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**Equality of rights for
commercial agents**

**Proposal for a Council Directive
to coordinate the laws of the Member States
relating to (self-employed) commercial agents**

(Presented to the Council by the Commission on 17 December 1976)

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Explanatory memorandum

The object of this proposal for a Directive which is now presented to the Council¹ is to harmonize the laws of the Member States relating to commercial agents i.e. commercial agents who carry on business as self-employed persons, as distinct from salaried or wage-earning commercial travellers.

Coordination of the law relating to commercial travellers will be dealt with in a subsequent proposal. Harmonization in that field raises problems of a different type which arise in the context of labour law.

After examining the laws which are currently in force and consulting the various trade and professional organizations, it was clear that the first subject which should be dealt with was coordination of the laws relating to commercial agents. Such agents play a very important part in interpenetration of markets and, for that reason, in the growth of intra-Community trade. The need to coordinate national laws in the field of commercial representation in its widest sense became apparent when the restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by the Council Directive of 25 February 1964.²

The differences which exist between one legal system and another in relation to commercial representation make for a continuing and quite definite inequality in conditions of competition. Moreover, those differences act as a barrier to the carrying on of the business of commercial representation in the Community.

This can be seen particularly in the differing degree of protection which is accorded to commercial agents from one State to another. The proposal for a Directive therefore provides in general for minimum rules establishing a common level of protection which the Member States must accord, those States that wish to provide more protection being at liberty to do so.

In the interests of the common market the said differences between legal systems must not be allowed to impede to any significant extent the making and operation of contracts between a principal who is established in one Member State and a commercial agent who is established in another. In point of fact the coordination here proposed applies not only to cases involving two or more Member States but also to cases arising in one Member State only, since trade in goods and the provision of services should always be effected in the Community under conditions which are similar to those of a single market. It would, moreover, be inconsistent with this objective to superimpose on the existing laws of Member States relating to commercial agents Community legislation applicable solely to transactions which involve a foreign element. Furthermore it would create unequal conditions of competition within one and the same State if commercial agents who carry on business in one Member State were subject to substantially

different legal systems depending upon whether their activities were governed by the law of the Member State in which they carry them on or by some other system of law.

Lastly, it is not possible to solve these problems by means of uniform rules of conflict of laws. For one thing unification of the conflicts rules would not remove the differences which exist in substantive law. For another thing any such unification would not have the effect that the same substantive law would become applicable to all commercial agents who carry on business within one Member State.

Moreover the unification of the conflicts rules, which is currently being undertaken by the Community, will not remove the element of uncertainty as to which law actually applies to any specific agency contract. Even if the connecting factors were made uniform they would leave some degree of latitude in interpretation and would not make it possible to forecast with absolute certainty which substantive laws were applicable. One of the objects of the Directive is to make it possible to do so.

Thus, with the object of establishing certainty as to the law, *renvoi* to the internal law of Member States takes place solely in relation to matters for which it has not been possible to create uniform rules for the Member States of the Community, or in which no element of competition is involved, or which do not affect the degree of protection by the law which has already been achieved.

The provisions contained in the proposal make up a balanced set of rules covering the most important aspects of the relationship between commercial agent and principal. Some of the provisions are unknown in the laws of Member States, although similar results have sometimes been arrived at in legal writings, in case-law or by usage, the consequences varying according to the circumstances.

Other provisions deal with topics which are already covered in a wide variety of ways by national law, some of them less favourable to the agent than the proposed Community law would be, and some of them more favourable. In some cases the relationship between principal and agent is governed by collective agreements made between trade or professional organizations. It will be seen that this proposal is in effect a codification of the law.

Basically the proposal has two objectives. The first is to remove the differences in law which are detrimental to the proper functioning of the common market. They affect the conditions of competition and create considerable legal uncertainty. This applies, for example, in relation to the goodwill indemnity, which is known in some Member States but not in others. It is more expensive for the principal to have an agent in those countries in which the goodwill indemnity is already compulsory by law, and this operates very much to the economic advantage of principals who are not under an obliga-

¹ OJ C 13 of 18.1.1977.

² Directive 64/224/EEC, OJ 56 of 4.4.1964.

tion to pay any indemnity after the contract has terminated. The second objective is to safeguard or improve the protection that already exists for commercial agents. Although they are self-employed, most commercial agents are economically in a weak position *vis-à-vis* their principals. In so far as the proposal envisages minimum rules it does not affect those provisions of national law which are more favourable to the commercial agent and does not stand in the way of progress. From a more general point of view the proposal is aligned on the principles set out in Article 117 of the EEC Treaty and, in harmonizing the law, endeavours to achieve a levelling-up.

This Directive governs the relationship between commercial agent and principal. It sets out the law concerning in particular:

- the legal definition of commercial agent,
- the rights and duties of the parties,
- remuneration of the commercial agent, and especially his right to commission,
- agreements restricting competition,
- *del credere* agreements,
- protection of agents whose income is mainly derived from their agency, where the principal is declared bankrupt, is in liquidation, makes an arrangement or composition or is the subject of similar proceedings, or where an order for execution is granted to a third party affecting moneys owed to the agent by the principal, or where the agent makes an assignment of such moneys,
- termination of contract, goodwill indemnity,
- limitation periods,
- those rules from which the parties are not permitted to derogate.

Proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents

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;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas the restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by Council Directive 64/224/EEC of 25 February 1964;¹

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 can be 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 matter the legal relationship between commercial agent and principal must be given priority of treatment;

Whereas in many cases commercial agents are as a rule, though in differing degrees, economically in a weak position *vis-à-vis* their principals, and it is accordingly appropriate that in harmonizing and improving the minimum rules in the laws of the Member States relating to commercial agents there be alignment upon the principles set out in Article 117 of the EEC Treaty,

Has adopted this Directive:

Chapter I

Scope of application

Article 1

1. The harmonization measures prescribed by this Directive apply to the laws, regulations and administrative provisions of the Member States governing the relations between self-employed commercial agents and their principals.

2. National laws and trade usages which are not inconsistent with the provisions of this Directive shall continue to apply to the relations referred to in paragraph 1.

Article 2

For the purposes of this Directive the expression 'commercial agent' means a self-employed intermediary who has continuing authority for a fixed or indeterminate period to negotiate and/or to conclude an unlimited number of commercial

¹ OJ 56 of 4.4.1964.

transactions in the name and for account of another person (who is hereinafter called 'the principal').

Article 3

This Directive does not apply:

— to intermediaries who are wage or salary earning employees within the meaning of Directive 64/224/EEC of 25 February 1964,¹

— to intermediaries who act in their own name,

— to intermediaries appointed to negotiate or to conclude in the name of the principal a specified transaction or a number of specified transactions only,

— to intermediaries who carry on their activities in the insurance or credit fields.

Article 4

The Member States are at liberty:

1. not to apply Articles 15(4), last sentence, 19, 26(2), 30 and 31 to persons who act as commercial agents but by way of secondary activity only; the question whether the activity is carried on in that way being determined in accordance with commercial usage in the State whose law governs the relations between principal and agent;

2. to apply some or all of the provisions of this Directive, as the case requires, to persons who carry on other trades or professions and who, although they work for their own account and/or in their own name, can under the national law be assimilated to commercial agents.

Chapter II

Rights and duties of the parties

Article 5

1. The commercial agent shall in carrying out his activities act fairly and in good faith *vis-à-vis*

his principal and third parties. He shall perform his duties with the care which a sound businessman would exercise.

2. Without prejudice to and in pursuance of the general duty specified in paragraph 1 the commercial agent shall:

(a) at all times supply to the principal the information he needs in order to conduct the business satisfactorily, especially as regards the solvency of third parties in current commercial transactions of which the agent is aware,

(b) keep separately from his own moneys all sums received for the principal and pay them over to him without delay,

(c) keep proper accounts relating to the accounts receivable and assets of his principal,

(d) look after such property as is given into his possession with the care which a sound businessman would exercise,

(e) comply with all instructions given to him by the principal for attaining the object of the agency, provided they do not basically affect the agent's independence. The agent may arrange his activities and use his time as he thinks fit.

