



## COMMERCIAL AGENTS

### THE COMMERCIAL AGENTS (COUNCIL DIRECTIVE) REGULATIONS 1993

The Regulations implemented the European Directive on self-employed commercial agents and they continue to apply post-Brexit. They impose significant obligations on principals concerning commission, minimum termination notices, compensation and restraint of trade.

#### What sort of agent?

The Regulations apply to a commercial agent (not a distributor) who is self-employed, having continuing authority to negotiate the sale or purchase of goods on behalf of the principal, or to negotiate and conclude such transactions on behalf of, and in the name of the agent's principal. So, the traditional sales agent is covered, and the more limited "marketing agent" (i.e. merely an introducer of customers) is also probably covered.

The Regulations specifically exclude:

- One acting as an officer of a company or association as between a person and that company or association; a partner as between a person and his or her partners, and an insolvency practitioner as between a person and the appointer of his or her office.
- One who has agreed that he or she should be unpaid.

As the Regulations apply to goods and not services, many agents will not usually have any protection, e.g. travel, insurance and estate agents. Software supplied electronically along with a perpetual licence and software supplied on tangible media (such as a disc) are likely to constitute "sale of goods" under the Regulations, but specific advice should always be sought in this area.

Also, a person is not covered if their activities as a commercial agent are secondary. The Regulations contain factors to be taken into account to establish what amounts to secondary activities.

Activities are not likely to be considered secondary where:

- The principal's business is the sale or purchase of goods of a particular kind.
- The goods are such that transactions are normally individually negotiated and concluded on a commercial basis and a transaction on one occasion is likely to lead to more transactions in the goods with the same customer or among customers of the same group or geographical area and it is, thus, in the commercial interests of the principal to appoint a representative to devote effort, skill and expenditure to develop the market.
- The principal is the manufacturer, importer or distributor.
- The goods are, in the market, identified with the principal.

- The agent devotes substantially the whole of their time for the principal or non-competing principals.
- The goods are not normally available in the market except through the agent.

Indications which suggest the agent's activities could be secondary include:

- Promotional material is supplied direct to potential customers.
- Agents are appointed without reference to other agents in the area or group.
- Customers normally select the goods for themselves and simply place orders via the agent.

Moreover, mail order catalogue agents for consumer goods and consumer credit agents are usually taken to be outside the protection of the Regulations.

Thus, it will not always be at all clear whether a person is protected.

#### **When and where do the Regulations apply?**

The Regulations apply to all appointments whenever created and whether or not in writing. Any provisions in existing agreements which are prohibited by the Regulations are void. They will apply regardless of the length of the appointment.

The Regulations only apply to the activities of commercial agents in Great Britain but the parties can choose to have their agency agreement governed by the law of an EEA member state (which will have its own regulations). If, however, another law is applicable to the agency agreement (e.g. US law) the Regulations will still have effect if the activities of the agent are carried out in Great Britain.

#### **Duties of an agent**

The agent is required to look after the interests of their principal and to act dutifully and in good faith. In particular, the agent must make proper efforts to negotiate and, where appropriate, conclude the transactions he or she is instructed to take care of. The agent must also communicate to the principal all necessary information and comply with the principal's reasonable instructions.

#### **Duties of a Principal**

The principal, like the agent, must act dutifully and in good faith. The principal must give the agent necessary information and documentation relating to the goods and the performance of the agency agreement, e.g. sales literature and technical specifications. The principal must tell the agent within a reasonable period of the principal's acceptance, refusal or non-performance of any transaction which the agent has procured for the principal, and must even notify the agent once the principal anticipates a lower than anticipated level of transactions.

#### **Level of Remuneration**

Almost always, the parties will have agreed this, but if not, the Regulations provide that the agent shall receive the customary amount paid to other agents in similar circumstances, and if there is no ready measure, then the agent will be entitled to reasonable remuneration.

