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European Communities

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EUROPEAN PARLIAMENT

# Working Documents

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DOCUMENT 222/78

## Report

drawn up on behalf of the Legal Affairs Committee

on the proposal from the Commission of the European Communities to the Council (Doc. 514/76) for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents

Rapporteur: Mr P. DE KEERSMAEKER

PE 48.337/fin.

By letter of 12 January 1977, the President of the Council of the European Communities consulted the European Parliament on the proposal from the Commission of the European Communities for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents (Doc. 514/76).

At its sitting of 7 February 1977 the European Parliament referred this proposal to the Legal Affairs Committee as the committee responsible and to the Committee on Economic and Monetary Affairs for its opinion.

The Legal Affairs Committee had appointed Mr De Keersmaecker rapporteur on 20 January 1977.

The Committee held an exchange of views on this proposal for a directive at its meeting of 18 May 1977, and considered the draft report at its meetings of 21 June, 27 September and 18 October 1977, and of 28 February, 18 April, 28 April, 22 May and 23 June 1978. At the last of these meetings it adopted the draft report unanimously with 4 abstentions.

Present: Sir Derek Walker-Smith, chairman; Mr De Keersmaecker, rapporteur; Mr Amadei (deputizing for Mr Sieglerschmidt); Mr Bouquerel (deputizing for Mr Rivierez), Mr Broeksz, Lord Brimelow, Mr Fitch (deputizing for Lord Ardwick), Mr Fletcher-Cooke, Mr de Gaay Fortman, Mrs Iotti, Mr Krieg, Mr Luster, Mr Masullo, Mr Radoux, Mr Scelba, Mr Schmidt, Mr Schwörer, Mrs Squarcialupi and Mr Zagari.

The opinion of the Committee on Economic and Monetary Affairs is attached to this report.

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The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 57(2) and Article 100 of the EEC Treaty (Doc. 514/76),
  - having regard to the report of the Legal Affairs Committee and the opinion of the Committee on Economic and Monetary Affairs. (Doc. 222/78 ),
1. Welcomes the submission of this proposal for a directive, which prescribes measures to harmonise the laws, regulations and administrative provisions of the Member States governing the relations between self-employed commercial agents and their principals;
  2. Stresses the need to coordinate national laws in the matter of commercial representation subsequent to the abolition by Council Directive 64/224/EEC of 25 February 1964 of the restrictions on freedom of establishment and freedom to provide services in respect of the activities of intermediaries in commerce, industry and small craft industries;
  3. Notes the categories expressly excluded by Article 3 from the field of application of the directive, but feels that part-time agents involved in mail-order sales of a wide range of goods from catalogues published periodically should also be excluded;

<sup>1</sup> OJ No. C 13, 18.1.1977, p.2.

4. Expects the Commission to submit in the near future the promised proposal for a directive to harmonize the Member States' laws applicable to commercial travellers, whose functions are similar to those of commercial agents;
5. Hopes also that the Commission will submit without delay a proposal for a directive concerning insurance agents and agents of financial institutions, who, although they should have been included, are, in fact, excluded from the field of application of this directive, by reason of the fact that in many countries the activities of these agents are governed by special provisions and fall outside the scope of regulations relating to commercial agents;
6. Approves the principle whereby the parties are required to act fairly and in good faith but feels that specific mention should be made of the requirement on the commercial agent to make reasonable efforts to conduct and conclude the business with which he is entrusted and not to use the principal's commercial or industrial secrets where this would be contrary to professional ethics;
7. Regards as satisfactory, subject to some clarification, the provisions of the proposed directive relating to the remuneration of the commercial agent and his right to commission and the reimbursement of expenses incurred by him in carrying out special tasks in accordance with the principal's instructions;
8. Welcomes the provisions for the protection of the commercial agent where a del credere clause is stipulated;
9. Feels that the provisions of the directive relating to bankruptcy of the principal and other proceedings initiated against the principal should be deleted, since these provisions do not have proper legal justification;
10. Stresses the need for the provisions concerning proof of the contractual relationship to be more carefully worded, since the directive, which leaves the parties free to choose the contractual form most suitable for them, must expressly lay down, if one of the parties so requests, that the contract be drawn up in writing;
11. Considers that the period of notice laid down in the directive for the termination of the contract is too long since it is unreasonable that the parties should continue to be mutually bound for this time once their will to cooperate has ceased to exist;