3. Unless otherwise agreed the commercial agent may employ the services of commercial agents and commercial travellers.

Article 6

The commercial agent shall not, even after the contract has come to an end, divulge to third parties or turn to account any commercial or industrial secrets which were disclosed to him or of which he became aware because of his relationship with the principal, unless he proves that his doing so is consistent with the principles of a sound businessman.

Article 7

1. The commercial agent may carry on business for his own account or for account of a third par-

¹ OJ 56 of 4.4.1964.

ty provided that business is in goods or services which do not compete with those for which he was appointed to represent the principal. In particular he may undertake to act as commercial agent for another principal or work for an employer as a salaried or wage-earning representative.

2. The commercial agent shall obtain the consent of his principal for the carrying on of any activity for his own account or for account of a third party if that activity involves goods or services which compete with those for which he has been appointed to represent the principal.

3. The parties may derogate from the provisions of paragraphs 1 and 2 and, in particular, agree that the commercial agent shall not carry on other activities for account of another principal, for his own account or as an employee.

Article 8

1. Where the commercial agent has had to meet a claim for breach of industrial, commercial or intellectual property rights over goods or services forming the subject-matter of his agency he may claim damages from his principal if the breach was caused by the principal.

2. The provisions of paragraph 1 shall apply *mutatis mutandis* in the event of breach of the rules of fair competition.

Article 9

1. The commercial agent shall have authority to negotiate commercial transactions for account of the principal. He shall have authority to conclude agreements in respect thereof only where the principal empowers him to do so.

2. The agent shall be presumed to have authority:

— to receive complaints from third parties where goods or services supplied are defective, and, where goods are not accepted, notices that they are available for collection;

— to protect the principal's rights to have the means of proof preserved.

3. Limitations of the agent's authority shall be ineffective as against third parties unless they were aware or ought to have been aware thereof.

Article 10

1. The principal shall in his relations with the commercial agent act fairly and in good faith. He shall make available to the commercial agent all the assistance he needs, having regard to the circumstances for the performance of his part of the contract.

2. Without prejudice to the general duty specified in paragraph 1, the principal shall make available to the agent in suitable quantity such materials, information and documents as are necessary for the performance of his activities. He shall in particular:

(a) supply the agent with samples, designs, price lists, printed advertising material, conditions of contract and other documents relating to the goods and services for which he has been appointed agent;

(b) provide the commercial agent with all information which is requisite for the performance of the contract, particularly as regards current and prospective production, and inform the agent without delay when the principal foresees that the volume of commercial transactions that the principal will be able to execute will be considerably lower than the commercial agent could normally expect;

(c) inform the commercial agent without delay of the acceptance, refusal or, in appropriate cases, the partial performance of a commercial transaction.

Chapter III

Remuneration and reimbursement of expenses

Article 11

1. The principal shall remunerate the commercial agent by paying him commission or a fixed sum or both. Any variable item of remuneration which is calculated by reference to turnover shall be deemed to be commission.

2. The amount of commission shall be agreed between the parties. In the absence of agreement the agent shall be entitled to the commission that is customarily allowed to agents appointed for the goods or services which form the subject-matter of his agency in the place where he carries on his activities. If there is no custom as to the commission the agent shall be entitled to a fair commission.

3. Agency contracts which exclude the agent's right to be remunerated shall be void.

Article 12

1. The commercial agent shall be entitled to commission on commercial transactions entered into during the currency of the contract:

(a) where the transaction is procured by the commercial agent, or

(b) where the transaction is entered into with a third party with whom the agent has previously negotiated or agreed a transaction falling within the terms of his agency, or

(c) where the commercial agent is appointed to cover a specific geographical area or a specific group of people and the transaction is entered into in that geographical area or with a person belonging to that group, notwithstanding that the transaction was negotiated or agreed otherwise than by the commercial agent.

2. The commercial agent shall not be entitled to the commission referred to in paragraph 1 if by

virtue of Article 13 that commission is payable to another agent.

Article 13

The commercial agent shall be entitled to commission on commercial transactions entered into after the contract has come to an end:

(a) where the transaction was negotiated by him, or

(b) where, the preparatory work having been done by him, the transaction was entered into mainly as a result of his efforts during the currency of the contract; in these cases, however, he shall be entitled to commission only if the transaction was entered into within a reasonable period after the contract came to an end, a 'reasonable period' being one which is proportionate to the type of transaction in question and to the volume thereof.

Article 14

Where the commercial agent is under duty to the principal to collect payment of moneys, the commercial agent shall be entitled to a special commission therefor.

Article 15

1. The right to commission arises at the moment when the principal and the third party enter into the commercial transaction.

2. The commission shall be payable upon the happening of either of the two following events:

(a) as soon as and to the extent that the principal has performed his part of the transaction, even if he fails to carry out his obligations fully in the manner agreed or satisfies some of them only partially, or

(b) as soon as and to the extent that the third party has performed his part of the transaction.

3. If the principal or the third party fails to perform his part of the transaction in full the

amount of commission due shall be calculated by reference to the value of that part performed whose value is the higher.

4. The parties may agree that so long as the third party has not performed his obligations the commission shall be payable at a later time than that provided for in subparagraph (a) of paragraph 2 above. The commission shall, however, be payable in all cases not later than the last day of the third month following the month during which the principal completed the performance of his part of the contract. Where the parties agree as aforesaid the agent shall be entitled to receive a payment on account, of suitable amount, not later than the last day of the month following the month during which the principal completed the performance of his part of the contract.

5. The principal shall each month supply the commercial agent with a statement of the amount of commission earned and the amount of commission payable. The statement shall set out the essential data used in calculating the amounts of commission. The statement shall be prepared promptly and in any event not later than the last day of the month following that in which the commission in question was earned. The parties may agree that this period shall be extended to three months.

Article 16

1. The right to commission shall be extinguished:

(a) Where the commercial agent has not fulfilled his obligations under Article 5(2)(a), the principal having entered into the commercial transaction without being aware of the third party's insolvency and it being established that the third party has not or will not perform his part of the transaction, or

(b) if and to the extent that it has become impossible to perform the transaction, this being in no way attributable to the principal, or

(c) if performance of the transaction cannot reasonably be required of the principal, particularly where there exist in relation to the third party serious grounds for non-performance.

2. Any commission which the commercial agent has already received for these commercial transactions shall be refunded.

Article 17

Unless otherwise agreed commission shall be calculated on the gross amount of the invoice without deduction of cash discounts, fidelity rebates or reductions allowed unilaterally by the principal after entry into the commercial transaction, and without deduction of incidental expenses such as costs of transport, packaging, insurance, taxes and customs charges, unless these incidental expenses are invoiced separately to the customer.

Article 18

1. The commercial agent shall be entitled to be supplied with all necessary extracts from the copies of the principal's books of account, together with explanations thereof, to enable him to check the amounts of commission to which he is entitled. Article 6 shall apply *mutatis mutandis*.

2. If there exist proper grounds for thinking that the items referred to in paragraph 1 which the principal has supplied are incorrect or incomplete, or if the principal refuses to supply them, the agent shall be entitled to require that either the agent himself or some person designated by the agent (being a person qualified for that purpose in accordance with the requirements of the national law applicable in the State where the books of account are kept), at the option of the principal, be given access to the books of account and the accounting documents for the purpose of examining them. This right may be exercised to the extent necessary for checking the correctness or completeness of the commission statement or of the said items.

Article 19

1. The agent shall be entitled to remuneration if he has already fulfilled his obligations under the agency contract or if he has already taken steps to meet those obligations, even though the

principal has made no use of his services or has used them to a considerably lesser extent than the agent could normally have expected, unless the principal's conduct is due to circumstances beyond his control.

