

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)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 100 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas the restrictions on the freedom of establishment and the freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by Directive 64/224/EEC ⁽⁴⁾;

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;

Whereas trade in goods between Member States should be carried on under conditions which are similar to those of a single market, and this necessitates approximation of the legal systems of the Member States to the extent required for the proper functioning of the common market; whereas in this regard the rules concerning conflict of laws do not, in the matter of commercial representation, remove the inconsistencies referred to above, nor would they even if they were made uniform, and accordingly the proposed harmonization is necessary notwithstanding the existence of those rules;

Whereas in this regard the legal relationship between commercial agent and principal must be given priority;

Whereas it is appropriate to be guided by the principles of Article 117 of the Treaty and to maintain improvements

already made, when harmonizing the laws of the Member States relating to commercial agents;

Whereas additional transitional periods should be allowed for certain Member States which have to make a particular effort to adapt their regulations, especially those concerning indemnity for termination of contract between the principal and the commercial agent, to the requirements of this Directive,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Scope

Article 1

1. The harmonization measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States governing the relations between commercial agents and their principals.
2. For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.
3. A commercial agent shall be understood within the meaning of this Directive as not including in particular:
 - a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association,
 - a partner who is lawfully authorized to enter into commitments binding on his partners,
 - a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy.

Article 2

1. This Directive shall not apply to:
 - commercial agents whose activities are unpaid,

⁽¹⁾ OJ No C 13, 18. 1. 1977, p. 2; OJ No C 56, 2. 3. 1979, p. 5.

⁽²⁾ OJ No C 239, 9. 10. 1978, p. 17.

⁽³⁾ OJ No C 59, 8. 3. 1978, p. 31.

⁽⁴⁾ OJ No 56, 4. 4. 1964, p. 869/64.

- commercial agents when they operate on commodity exchanges or in the commodity market, or
- the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries.

2. Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State.

CHAPTER II

Rights and obligations

Article 3

1. In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith.
2. In particular, a commercial agent must:
 - (a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
 - (b) communicate to his principal all the necessary information available to him;
 - (c) comply with reasonable instructions given by his principal.

Article 4

1. In his relations with his commercial agent a principal must act dutifully and in good faith.
2. A principal must in particular:
 - (a) provide his commercial agent with the necessary documentation relating to the goods concerned;
 - (b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.
3. A principal must, in addition, inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

Article 5

The parties may not derogate from the provisions of Articles 3 and 4.

CHAPTER III

Remuneration

Article 6

1. In the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent shall be entitled to the 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. If there is no such customary practice a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

2. Any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission within the meaning of this Directive.

3. Articles 7 to 12 shall not apply if the commercial agent is not remunerated wholly or in part by commission.

Article 7

1. A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

- (a) where the transaction has been concluded as a result of his action; or
- (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

2. A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract:

- either where he is entrusted with a specific geographical area or group of customers,
- or where he has an exclusive right to a specific geographical area or group of customers,

and where the transaction has been entered into with a customer belonging to that area or group.

Member States shall include in their legislation one of the possibilities referred to in the above two indents.

Article 8

A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated:

- (a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by

the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or

- (b) if, in accordance with the conditions mentioned in Article 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

Article 9

A commercial agent shall not be entitled to the commission referred to in Article 7, if that commission is payable, pursuant to Article 8, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

Article 10

1. The commission shall become due as soon as and to the extent that one of the following circumstances obtains:

- (a) the principal has executed the transaction; or
- (b) the principal should, according to his agreement with the third party, have executed the transaction; or
- (c) the third party has executed the transaction.

2. The commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have.

3. The commission shall be paid not later than on the last day of the month following the quarter in which it became due.

4. Agreements to derogate from paragraphs 2 and 3 to the detriment of the commercial agent shall not be permitted.

Article 11

1. The right to commission can be 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 fact is due to a reason for which the principal is not to blame.

2. Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.

3. Agreements to derogate from paragraph 1 to the detriment of the commercial agent shall not be permitted.

Article 12

1. The principal shall supply his commercial agent with a statement of the commission due, not later than the last day

of the month following the quarter in which the commission has become due. This statement shall set out the main components used in calculating the amount of commission.

2. A commercial agent shall be entitled to demand that he be provided with all the information, and in particular an extract from the books, which is available to his principal and which he needs in order to check the amount of the commission due to him.

3. Agreements to derogate from paragraphs 1 and 2 to the detriment of the commercial agent shall not be permitted.

4. This Directive shall not conflict with the internal provisions of Member States which recognize the right of a commercial agent to inspect a principal's books.

CHAPTER IV

Conclusion and termination of the agency contract

Article 13

1. Each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any terms subsequently agreed. Waiver of this right shall not be permitted.

2. Notwithstanding paragraph 1 a Member State may provide that an agency contract shall not be valid unless evidenced in writing.

Article 14

An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period.

Article 15

1. Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

2. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.

3. Member States may fix the period of notice at four months for the fourth year of the contract, five months for the fifth year and six months for the sixth and subsequent

years. They may decide that the parties may not agree to shorter periods.

4. If the parties agree on longer periods than those laid down in paragraphs 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.

5. Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.

6. The provisions of this Article shall apply to an agency contract for a fixed period where it is converted under Article 14 into an agency contract for an indefinite period, subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

Article 16

Nothing in this Directive shall affect the application of the law of the Member States where the latter provides for the immediate termination of the agency contract:

- (a) because of the failure of one party to carry out all or part of his obligations;
- (b) where exceptional circumstances arise.

Article 17

1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and
- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

- (b) The amount of the indemnity may not exceed a figure equivalent to an indemnity 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;

- (c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

3. The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

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

4. Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death.

5. The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

6. The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this Article, and shall if necessary submit to it proposals for amendments.

Article 18

The indemnity or compensation referred to in Article 17 shall not be payable:

- (a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;
- (b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities;
- (c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.

Article 19

The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.

Article 20

1. For the purposes of this Directive, an agreement restricting the business activities of a commercial agent following termination of the agency contract is hereinafter referred to as a restraint of trade clause.
2. A restraint of trade clause shall be valid only if and to the extent that:
 - (a) it is concluded in writing; and
 - (b) it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.
3. A restraint of trade clause shall be valid for not more than two years after termination of the agency contract.
4. This Article shall not affect provisions of national law which impose other restrictions on the validity or enforceability of restraint of trade clauses or which enable the courts to reduce the obligations on the parties resulting from such an agreement.

CHAPTER V

General and final provisions

Article 21

Nothing in this Directive shall require a Member State to provide for the disclosure of information where such disclosure would be contrary to public policy.

Article 22

1. Member States shall bring into force the provisions necessary to comply with this Directive before 1 January 1990. They shall forthwith inform the Commission thereof. Such provisions shall apply at least to contracts concluded after their entry into force. They shall apply to contracts in operation by 1 January 1994 at the latest.
2. As from the notification of this Directive, Member States shall communicate to the Commission the main laws, regulations and administrative provisions which they adopt in the field governed by this Directive.
3. However, with regard to Ireland and the United Kingdom, 1 January 1990 referred to in paragraph 1 shall be replaced by 1 January 1994.

With regard to Italy, 1 January 1990 shall be replaced by 1 January 1993 in the case of the obligations deriving from Article 17.

Article 23

This Directive is addressed to the Member States.

Done at Brussels, 18 December 1986.

For the Council
The President
M. JOPLING