#### **Commission**

If the agent is to receive commission (as opposed to some other means of remuneration) then the Regulations identify the transactions in respect of which the agent is entitled to commission. Thus, commission will be due on any transaction which is concluded during the term of the agency agreement:

- As a result of the agent's action
- With a third person whom the agent has previously acquired as a customer for transactions of the same kind
- With a customer from any specific geographical area or group to which the agent has been given an exclusive right under the appointment

The agent will also be entitled to commission on transactions concluded after termination of the agency if either:

- The transaction is mainly attributable to the agent's efforts during the agency agreement and entered into within a reasonable period after its termination
- The customer's order reached the principal or the agent before the agency agreement came to an end

There are provisions dealing with the competing entitlements between successor and predecessor agents.

The Regulations detail when commission falls due, and an agency agreement will usually be consistent with this if it provides that the commission will only fall due when the principal has been paid by the customer, or should have been paid by the customer had the principal performed its part of the transaction.

Having established when the commission becomes due, the Regulations provide that it must actually be paid, regardless of any agreement to the contrary, at the latest on the last day of the calendar month following the quarter in which it became due.

#### **Statements and accounts**

The principal must supply the agent no later than the last day of the calendar month following each quarter with a statement of the commission due and the calculations. Moreover, the agent will be entitled to see all the principal's information and records which the agent needs in order to check the amount of the commission due.

#### **Written document and notices**

Either party may insist upon a signed document from the other party setting out the terms of the agency agreement. There are specific regulations about serving notices.

#### **Termination rights – minimum notice**

If the agency agreement is for an indefinite period (which may have been agreed originally, or may be the case after a fixed period has expired but the parties nevertheless continue to perform it), then the following minimum notice is required by either party:

- One month for the first year
- Two months for the second year started
- Three months for the third year started or thereafter

If these periods are lengthened, the period of notice which the principal is required to give must not be shorter than that required to be given by the agent.

Unless the parties specifically agree otherwise, any such notice period must expire at the end of a calendar month.

Earlier termination is still possible in the case of very serious breaches by the agent justifying "immediate termination" or in other "exceptional circumstances". However, specific advice should always be sought.

#### **Termination rights – Compensation or Indemnity**

Compensation or an indemnity payment will be generally payable on any termination of the agency agreement, including where the agency is terminated by the agent's death. There are some exceptions, including where the principal terminates the agency because of the agent's repudiatory breach (i.e. a breach which is so serious as to justify immediate termination). Then these payments do not apply.

If the agent terminates, no indemnity or compensation is due, unless the termination:

- Is caused by circumstances attributable to the principal
- Is caused by the age, infirmity, or illness of the agent

- Occurs where the agent, with the principal's agreement, assigns the agency agreement to someone else

It must be emphasised that the parties cannot during the agency agreement exclude these rights to compensation or indemnity.

The agent will be entitled to compensation rather than an indemnity unless the agency agreement otherwise provides.

The indemnity will be available only to the extent that:

- The agent has brought new customers or significantly increased the business with existing customers and the principal continues to derive substantial benefits from this; and
- It is fair generally and, in particular, having regards to the commission lost by the agent.

The maximum indemnity is equal to the agent's average annual remuneration (averaged over a maximum of five years).

The compensation is for damage suffered by the agent as a result of the termination of the relationship. This would have to be proved, but the Regulations deem damage to have been suffered in circumstances which either:

- Deprive the agent of commission which proper performance of the agency agreement would have generated while providing substantial benefits to the principal
- Have not enabled the agent to recover his or her costs

There is no guidance in the Regulations as to the maximum amount of compensation payable, although the courts have given guidance as to the criteria to be taken into account in assessing the amount of compensation recoverable.

The agent must make the claim within one year after termination of the agency agreement.

#### Restrictive covenants

The Regulations only allow a restraint of trade clause to apply after the termination of the agency agreement if it:

- Was concluded in writing
- Only relates to the geographical area, or group of customers and goods covered by the agency
- Continues for not more than two years after termination

Of course, such a restraint must also comply with all applicable national laws on restraint of trade.

#### Conclusion

Many of the provisions of the Regulations are mandatory and they must be considered before deciding whether to appoint an agent, a distributor or an employee sales or buying force.

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#### KEY CONTACT

For further information about any of the issues raised in this guide, please contact:

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