2. Usually, in calculating the remuneration referred to in paragraph 1, account shall be taken of all the circumstances, the basis being the average monthly remuneration of the commercial agent during the twelve months before the circumstances described in paragraph 1 arose. If the contract was concluded less than twelve months previously the remuneration shall be calculated on the basis of the average monthly remuneration paid during the currency of the contract.

3. In applying paragraph 2 the following shall be taken into account:

(a) the expenses incurred by the commercial agent for the purpose of setting up the agency and preparing to commence business,

(b) the amounts which the commercial agent has saved on expenses, the amounts which he has earned in carrying on some other activity and those which he has deliberately not earned because he has declined some activity which was nevertheless suitable.

Article 20

1. The commercial agent shall not be entitled to reimbursement of expenses incurred in the usual course of his activities unless the parties have agreed otherwise or there is a custom to the contrary.

2. Where, however, the agent incurs expenses in connection with special activities undertaken on the instruction or with the consent of the principal, he shall be entitled to be reimbursed.

Chapter IV

Del credere

Article 21

1. Every agreement whereby the commercial agent guarantees in favour of his principal that a third party will pay the price of goods or services forming the subject-matter of commercial transactions which the agent has negotiated or agreed, shall be evidenced in writing or by cable, telex or telegram. This type of agreement is hereinafter referred to as a *del credere* agreement.

2. (a) A *del credere* agreement covering transactions which were not negotiated or agreed by the commercial agent shall be void.

(b) A *del credere* agreement shall be concluded in relation only to a particular commercial transaction, or in relation to a series of such transactions with particular third parties who are specified in the agreement.

(c) Any *del credere* agreement which amounts to an unlimited guarantee on the part of the commercial agent for transactions falling within the first sentence of paragraph 1 shall be void.

3. The commercial agent shall be entitled to be paid a separate commission, of reasonable amount, for transactions entered into to which his *del credere* guarantee applies.

4. The parties may derogate from the provisions of paragraphs 1 to 3 as regards transactions:

(a) in which the place of business of the principal or of the third party is outside the territory of the Community or, if the principal or third party has no place of business, then his place of habitual residence is outside that territory, or

(b) which the agent has been given full power to agree and to carry out.

Chapter V

Bankruptcy or winding-up of the principal, execution and assignment

Article 22

1. Natural persons whose income is mainly derived from a commercial agency shall as regards sums owing to them for remuneration and reimbursement of expenses be treated as employees of the principal where bankruptcy or winding-up proceedings have been opened in respect of the principal or an arrangement, composition or other procedure is in progress with the principal's creditors.

2. The natural persons to whom paragraph 1 applies shall in relations to sums owing to them by the principal on account of remuneration and reimbursement of expenses enjoy those rights to which employees are entitled as regards the amount of income for which execution cannot issue where third parties obtain an order for execution against the principal.

3. The provisions of national law relating to employees shall apply *mutatis mutandis* to the natural persons referred to in paragraph 1 as regards assignment of sums owing to them by the principal for remuneration and reimbursement of expenses.

4. The Member States may fix maximum figures of income for purposes of the application of paragraph 1.

Chapter VI

Making of the contract and cessation of the contract

Article 23

Each party shall be entitled to receive from the other a signed written document setting out the

terms of the contract and any terms subsequently agreed. Any purported waiver of this right shall be invalid.

Article 24

Article 23 shall apply *mutatis mutandis* where by mutual agreement the agency contract is terminated.

Article 25

Subject to Articles 27 and 28 a contract for a fixed or determinable period shall terminate upon the expiration of the period for which it was made. Unless otherwise agreed a contract for a fixed or determinable period which continues to be performed after that period has expired shall be deemed to be converted into a contract for an indeterminate period.

Article 26

1. Where the contract is concluded for an indeterminate period either party may terminate it by notice. Notice shall be given in writing. The period of notice shall be the same for both parties.

2. During the first year of the contract the notice shall be of not less than two months. After the first year the period of notice shall be increased by one month for each additional year which has begun. The Member States may prescribe a maximum period of notice which shall in no case be less than twelve months. Periods of notice shall coincide with the end of a calendar month.

Article 27

1. Either party may terminate the contract at any time:

(a) where the other party has in relation to the contract committed a fault such that the party who terminates cannot be required to keep it in being until the end of the period of notice or until the end of its agreed period of duration, or

(b) where some circumstance arises which makes it impossible to perform the contract, or which seriously prejudices its performance, or which substantially undermines the commercial basis of the contract, so that the party who terminates cannot be required to keep it in being until the end of the period of notice or until the end of its agreed period of duration.

2. Termination must be effected *vis-à-vis* the other party as soon as the fault becomes known or as soon as the events which justify termination have occurred. The party who terminates shall upon request of the other inform him in writing of the reasons therefor.

3. Where the contract is terminated under paragraph 1 (a) the party who is at fault shall be liable in damages to the other.

Article 28

1. Where one of the parties terminates the contract or declares that it is at an end, without in either case observing the proper period of notice provided for by the contract or by law, and neither of the grounds for termination set out in Article 27 applies, that party shall be liable in damages to the other.

2. In the cases referred to in paragraph 1 the commercial agent shall be entitled to claim a lump-sum indemnity in lieu of damages where the contract is terminated by the principal or declared by him to be at an end. The indemnity shall be calculated on the basis of the average remuneration paid to the agent during the period of twelve months preceding the declaration or termination. If the contract was concluded less than twelve months previously the indemnity shall be calculated on the basis of the average remuneration received during the currency of the contract up to the time when the relevant event took place. The indemnity shall be paid for the unexpired period of the contract but subject to a maximum period of two years.

Article 29

1. Upon cessation of the contract the commercial agent shall deliver up to the principal the mat-

erials and documents referred to in Article 10 (2) unless he has disposed of them in the normal course of business.

2. To secure the rights of the commercial agent as regards remuneration and reimbursement of expenses, he shall have a lien over such movables and other property of the principal as are in his possession pursuant to the contract, which lien shall continue after cessation of the contract.

Article 30

1. After cessation of the contract the commercial agent or his heirs shall be entitled to require payment by the principal of a goodwill indemnity:

(a) where the agent has brought new customers to the principal or has appreciably increased the volume of business with the existing customers, and

(b) where as a result thereof substantial benefits will continue to accrue to the principal, and

(c) where, notwithstanding Article 13, the cessation of the contract results in his not receiving remuneration for transactions negotiated or agreed, after the contract has come to an end, between the principal and the customers referred to in subparagraph (a) above.

2. The goodwill indemnity shall be reasonable in amount having regard to all the circumstances. It shall be equal to not less than one tenth of the annual remuneration calculated on the basis of the average remuneration during the preceding five years, including transactions on which commission arises under Article 13, multiplied by the number of years for which the contract has been in existence. If the contract was concluded less than five years previously the indemnity shall be calculated on the average remuneration received during the period which has actually run.

3. The amount of the indemnity shall not exceed twice the average annual remuneration calculated in the manner provided in paragraph 2. Subject always to this maximum, either party may request that the amount of the indemnity be calculated otherwise than as provided in para-

graph 2 where, having regard to all the circumstances, it would be equitable so to calculate it.

4. Where the agent terminates the contract by notice the period of which is consistent with the period of notice required by the contract or by law, he shall be entitled to an indemnity not exceeding the amount provided for in paragraph 2. If such termination is justified having regard to the principal's conduct, or for reasons which are particular to the agent, such that the agent cannot be required to continue his activities, the indemnity may be fixed at the maximum amount provided for in paragraph 3 if this is equitable.

5. The right to goodwill indemnity shall not by prior agreement be contracted out of or restricted. It may be exercised only during the period of three months following cessation of the contract.

