system of the collective agreement is based on level of commissions and duration of the agency contract and the set percentages laid down in the agreement.

Under the collective agreement, the agent in most cases receives an amount which is much less than the maximum envisaged under the Directive.

LUXEMBOURG

Luxembourg's law implementing the Directive of 3 June 1994 applies to all contracts existing before 1 January 1994 as well as to contracts entered into force after that date. Article 19 provides for an indemnity to be paid on termination. The new law introduced a right which did not exist under the pre-existing law. It is therefore unsurprising that there

courts decisions. Those consulted also thought it was too soon to develop a theory about how the law would be interpreted.

Article 23(1) sets out the right to damages for unjustified failure to give due notice and Article 23(2) provides for damages to be paid for a serious breach of contract. Article 24 states that this amounts to a sum equal to the remuneration that would have been received in the period between the breach and the normal end of the contract. To calculate this sum regard is to be had to the previous level of commissions and to other relevant matters. This sum can be reduced if the judge considers it too high in the circumstances of the case.

THE NETHERLANDS

Article 7:442 of the Civil Code provides for an indemnity to be paid on termination of the agency contract. Under Article 7:439 damages are payable for unjustified failure to respect the correct notice period and Articles 7:440 and 7:441 provide for damages to be paid for breach of contract. This covers the period from actual termination to the date on which the agency would have been terminated had proper notice been given. This amount is the amount of remuneration which would have been received and is based on the commission received prior to termination and other relevant circumstances. The judge can reduce the amount if he considers that it is too high having regard to the facts of the particular case. Under Article 7:441.3, the party can seek in place of the sum under Article 7:441.1 and 2., compensation for the actual damage suffered and he bears the burden of proving his loss.

There is not any reported case to date concerning the new law and nor are there any statistics.

AUSTRIA

The Austrian law of 11 February 1993 came into force on 1 March 1993. Under Article 24, the agent has a right to an indemnity. To date there are no reported cases concerning the amount of indemnity or damages payable on termination of an agency contract under the 1993 law. The Directive has lead to a change in the previous law and in particular to a doubling of the maximum limit. Therefore, previous case-law is not useful guidance. Under the old law, there was a digressive reduction in the upper limit of compensation of aggregate amount of one year's commission calculated as a yearly average over the previous three years according to the length of the relationship.

In practice, it appears that commercial agents calculate the indemnity on the basis of the average income of the last five years taking into account the fluctuation of customers by computing a digression of income on the basis of 5 years. In most cases, this exceeds the upper limit set by law. On this basis, the parties negotiate in order to find a reasonable settlement. The method of calculation is based on German experiences.

It was considered too soon to make any judgment about the average level of indemnity paid. A claim for damages or performance of the contract can be made if a party terminates the contract prematurely without just cause under article 23. Article 23 also applies to a breach of Article 21 which is concerned with notice periods. Any other claims

for damages are dealt with in accordance with the provisions of the General Civil Code and the Commercial Code.

PORTUGAL

Portugal adopted its law in 1986 which followed to a large extent the proposal for the Directive and included at Article 33 the right to an indemnity. The law came into force on 2 August 1986. It has been amended by Articles 33 and 34 of Decree No. 118/93 to bring Portugese law in conformity with Article 17 of the Directive.

In Portugal there have been a number of court judgments[15]. The courts have calculated the level of indemnity taking into account the importance of new clients, the increased development of existing customers, the advantages to the principal after the termination of the contract and the loss of commission by the agent. The courts consider the indemnity as a measure of compensation for the agent for the benefits to the principal existing at the end of the contract with the clients developed by the agent.

Under Article 32 of the law and under Articles 562-572 of the Civil Code, there is also a right to be indemnified for the damages suffered for breach of contract. Article 29 specifically provides for damages for failure to respect the notice period or alternatively to damages for lack of due notice. The agent can seek, as an alternative to damages, a sum calculated on the basis of the average monthly remuneration over the previous year multiplied by the time remaining if the contract had continued to run. If the contract is of less than one years duration then the whole contract period is to be used.

FINLAND

Under section 28 of Act N° 417 of 8 May 1992, the right to indemnity on termination of an agency contract was introduced. The Directive has brought about a change in the pre-existing law. The law came into force on 1 November 1992 and there has been no court decision to date.