12. Approves the provisions of the proposed directive concerning the termination of the contract without prior notice where one of the parties has committed a serious fault that warrants such cessation or in the case of 'force majeure', but suggests that the directive should also lay down express provisions on the case of repeated faults by one of the parties;
13. Considers it desirable for the principle to be introduced into all the Member States' legislation of the right of the commercial agent or his heirs to be paid, on termination of the contract, or where the agent himself terminates the contract while observing the proper period of notice provided for by the contract or by law, a goodwill indemnity calculated fairly on the basis of the average remuneration earned by the agent while the contract was in force;
14. Considers appropriate the provisions of the directive governing the restrictions which the principal may impose on the business activities of the business agent in the period following cessation of the contract and stresses that it is imperative for an agreement restricting competition to be made in writing, failing which it must be null and void;
15. Considers it acceptable that when the commercial agent is a legal person or a company with a paid-up capital of more than 100,000 European units of account, the parties may derogate from the provisions relating to payment on account of commission and remuneration, the del credere clause, the period of notice and the goodwill indemnity;
16. Suggests that the limitation period on parties' rights should be reduced in order to relieve them of the need to keep space-consuming material on file solely because of the requirement to preserve proof;
17. Considers that the provisions designed to protect the commercial agent from the consequences of his economically weak position vis-à-vis his principal are in line with the principles of Article 117 of the EEC Treaty referred to in the fifth recital of the directive, but feels that the long list of provisions contained in Article 35 makes the directive too inflexible and therefore requests the Commission to submit a revised version of this article;

18. Approves, subject to the foregoing observations, the proposal for a directive in its entirety;
19. Invites the Commission, pursuant to Article 149, second paragraph, of the EEC Treaty, to adopt the following amendments;

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

Article 1 unchanged

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

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

The agent may arrange his activities and use his time independently and as he thinks fit.

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,
- 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 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,
- 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,
- to part-time agents involved primarily in mail-order sales to consumers from catalogues published periodically, at least twice a year, offering a wide range of goods for sale by cash or hire purchase.

<sup>1</sup>For full text see OJ No. C13, 18.1.1977, pp. 2-10.



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;

paragraph 2 unchanged

Article 5

paragraph 1 unchanged

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;

Article 4

The Member States are at liberty:

1. not to apply Articles 15(4), second and third sentences (rest unchanged)

Article 5

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

- (a) make reasonable efforts to conduct and conclude the business with which he is entrusted;

(b) unchanged

(c) unchanged

(d) unchanged

(e) unchanged

(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.

(f) 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.  
(last sentence deleted)

paragraph 3 unchanged

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 6

In his relations with third parties, the agent shall not, even after the contract has come to an end, (five words deleted) 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 such conduct is generally accepted to be consistent with the principles of a sound businessman.

Article 7 unchanged

Article 8

paragraphs 1 and 2 unchanged

Article 8

3. The commercial agent shall inform the principal of any legal action to be taken against him in respect of the breaches referred to in paragraphs 1 and 2 above.

Article 9 unchanged

Article 10

Article 10

paragraph 1 unchanged

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:

2. unchanged

(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;

(a) unchanged

(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;

(b) provide the commercial agent with all information necessary for (rest unchanged)

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

(c) inform the commercial agent in good time of (rest unchanged)

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.

Article 11

1. The principal shall remunerate the commercial agent by paying him a fixed sum, fixed commission and/or variable commission. The parties may agree for a proportion of the remuneration to be paid in kind.

Any variable remuneration factor which is calculated by reference to turnover shall be deemed to be commission.

paragraphs 2 and 3 unchanged

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.

paragraph 2 unchanged

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 12

1. unchanged
- (a) unchanged
  - (b) where the transaction is entered into with a third party whom the agent had previously acquired as a client or with whom he had agreed a transaction falling within the terms of his agency, or
  - (c) unchanged

Article 13

- The commercial agent shall be entitled to commission on commercial transactions entered into after the contract has come to an end:
- (a) unchanged
  - (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. The parties may fix this period of time by common accord.

Article 14 unchanged

Article 15

Article 15

paragraph 1 unchanged

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

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

(a) unchanged

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

(b) as soon as and to the extent that the client has fulfilled the obligations laid down in the contract.

paragraph 3 unchanged

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 that 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.

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.

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.

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.

paragraph 5 deleted (see Article 18)

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 16

1. The right to commission shall be extinguished:
- (a) Where the commercial agent has not fulfilled his obligations under Article 5(2)(b), (rest unchanged)
  - (b) unchanged
  - (c) unchanged
2. unchanged

Article 17 unchanged

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.

Article 18

1. 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.
2. 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. (last sentence deleted).

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.

3. If there exist proper grounds for thinking that the statement of the amount of commission earned referred to in paragraph 1 or the information which the principal has supplied are incorrect or incomplete, or if the principal refuses to supply such information, 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. The prohibition contained in Article 6 shall apply in the cases referred to in paragraphs 2 and 3 of the present article.

Articles 19 and 20 unchanged

Article 21

Article 21

paragraph 1 unchanged

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.