6. The right to indemnity provided for in Article 28 shall not affect the right to goodwill indemnity.

Article 31

No claim to goodwill indemnity shall arise:

(a) Where the principal terminates or could have terminated the contract under Article 27(1)(a),

(b) where the principal maintains the contract on foot with the agent's successor who was introduced by the agent himself or by his heirs, the successor being from the legal point of view substituted entirely in the place of the agent,

(c) where the agent terminates the contract without giving notice of the proper duration required by the contract or by law and without proper grounds under Article 27(1).

Article 32

1. Any agreement restricting the business activities of the commercial agent following cessation of the contract shall be in writing, and in default thereof shall be void. This type of agreement is hereinafter referred to as an agreement restricting competition.

2. An agreement restricting competition shall apply only in relation to the geographical area or group of persons entrusted to the commercial agent and to the goods and services covered by his agency at the time when the contract came to an end.

3. An agreement restricting competition shall be valid for not more than two years after cessation of the contract.

4. Subject to the provisions of paragraph 5 the principal shall pay to the commercial agent a suitable indemnity so long as the agreement restricting competition is in force. The indemnity shall be calculated on the basis of the remuneration of the commercial agent and shall have regard to all the circumstances of the case.

5. (a) Where the principal terminates the contract under Article 27(1)(a) the agreement restricting competition shall continue effective but the agent shall not be entitled to the indemnity.

(b) Where the commercial agent terminates the contract under Article 27(1)(a) the agreement restricting competition shall apply unless terminated by him. Such termination shall be effected in writing.

(c) Where either party terminates the contract under Article 27(1)(b) or thereunder declares it to be at an end, the other party may terminate the agreement restricting competition. Such termination shall be effected in writing.

6. Before the contract has come to an end the principal may terminate the agreement restricting competition and, if he does so, shall after the expiration of six months from the time when he gave notice of termination no longer be under obligation to pay the indemnity referred to in paragraph 4.

Chapter VII

General and final provisions

Article 33

1. Where the commercial agency is undertaken by a company or legal person whose most recent annual accounts show that it has a paid-up capital exceeding the equivalent of 100 000 European Units of Account, the parties may derogate from the provisions of Articles 15(4), 19, 21, 26(2) and 30.

2. The European Unit of Account (EUA) means the unit of account defined in Commission Decision No 3289/75/ECSC of 15 December 1975.¹

Article 34

1. Claims which arise under the foregoing provisions shall be subject to a limitation period of four years. The limitation period shall begin to run from the end of the year during which the claim arose.

2. As regards claims which arise during the last ten years of the contract for commission which has not been included in the statement referred to in Article 15(5), or for reimbursement of expenses under Article 20, the limitation period shall begin to run from the end of the year during which the contract came to an end.

Article 35

1. Any stipulation whereby the parties derogate, to the detriment of the agent, from the provisions next hereinafter mentioned shall be void: Article 5(1), 8, 10(1), 10(2)(b) and (c), 11(1) and (3), 12(1), 13, 14, 15, 16(1), 18, 19(1) and (2), 20(2), 21(1), (2) and (3), 23, 26, 27, 28, 29(2), 30, 32 and 34.

2. In addition to the cases of derogation permitted under Article 21(4) and Article 33, the parties

may derogate from the compulsory provisions specified in the foregoing paragraph in relation to those activities which the commercial agent carries on outside the Community.

Article 36

1. The Member States shall before 1 January 1980 adopt and publish the provisions which are necessary to comply with this Directive and shall inform the Commission thereof immediately. They shall apply those provisions from 1 July 1980.

2. From the time of notification of this Directive the Member States shall inform the Commission, in good time to enable it to communicate its observations, concerning the draft laws, regulations and administrative provisions which they plan to adopt in the field governed by this Directive.

Article 37

This Directive is addressed to the Member States.

¹ OJ L 327 of 19.12.1975.

Commentary

Chapter I

Scope of application

Article 1

This Article specifies the subject-matter and scope of the proposal for a Directive.

Unlike the Council Directive of 25 February 1964¹ this proposal is concerned only with self-employed commercial agents as defined in Article 2. Agents of this kind and salaried or wage-earning commercial travellers resemble each other in that the continuing task of both is to represent their principal. Due consideration will have to be given to this similarity in their roles when the future Directive harmonizing the law relating to salaried or wage-earning commercial travellers is being prepared. Article 3 specifies which types of commercial agent are not covered by the definition contained in Article 2 or are expressly excluded from it.

The legal relations between commercial agent and principal form the subject-matter of this Directive irrespective of whether they contain any foreign element. Where there is a foreign element the rules of private international law will determine which national system of law applies. Where the relevant national law happens to be that of a Member State the law relating to commercial agents as set out in this proposal will apply.

Paragraph 2 provides that national law and current trade usage continue to apply provided they are not inconsistent with the mandatory provisions hereof.

Article 2

It is essential to have a definition of 'commercial agent'. In some Member States the concept of 'commercial agent' is unknown, whilst in others it remains undefined or is defined only partially. What is required is a line of demarcation between the activities of commercial agents and the activities of other intermediaries. The commercial agent is self-employed i.e. he arranges his activities as he thinks fit and uses his time as he pleases.² It is in this respect that he differs from the salaried or wage-earning commercial traveller. Another distinguishing feature of the commercial agent is that he acts not in his own name but in the name and for account of his principal. This is the difference between the commercial agent and the commission agent (commissionaire, Kommissionär), the latter acting for account of another but in his own name. The third important distinguishing feature of the commercial agent is the continuing nature of his contractual tie with the

principal. Where a person is appointed to act temporarily as intermediary to negotiate or conclude agreements for a specific number of transactions in the name of the principal, he is not on that ground alone to be taken to be the commercial agent of that principal.

Companies or legal persons may be commercial agents. Where the paid-up capital exceeds 100 000 EUA.³ Article 33 permits the parties to derogate from some of the mandatory provisions contained in the Directive. Commercial agents in this category are economically powerful enough not to require any special protection.

Article 3

For the sake of clarity this Article sets out the most important classes of persons who do not fall within the definition in Article 2. Also it excludes from the scope of application of the Directive agents who act for insurance of financial institutions; unless expressly excluded these agents would be covered by the definition. The reason for excluding them is that in a number of States there exist special laws which apply to agents of this kind or else they are expressly exempted from the ambit of particular laws which apply to commercial agents. A proposal for a Directive will be presented at a later date to coordinate the laws of Member States in this field.

Article 4

It is left to the Member States to decide whether the Directive is to apply in whole or in part to persons who carry on business as commercial agents but by way of secondary activity only, and to other trades or professions. There are, for example, persons who carry on some other trade or profession and who have a standing arrangement to sell goods which they have bought from the other party to that arrangement and it may be that from the economic point of view the relationship between those two persons is founded upon a proper construction of the contract to be one of principal and agent. Indeed, some independent or sole trader businesses may well be merely a device to circumvent certain mandatory provisions of law. In such cases as these it may be necessary to apply the legal provisions relating to commercial agents. But it does not appear to be necessary to lay down rules to cover these special cases in this Directive the object of which is to provide uniform regulation of the law relating to commercial agents.

No definition is given of 'commercial agency by way of secondary activity' because it is impossible to lay down suitable criteria which apply in every case. All the surrounding circumstances must be considered in each individual case in

¹ OJ 56 of 4.4.1964.

² Article 5(e) of this Directive.

³ The EUA is defined in the commentary to Article 33.

deciding whether a commercial agent is carrying on business by way of secondary activity. Moreover, opinions on this subject vary from one country to another. The Directive here refers back to the usages of trade in the State whose law governs the contract. Where the commercial agent does carry on his business by way of secondary activity the provisions of the Directive, in principle, apply. The Member States may allow the parties to derogate only from those mandatory provisions which are specified in this Article. The provisions in question would in point of fact involve the principal in financial burdens which would be unreasonable in relation to the economic importance of the business carried on. To make these provisions compulsory would have the effect of restricting substantially the entry into and carrying on of the business of commercial agents by way of secondary activity for a large number of people who derive appreciable revenue from it, e.g. persons who collect group orders for mail order establishment—very often they are married women who normally do not carry on any trade or business.