In practice, it appears that agents seek the maximum amount and the principal makes a counter-offer. The negotiations result in an amount which is not based on any specific calculation, rather it is the outcome of bargaining. Generally, the indemnity is in the region of 3-6 months average commission. It was felt by the agents federation that the amount of indemnity period was slightly higher under the new law than under the old law, but no statistics are available to support this.

Under Section 9 of the law, the right to damages for harm caused by a violation of the agency contract is laid down or for when a party has neglected one of his obligations.

---

15 Accórdão da Relação de Coimbra of 14.12.1993 Court of Appeal in Colectânea de Jurisprudéncia, Year XVIII, 1993, Volume V, p. 46; Accórdão do Supremo Tribunal de Justiça of 4.5.1993 in colectânea de Jurisprudéncia - Accordãos do Supremo Tribunal de Justiça, Year I, Volume II, 1993, p. 78 and also same court, judgment of 27.10.1994 in Year II, Volume III, 1994, p. 101; Acórdão da Relação do Porto of 18.10.1994 in Colectânea de Jurisprudência, Year XIX, Volume IV, 1994, p. 212.

Further, Sections 26 and 27 of the Act provide for damages where notice periods are not respected.

SWEDEN

Article 28 of Law N°351 of 2 May 1991 introduced a right to receive an indemnity which did not exist under the previous law, which only sought to ensure that an agent received commission on orders concluded after the withdrawal of the agent's authority provided that the orders were brought about through the acts of the agent during the currency of the agreement.

As for other Member States, there has yet to be any court decision. In practice agents seek the maximum amount permitted under the law and the parties negotiate on this basis to reach an equitable sum. In doing so, the parties take into account, inter alia, the duration of the contract, the agent's promotional activities, the number of new customers, orders given after termination, the possibility of a new contract for the agent and the costs incurred and investments made by the agent.

There are no statistics but the Swedish authorities estimated that awards were typically between 6 months and 1 year commission calculated as an average over the last years of the contract. This would represent an increase in the amount of compensation.
Article 34 of the law provides for damages for breach of contract.

UNITED KINGDOM

The UK has adopted its own particular system in that under Regulation 17 of Statutory Instrument N° 3053 of 1993 the parties may choose whether an agent will have the right to an indemnity or compensation.[16] It is only in default of a contractual provision that the law requires compensation to be paid. This method of implementation has of itself produced uncertainty, particularly since neither of the two options are familiar to the UK legal systems.

The law has only recently come into force in the UK and has caused a certain amount of confusion as parties and lawyers attempt to apply concepts with which they are unfamiliar and which are a certain degree alien to UK traditions. Various different approaches have developed.

In relation to compensation, lawyers try to apply traditional common law principles which does not work well since under the common law, termination of a contract in accordance with its terms or at the natural end of a fixed term contract does not give rise to a damages claim. Under the common law, the court tries to put the agent in the position he would have been in if the contract had been properly performed, but the injured party is expected to mitigate his loss and the court will have regard to future events. Typically for a fixed term contract, this would give the agent the right to claim commission for the duration of the contract. In the case of a contract for an indefinite period, the agent could seek

[16]Regulation 17 of S.I No. 483 of 1993 for Northern Ireland

damages for the notice period amounting to the remuneration he would have received in this period. The agent could also seek compensation for costs incurred in pursuance of the agency. Lawyers therefore have difficulties in reaching a view as to the level of compensation where the agent has died, become ill or retired. Typical compensation payments are between 3-6 months with some payments of 15 months depending on the level of service.

Some lawyers have therefore tried to apply by analogy the law relating to unfair dismissal or redundancy which is determined by age, length of service and the weekly wage.

As regards the indemnity provision, agents claim the maximum amount and then through negotiations a smaller sum is agreed. Typical payments appear to be between 3-6 months commission based on what would have been earned rather than the average of the last 5 years.

Most contracts do not contain a provision providing for an indemnity, but this does not necessarily reflect a preference for the compensation option rather than the indemnity option.

To date, there have been no cases and parties are reluctant to litigate since lawyers are unconfident in advising what their clients' rights are and consequently what the courts will award. However, there are likely to be cases in the near future.

ISSN 0254-1475

COM(96) 364 final

DOCUMENTS

EN 06 04 05 08

Catalogue number : CB-CO-96-365-EN-C

ISBN 92-78-07182-X

Office for Official Publications of the European Communities

L-2985 Luxembourg