Chapter II

Rights and obligations of the parties

Articles 5 to 10 deal with the rights and obligations of principal and agent.

They must help each other to achieve the objects of the contract of commercial agency. The contract relates to the economic interests of both parties. Each of them is bound, within the framework of the contract, to protect the interests of the other. The basic principle is that each must act fairly and in good faith. As there is no consensus in the Member States as to the applicability of that principle in this field, Article 5(1) and Article 10(1) expressly provide for it. The same principle applies concerning the commercial agent's conduct *vis-à-vis* third parties, especially where he brings about a commercial relationship between principal and third party.

Article 5

The first paragraph sets out the general principle that the commercial agent must act fairly and in good faith *vis-à-vis* his principal and must protect his interests with all proper care. Paragraph (2) contains a non-exhaustive list of obligations which flow from that principle and which are incumbent upon the commercial agent. In the first place there is the obligation not to act as intermediary in relation to, nor to conclude transactions with, third parties whom the agent knows to be insolvent. He must accordingly¹ inform the principal concerning the solvency of third parties with whom transactions are in course of negotiation or execution. Subparagraph (c) requires the agent to keep certain accounts which must, if

appropriate, include accounts relating to money owed by customers. Subparagraph (e) emphasizes the commercial agent's obligation to comply with all instructions given him by the principal within the framework of the agency. It is for the principal alone to decide, for example, whether and on what terms a commercial transaction is to be entered into and performed. In this respect therefore the agent's independence is limited.

Article 6

Even after termination of the contract the commercial agent is bound to exercise special care as regards the commercial or industrial secrets communicated to him or of which he became aware during the currency of the contract. In no case is he at liberty to disclose them to third parties. As a general rule he must not exploit those secrets for purposes of his own business. This principle cannot, however, be always rigorously applied. The commercial agent cannot be prohibited from turning to account trade or professional information, or information which is special in his field of activity, acquired by him before termination but during the currency of his contract with the principal. The dividing line between what is permissible and what is prohibited has to be determined in accordance with the notions of the sound businessman and commercial usage. Article 6 provides that the commercial agent must show that this exploitation of secrets is not inconsistent with those notions. Thus an agent who began to exploit secrets after termination of the contract would run the risk of not being able to discharge the burden of proof which lies upon him. This provision applies independently of the rules set out in Article 32 relating to agreements restricting competition.

Article 7

Notwithstanding that the commercial agent is self-employed, free to arrange his work as he thinks fit and to carry on, concurrently with the commercial agency entrusted to him, any other activity for his own account or for account of a third party, he must obtain the principal's consent if he wishes to engage in business on his own account, or for account of a third party, in goods or services which compete with those covered by his agency. Paragraph (3) provides that the parties may in this matter limit or increase the agent's freedom of action.

Article 8

It can sometimes happen that the proprietor of a patent, trademark, design or model brings legal proceedings against the agent in order to prevent him from selling or using the

¹ Subparagraph (a).

protected product. The agent may be required to pay damages for infringement of the rights in question. National laws and international conventions allow action to be brought directly against the person who commits the infringement. In these circumstances it is of small importance whether the infringer of industrial, commercial or intellectual property rights acted in his own name or in the name of another, on his own initiative or at the request of a third party. As the Directive in no way purports to make changes in relation to the exercise of these rights of protection, it could not possibly prohibit the bringing of legal proceedings against commercial agents who act on behalf of their principals. The Directive does, however, expressly provide that the principal must indemnify the agent who suffers damage because one of those rights has been infringed in the course of carrying on the agency, if the infringement was attributable to the principal. Where the agent considers that he would be entitled to claim damages from the principal if, in the action brought by the proprietor of the right of protection against the agent, judgment were to be given in favour of the former, the agent shall be entitled to require the principal to be joined as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings pursuant to the national law.¹

The position will be the same where the commercial agent infringes the fair trading laws e.g. if he disregards certain prohibitions relating to publicity, defamation etc.

Article 9

By far the majority of commercial agents in the Member States are at the present time authorized only to negotiate on behalf of their principals, the conclusion of the actual agreement for the transaction being a matter for the principal himself. The Directive reflects this situation.

Paragraph (1) provides that the agent has, by definition, authority to negotiate commercial transactions for account of the principal. It also provides that the agent has no authority to conclude them unless the principal confers it on him.

Paragraph (2) sets out certain presumptions. The agent always has authority to receive notices of complaint from third parties concerning defective goods or services. Similarly he always has authority to receive notices to the effect that goods are available for collection, in cases where the person to whom they were supplied declines to accept them. Lastly, he always has authority to protect the principal's rights as regards the preservation of evidence.

Where a commercial agent describes himself as having greater authority than that arising by virtue of the various presumptions aforesaid, third parties must not rely upon his description even though they know, or it is actually proved, that the agent is working for a particular principal. Any authority in excess of that presumed must be proved. The Directive does not specify how such authority should be conferred. The mat-

ter is governed in each specific case by the relevant national law.

Paragraph (3) relates to the case where the principal reduces the agent's authority below that provided for in paragraphs (1) and (2). Limitations on the agent's authority cannot be invoked against the third party unless he was aware or ought to have been aware of them.

Article 10

The principal's general and special duties *vis-à-vis* the commercial agent are substantially the same as those which arise under the legislation, case-law and juristic writings in Member States. As regards the principles it expresses and its phraseology and form, this Article is the counterpart of Article 5 (duties of the commercial agent).

Paragraph (1) requires the principal to act fairly and in good faith, while paragraph (2) contains a non-exhaustive list of the principal's special duties. He must make available to the agent, in suitable quantity, such materials, information and documents as are necessary for the performance of this activities. In addition, the principal must provide the agent with all information concerning current and prospective production which is requisite for the performance of the contract. He must also inform the agent without delay of the acceptance, refusal or partial execution of commercial transactions. These items of information are important in view of the fact that, as provided in Article 15, the right to commission arises at the moment when the principal and the third party enter into the commercial transaction, and the execution of the transaction determines when the commission becomes payable.

Chapter III

Remuneration and reimbursement of expenses

The provisions of this chapter, namely Articles 11 to 20, are based on the principle that the commercial agent is entitled to be remunerated for his services. These Articles indicate also the various elements that go to make up his remuneration, the conditions under which the agent is entitled to commission on transactions entered into during the currency of the contract and after termination, the time at which commission is payable, the way in which the amount of commission is to be calculated, and the cases in which the right to commission is extinguished. These Articles confer on the commercial agent the following rights: the right to examine the principal's books for the purpose of verifying the cor-

¹ See Article 6(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, and Article V of the Protocol annexed to that Convention, Supplement to Bull. EC 2-1969.

rectness of the commission statement, the right to special commission for collecting payment of moneys, the right to be remunerated in cases where the principal does not make use of his services or where the principal makes less use of them than the agent could in the normal course of events have expected.

Article 11

This Article adopts those forms of remuneration of commercial agents which are in use in the Member States. For the avoidance of doubt, paragraph (1) provides that any variable item of remuneration which is calculated by reference to turnover is to be deemed to be commission. It is common for the agent's remuneration to consist not of a percentage of the amount of the invoice but of a payment calculated by piece, weight or volume.

Paragraph (2) deals with the amount of commission where no specific amount has expressly been agreed. It confirms the general rule which already applies in all Member States, namely, that the parties are free to determine for themselves the amount of commission.

Article 12

This Article specifies at what point of time the right to commission arises for commercial transactions entered into during the currency of the contract. The right to commission arises in the following three cases (which are those generally accepted in the laws of Member States):

- where the transaction is procured by the commercial agent,
- where the transaction is entered into with a third party with whom the agent has previously negotiated or agreed a transaction on behalf of the principal,
- where the transaction is entered into with a third party in the geographical area or belonging to the group of persons covered by the agency.

Where a transaction is carried out during the currency of the contract the agreement to enter into it has, generally speaking, already been concluded. Where, however, entry into the agreement takes place after termination of the contract of commercial agency the commercial agent is entitled to commission if the transaction was negotiated by him or if it was entered into largely as a result of his work.

Paragraph (2) provides that a principal who, under Article 13, owes commission to a former agent for a transaction entered into after termination of the contract is not under obligation to pay commission to the new agent unless it was otherwise agreed.

Article 13

As regards transactions entered into after termination of the contract this Article provides that the commercial agent is entitled to commission on transactions negotiated by him and on transactions prepared by him which are entered into mainly as a result of his efforts. These provisions follow the principles applied in a number of Member States. The right to commission exists, however, only where the transaction is entered into within a reasonable period after termination of the contract. The time required for examination of offers and for making the various calculations which have to be made can vary considerably from one transaction to another. It appeared undesirable to fix a specific period of time applicable in all cases. It was considered more important that the rule here should be fair rather than that it should be precise.

Article 14

Under this Article the commercial agent is entitled to special commission for collecting payment of moneys, such commission being dealt with separately in the contract and recorded separately in the books and in the commission statement.

Article 15

The agent's right to commission arises at the moment when the principal and the third party enter into the commercial transaction. The Directive thus advances the time at which the right comes into being, for this is not the position in those legal systems under which the right to commission arises only if, and in so far as, the principal carries out the transaction. It follows from this Article that where the principal is declared bankrupt, is in liquidation, makes an arrangement or composition or is the subject of similar proceedings before the commercial transaction has been executed, even if executed only in part, the commercial agent may prove in those proceedings for the amount of his claims. This is the main advantage of the provisions set out on this subject in the present proposal as compared with the legal systems in which the right to commission arises at some later time.

The commission is payable at the latest when the third party executes his part of the transaction. Any agreement to the contrary is void. Moreover, commission is payable if the principal has performed his part of the transaction but the third party has not yet executed his part. The parties may, however, agree that in such cases the commission will be payable at a later time; but the time for payment is not to be extended beyond the last day of the third month following that in which the principal completes the performance of his obligations *vis-à-vis* the third party. Here the agent is entitled to a payment on account, of suitable amount, payable on the last day of the month following that in which the principal performed his part of the contract. If the third party discharges

his obligations *vis-à-vis* the principal before the end of the period agreed between them the commission becomes payable as soon as he has discharged them. In any event, commission is payable on a sum equal to the value of that part of the transaction which has been executed by the principal or third party. Where the principal or third party fails to perform his part of the transaction in full, the amount of commission is to be calculated on the basis of the value of that part performed which is the higher.

There are six advantages in regulating the matter in this way:

1. The general rule is that the principal is not bound to pay commission unless the third party performs his part of the transaction.
2. Where the principal performs his part of the contract first, payment of commission in full may be postponed for so long as the third party fails to perform his part. A suitable payment on account must, however, be made to the agent.
3. The agent knows that where the third party has not performed his part of the contract, and however long that state of affairs continues, commission will be paid as a general rule at the end of the third month following that in which the principal performs his part. The exceptions to this are set out in Article 16.
4. The period of three months which is allowed for preparation of the commission statement will facilitate the accounting involved.
5. The commission statement must include not only commission which is actually payable but also commission earned though not yet payable, so as to give the agent the opportunity of proving his debt, if necessary, in insolvency proceedings.¹
6. The wording of the Article makes it clear that in the event of partial performance of the transaction by one party, only a partial commission is payable. Where both parties perform only part of their obligations, the amount of commission will be proportionate to that part whose value is the higher. But where one party performs in full and the other only in part, commission will be payable on the whole value of the transaction.

Article 16

The right to commission, which arises when principal and third party enter into the commercial transaction, can in certain circumstances be extinguished. Some legal systems already specify to some extent what these circumstances are and provide either that no right to commission arises, or that the right is nullified with retroactive effect, in cases where those circumstances occur.

Where subparagraph (a) applies, the transaction was entered into with a customer who was insolvent and, because the agent failed in his duty under Article 5 and omitted to inform

the principal thereof, the principal was unaware of the insolvency. In addition, the customer has not performed his part of the contract. Here the loss of entitlement to commission is due to the negligence of the agent. The only cases intended to be caught by this subparagraph are those in which the agent fails to exercise his duty of care, with consequent loss to the principal or potential loss to him if he had executed the transaction.

Where subparagraph (b) or (c) applies the transaction was validly entered into but was not executed for some such reason as *force majeure*, or because the customer's business has ceased to exist or has ceased payment, so that the principal cannot perform this part of the transaction or is unwilling to do so. It will be mainly for national law to determine which cases are covered by these two subparagraphs. In any event it is impossible to spell out in the Directive the precise meaning of such concepts as 'impossibility' and 'serious grounds', the scope and significance of which have been settled by the law or by the case-law or in juristic writings in the Member States.

Article 17

This Article gives some degree of protection to the commercial agent as regards the calculation of his commission. It specifies in particular how discounts and incidental expenses are to be dealt with in preparing the commission statement. These provisions are not mandatory.

Article 18

This Article entitles the commercial agent to obtain information and, if necessary, to examine the principal's books of account. He may exercise this right to the extent necessary for verifying the correctness and completeness of the commission statement. It is supplementary to Article 15(5).

Items of information of which the agent becomes aware as a result of the exercise of his right to examine the books of account must not be divulged to third parties nor exploited by the agent (Article 6 applies by analogy). Such items are to be regarded in the same way as commercial or industrial secrets belonging to the principal.

Article 19

The commercial agent is entitled under Article 11 to be remunerated for his work. In certain circumstances he is entitled to be paid even though he does no work for the principal or less work than anticipated. This would be the case, for example, where the commercial agent has begun to negotiate transactions for the principal or where the agent has done what

¹ See Article 22.

ever is necessary to enable him to carry out his part of the agency contract but, as regards the sector entrusted to the agent, the principal has not developed his business to the extent that the agent could reasonably have expected having regard to the economic development of the undertaking and to market movements.

Some legal systems classify these cases under the heading of 'non-acceptance by the principal'. But there is no fault on the part of the principal if his conduct is attributable to circumstances beyond his control. The circumstances in which no remuneration should be paid will be determined by the national law and the relevant case-law. Yet again it was necessary to confine the Directive to fundamentals.

Paragraphs (2) and (3) relating to calculation of commission indicate what is meant by suitable remuneration. The amount of remuneration is to be determined by reference to all the material circumstances e.g. the amount of any lump-sum payment agreed between the parties or of any commission already earned. Account must also be taken of expenditure not incurred and of sums which the agent has earned by doing other work, or of sums he could have earned because he had less work to do for the principal.

Of course the amount of remuneration will be increased if the commercial agent has for the benefit of both parties opened up sale or distribution establishments that remain wholly or partly unused.

Article 20

The proposal adopts the general rule which currently obtains in the member States that the commercial agent is not entitled to reimbursement of expenses incurred in the normal course of his activities unless the parties agree otherwise or unless there is a custom to the contrary.

It is, however, expressly provided that expenses incurred in connection with some special activity undertaken on the instructions or with the consent of the principal shall be reimbursed e.g. the cost of an advertising campaign.

Chapter IV

Del credere

Article 21

This Article defines the *del credere* agreement whereby the commercial agent guarantees in favour of the principal that a third party will pay for goods or services supplied in execution of commercial transactions which the agent has negotiated or agreed. It also protects him when he gives a *del credere* guarantee. The protection afforded is about on a par with the average throughout the various Member States. The written

form is mandatory. *Del credere* agreements concluded by cable, telex or telegram are treated as satisfying this requirement. The draft proposal for a Directive on suretyship¹ contains a like provision in keeping with developments in modern business. *Del credere* agreements may be in the form of a suretyship agreement or of an indemnity agreement.

Del credere agreements are to be made by commercial agents only in relation to transactions which they themselves have negotiated or agreed. As he plays no part in those transactions which are arranged directly between principal and third party it appears to be entirely proper that his liability should not extend thereto. Furthermore, the Article provides that *del credere* agreements which impose on the commercial agent unlimited liability for all transactions are void. This is based upon consideration of social policy and is intended to show clearly that the commercial risk lies on the principal.

By analogy with the commission payable under Article 14 for collection of moneys, the commercial agent is entitled to be paid a separate commission, of reasonable amount, on all transactions covered by his *del credere* undertaking.

It appeared to be reasonable to allow the parties to derogate from certain of these provisions. They may do so in cases where the principal or the third party is established outside the Community, for in such cases the agent's knowledge of the market is extremely relevant. They may derogate also in cases where the agent is given unlimited authority to agree and to execute commercial transactions.

Chapter V

Bankruptcy or winding-up of the principal execution and assignment

Article 22

Most commercial agency businesses are from the economic point of view small-scale and accordingly depend heavily on the principal. For this reason they should for certain purposes be treated in the same way as employees. This Article confers on them the same protection as employees have where bankruptcy or winding-up proceedings are opened against the principal, where he makes an arrangement or composition with his creditors or is the subject of similar proceedings, where an order is obtained by a third party for payment to him of sums of money held by the principal representing debts due from the principal to the agent, or where the agent assigns debts due to him from the principal. As regards the bankruptcy, winding-up and other similar proceedings hereinafter referred to, Member States may fix maximum figures of income beyond which the protection would no longer

¹ Currently being prepared by Commission departments.

apply. In the other fields covered by this Article such maxima have already been fixed in most of the Member States.

Chapter VI

Making of the contract and cessation of the contract

Articles 23 and 24

The Directive does not require every commercial agency agreement to be in writing, although one Member State does impose that rule and a number of trade associations of which commercial agents are members would like to see that requirement adopted. Each party is, however, entitled to receive from the other, upon request, a written statement signed by that other setting out the terms of the contract and any terms subsequently agreed. The same applies, *mutatis mutandis*, where the contract is terminated by mutual agreement. After careful consideration of the advantages and disadvantages of a compulsory written contract and bearing in mind particularly that in cases where the contract were not reduced to writing the result would be nullity of the contract, it was decided that the Directive should not impose a requirement of writing. The rule now proposed avoids useless complication and unnecessary paperwork and will no doubt be in the best interests of both parties.

Articles 25, 26, 27 and 28

A contract for a fixed or determinable period, known in some States as a contract for a specific purpose, terminates upon the expiration of the period for which it was concluded. The Directive provides (but the parties are free to agree otherwise) that where a contract for a fixed or determinable period continues to be performed after that period has expired, it shall be deemed to be converted into a contract for an indeterminate period. All doubt is thereby removed and the parties are at liberty to agree otherwise.

The parties are entitled to agree upon the period of notice to be given in order to terminate a contract concluded for an indeterminate period. Certain minimum periods must, however, be observed for reasons of social or competition policy as well as for the sake of certainty as to the law.

In order to avoid any misunderstanding the Directive provides that periods of notice are to coincide with the end of a calendar month.

Article 27 deals with the two common cases in which the parties may terminate the contract without observing any period of notice or waiting for the contract to run its normal term. First there is the case where one of the parties has in relation

to the contract committed a fault such that the other party cannot be required to keep it in being until the end of the period of notice or until the end of the agreed period of duration of the contract. Secondly there are the cases of *force majeure*, inevitable accident, change in the surrounding circumstances, etc., which substantially undermine the commercial basis of the contract. An example would be the case where the commercial agent finds it impossible to continue in business for reasons of health, old-age or serious and unforeseeable family circumstances.

Certain technical requirements are imposed in relation to these provisions. Thus the party who wishes to terminate because of the fault committed by the other party must do so as soon as he becomes aware of it. Where Article 27(1)(b) applies, termination must take place within a reasonable time after the occurrence of the event which justifies termination. In both cases the reasons for termination must upon request of the other party be communicated to him in writing.

Article 28 provides that where the contract is terminated by reason of the fault of one of the parties, the party who is at fault is liable in damages to the other. However, to lighten the burden of proof the Directive provides that the agent may claim a lump-sum indemnity instead of damages where the contract is terminated by the principal or is declared by the principal to be at an end. This will apply were the principal terminates either by notice of improper length or before the contract has run its full term, in circumstances where there is no fault on the part of the agent, no *force majeure* and no inevitable accident. The indemnity is to correspond to the remuneration which would have been earned during the unexpired period of the contract, but with a maximum period of two years. If the agent decides to claim damages instead, he must prove his loss.

Article 29

This Article reflects the law as it stands generally in the Community at the present time. Upon termination of the contract all samples, materials and documentation which were made available by the principal to the agent must be returned to the principal.

In order however to secure the agent's claims for remuneration and reimbursement of expenses he is given a lien. The lien does not apply to secure his entitlement to goodwill indemnity.

Article 30

This Article requires the Member States to provide in their law that commercial agents shall be entitled to goodwill indemnity. Some Member States already do so; the others will have to introduce it as a law reform measure affecting commercial agents.

After termination of the agency contract the agent or his heirs are to be entitled to payment of a goodwill indemnity provided the three following conditions are satisfied:

1. the agent has brought new customers to the principal or has appreciably increased the volume of business with existing customers,
2. the principal will after termination of the contract continue to derive substantial benefits from the increase in custom or turnover,
3. because of termination the agent is no longer in receipt of the remuneration to which he was entitled during the currency of the contract.

All three conditions must be satisfied.

The amount of indemnity must be reasonable having regard to all the circumstances. As a general rule it would be reasonable that the agent receive in respect of each year of the agency at least one tenth of the average annual remuneration received by him during the preceding five years. In making this calculation account is to be taken of the entitlement to commission under Article 13 following termination. The agent can never require an indemnity of more than twice the average annual remuneration. He will as a general rule be entitled to the maximum indemnity after twenty years. Exceptionally, either party may request that the rule fixing the amount of the indemnity at one tenth of the average annual remuneration over the preceding five years, for each year of the agency, be waived if it would be equitable to do so. The amount of indemnity arrived at is not, however, to exceed an amount which is equal to twice the average annual remuneration. Below that figure the waiver may operate to the advantage of the agent, so that he receives more, or to the advantage of the principal, so that he pays less. If the parties cannot agree, the amount of indemnity will be determined by the Court.

Paragraph (4) is based on the idea that the agent is entitled to the indemnity even in those cases where he has terminated the contract by notice of the proper duration required under the contract or by law. This paragraph limits the amount of the indemnity to not more than one tenth of the average annual remuneration for each year during which the contract has subsisted, as provided in paragraph 2, where the agent terminates the contract but not in reliance on any of the grounds specified in Article 27(1). The object here was to avoid the situation where the agent would exercise his right of termination during the early years of the contract in order to obtain the maximum indemnity specified in paragraph (3). On the other hand the agent will be able to obtain the maximum indemnity where he has proper grounds for terminating the contract, where the principal terminates without proper grounds or where the contract comes to its end in the normal fashion. The fact that the provisions contained in paragraph 4 are rather more finely drawn than the existing national law

provisions is explained by the adoption, in paragraph 2, of a uniform method of calculating the indemnity.

For the avoidance of doubt, Article 30 provides that if the agent dies during the term of the contract, his heirs are to be entitled to the goodwill indemnity. The indemnity is, of course, payable *inter alia* to the agent because on his side he provides a consideration which is not fully paid for by the normal remuneration.

Article 31

This Article sets out three situations in which the goodwill indemnity is not payable.

The first is where the principal terminates the contract under Article 27(1)(a) because of fault committed by the agent.

Secondly there is the situation where the principal continues to contract with the agent's successor by agreement either of the agent or of his heirs, the new agent succeeding to all the rights and duties of the old. One would no doubt be justified in supposing that in these circumstances the old agent will receive a lump-sum payment from his successor which will include the goodwill indemnity.

The third case is the situation where the agent terminates the contract without having proper grounds under Article 27(1)(a) or (b) and, in addition, fails to observe the contractual or other legal provisions concerning the length of the period of notice or, otherwise, the period of the contract itself. It appeared to be equitable to provide that in such circumstances the agent would have no claim to goodwill indemnity.

Article 32

The question of restraint of competition after termination of the contract is dealt with in very different ways in the legislation, case-law and juristic writings in the various Member States. This proposal for a Directive provides that agreements restricting competition must be expressed in writing and must not subsist for more than two years after termination of the contract. They must not be wider in scope than the geographical area or group of persons covered by the agency and must be limited to the type of goods or services which formed the subject-matter of the agency at the time of termination. After termination of the contract the principal must pay to the agent a suitable indemnity throughout the whole period of currency of the agreement restricting competition. The amount is to be calculated on the basis of the agent's remuneration having regard to all the surrounding circumstances. Up to a point it is open to the principal to bring the agreement restricting competition to an end and thereby extricate himself from the obligation to pay the indemnity.

The present proposal specifies in which cases the obligations arising under an agreement restricting competition may be

modified. The cases mainly in point are those where the principal terminates the contract on the ground of fault committed by the agent, where the agent terminates on the ground of fault committed by the principal, where either party terminates because of *force majeure*, inevitable accident or for some personal reason, which makes it impossible for him to continue with the contract.

Chapter VII

General and final provisions

Article 33

The parties are free in certain cases to derogate from some of the mandatory provisions in the Directive. Those provisions are:

- Article 15(4): Agent's right to receive a suitable payment on account.
- Article 19: Agent's right to remuneration where the principal has not made use of his services or has made less use of them than the agent could ordinarily expect.
- Article 21: Agent's right to separate commission for giving *del credere* guarantees.
- Article 26(2): Agreement as to minimum period of notice for termination of an agency contract concluded for an indeterminate period.
- Article 30: Agent's right to goodwill indemnity.

The parties may vary the provisions on the foregoing matters where the agent is a company or legal person whose paid-up capital is more than 100 000 EUA.¹ The parties may exclude entirely the rights provided for in Articles 19, 21 and 30.

This Article reposes on the basis that commercial agents who are economically strong enough to carry on business in the form of a company or legal person are not under disadvantage in negotiating the terms of a contract. Accordingly they do not require any special protection.

Article 34

This Article is concerned with limitation periods in relation to rights which flow from the provisions of the Directive. The periods of limitation vary in length from one Member State to another, depending on the particular subject-matter, from six months to thirty years. Article 34 fixes a uniform period of four years calculated from the end of the year in which the right arises. Derogations are, however, allowed as regards rights which arise during the period of ten years preceding termination of the contract to sums of money which have been omitted from the commission statement referred to in

Article 15(5) or to reimbursement of expenses under Article 20. In these cases the period of limitation begins to run from the end of the year during which the contract expires, the object being to obviate the difficulty which the agent would experience if he had to commence legal proceedings during the currency of the contract. In proposing a period of ten years prior to termination it is considered that certainly as to the law would thereby be assured whilst at the same time taking account of the fact that in all Member States a limit is imposed upon the length of time during which books of account and relevant documents have to be preserved.

Article 35

This Article is based on the principle that principal and agent are not entitled to derogate from the mandatory provisions contained in the Directive, or more precisely from the mandatory provisions of national law adopted in application of the Directive. They are prohibited from doing so only in so far as the derogation would be inconsistent with the provisions which are designed to protect the agent. Member States will thus have to ensure that terms agreed between the parties are void under the national law if they are contrary to the mandatory provisions.

The relevant provisions are as follows:²

- Article 5(1): Duty of the commercial agent to act fairly and in good faith.
- Article 8: Agent's right to damages from the principal where the agent has had to meet a claim for infringement of industrial, commercial or intellectual property rights, the infringement being attributable to the principal.
- Article 10(1) and Article 10(2)(b) and (c): Duty of the principal to act fairly and in good faith, especially to provide the agent with all the information he requires in order to carry out the contract, and to inform him of the acceptance, refusal or partial execution of commercial transactions.

¹ The European Unit of Account (EUA) is defined as the sum of the following amounts in the currencies of the Member States of the Community:

| | |
|------------------|---------|
| German mark | 0.828 |
| Pound sterling | 0.0885 |
| French franc | 1.15 |
| Italian lira | 109 |
| Dutch guilder | 0.286 |
| Belgian franc | 3.66 |
| Luxembourg franc | 0.14 |
| Danish krone | 0.217 |
| Irish pound | 0.00759 |

The value of the unit of account in any given currency is equal to the sum of the equivalent in that currency of the amounts of currency referred to above. It is calculated by the Commission using daily market exchange rates.

The exchange rates of the EUA in the various national currencies are published daily in the Official Journal of the European Communities under information and notices.

Council Decision of 21 April 1975, OJ L 104 of 24.4.1975; Commission Decision of 18 December 1975, OJ L 327 of 19.12.1975.

² Some of the mandatory provisions in the Directive (e.g. Articles 1, 2, 3 and 22) do not relate to the contract itself and in this respect are different from the provisions listed here.

- Article 11(1) and (3): Agent's right to be remunerated for his services.
- Article 12(1): Conditions governing the right to remuneration.
- Article 13: Right to commission on transactions entered into after termination of the contract.
- Article 14: Right to special commission for collection of moneys.
- Article 15: Time at which the right to commission arises.
- Article 16(1): Cases in which commission does not become due.
- Article 18: Agent's right to examine the books of account.
- Article 19(1) and (2): Right to remuneration where principal does not make use of agent's services to the extent expected; basis of calculation of remuneration in these circumstances.
- Article 20(2): Right to reimbursement of expenses.
- Article 21(1)(2) and (3): The *del credere* provisions, which as provided in paragraph 4 may be derogated from only where the principal or the third party is established or is habitually resident outside the Community, or where the agent has been given full authority to conclude contracts.
- Article 23: Right to receive a signed written statement of the terms of the contract.
- Article 26: Formal requirements relating to notice and minimum period of notice.
- Article 27: Notice in case of serious fault or undermining of the commercial basis of the contract.
- Article 28: Right to damages or lump-sum indemnity for wrongful termination, at the agent's option.
- Article 29(2): Agent's right of lien.
- Article 30: Goodwill indemnity.
- Article 32: Agreements restricting competition—formal requirements, scope and duration.
- Article 34: Limitation periods.

Paragraph (2) provides that the rule prohibiting derogation from the mandatory rules does not apply where and in so far as the agent carries on business as a commercial agent outside the Community. Thus where the agent carries on business partly inside the Community and partly outside it the parties may derogate from the mandatory provisions so far as concerns that part of the business which is outside. The important thing is that within the Community all commercial agents be placed on an equal footing and have the benefit of the protection conferred by the Directive. In this way, moreover, the conditions of competition to which principals who appoint agents within the Community are subject will be in balance. On the other hand, where agents carry on their business outside the Community they and their principals must be free to derogate from the mandatory provisions because, in order to

be able to compete successfully, they must have full scope to adopt to prevailing market conditions.

Articles 36 and 37

It is recognized that as the subject-matter of the Directive is complex a relatively long period of time will be required for it to be introduced into the national laws.