2. 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.

Any del credere agreement shall be void which

- (a) covers transactions which were not negotiated or agreed by the commercial agent, or
- (b) amounts to an unlimited guarantee on the part of the commercial agent for transactions negotiated or agreed by the agent.

paragraphs 3 and 4 unchanged

Article 22 deleted

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 23

If requested by either party, the contract between the commercial agent and the principal and any terms subsequently agreed shall be made in writing.

If the contractual relationship between the commercial agent and the principal does not arise from a written contract, each party shall be entitled to receive from the other party, either during the currency of the contract or upon its cessation, a signed written document setting out all the rights and obligations of the parties. Any purported waiver of this right shall be invalid.

Article 24 deleted

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 25

Subject to Articles 27 and 28 a contract for a fixed period or a period to be determined by the parties shall terminate upon the expiration of the period for which it was made. (rest unchanged)



Article 26

Article 26

paragraph 1 unchanged

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.

2. The period of notice shall not be less than one month during the first year in which the contract enters into force. After the first year, it shall be increased by fourteen days 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 three months. (last sentence deleted)

Article 27

Article 27

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

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

(a) where the other party has in relation to the contract committed a fault once or repeatedly 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.

(b) unchanged

paragraphs 2 and 3 unchanged

Article 28 unchanged

Article 29

Article 29

paragraph 1 unchanged

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.

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. When exercising this right, the agent shall maintain the principal's movables and other property in good condition.

Article 30

Article 30

paragraph 1 unchanged

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.

2. The goodwill indemnity shall be reasonable in amount having regard to all the circumstances. It shall be equal to (three words deleted) one tenth of the annual remuneration (rest unchanged)

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

3. The amount of the indemnity shall not exceed (one word deleted) the average annual remuneration calculated in the manner (rest unchanged).

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.

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 a goodwill indemnity.

If termination of the contract by the agent is not 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 shall not exceed the sum calculated on the basis of paragraph 2 of this article.

paragraphs 5 and 6 unchanged

Articles 31, 32 and 33 unchanged

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 34

1. Claims which arise under the foregoing provisions shall be subject to a limitation period of three 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 18(1), 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 deleted

Articles 36 and 37 unchanged

EXPLANATORY STATEMENTI. INTRODUCTION

1. Following the abolition of restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries<sup>1</sup> it became necessary to coordinate national laws relating to commercial agents. Commercial agents perform a very important function in inter-penetration of markets and their activities promote the development of intra-Community trade.

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

3. The aim of the directive is to prevent, in the interests of the working of the common market, these differences from continuing to impede 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.

4. It should be noted, moreover, that the directive does not merely coordinate the laws of the different Member States, but covers the rules governing commercial representation applicable within the individual Member States, and the principle that 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.

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<sup>1</sup>

OJ No. 56, 4.4.64, p. 869

## II. CONTENT OF THE DIRECTIVE

5. The Commission's proposal for a directive to coordinate the laws of the Member States relating to (self-employed) commercial agents<sup>1</sup> first lays down, in Article 2, a definition of self-employed commercial agents. It then set out provisions governing the relationship between commercial agent and principal including:

- the rights and duties of the parties
- remuneration and commission
- agreements restricting competition
- del credere agreements
- protection of agents in case of bankruptcy of the principal or similar circumstances
- termination of contract and the corresponding indemnities
- limitation periods
- those rules from which the parties are not permitted to derogate.

The provisions are set out in the proposal for a directive in seven chapters which we shall now briefly review.

6. Chapter I deals with the scope of application, which is confined to self-employed commercial agents. Salaried or wage-earning commercial travellers are excluded<sup>2</sup>, although, like self-employed commercial agents they have the continuing task of representing their principal. The directive also does not apply to intermediaries who act in their own name, to those temporarily appointed to negotiate or to conclude a number of specified transactions only, or to intermediaries who carry on their activities in the insurance or credit fields.

7. Domestically, Member States are at liberty not to apply certain of the directive's provisions relating to the payment of the commission, remuneration, cessation of the contract and goodwill indemnity, to persons who act as commercial agents by way of secondary activity only. On the other hand, Member States may extend the provisions to other trades and professions equated, under domestic law, with that of commercial agent.

<sup>1</sup> OJ No C 13, 18.1.77, p. 2 et seq

<sup>2</sup> In the future directive relating to this category, the Commission intends to give due consideration to the similarity in the roles of salaried or wage-earning commercial travellers and self-employed commercial agents.

8. Chapter II concerns the rights and obligations of the parties. The commercial agent shall perform his duties with the care which a sound businessman would exercise and shall not, even after the contract has come to an end, divulge commercial secrets pertaining to the principal; moreover, he shall refrain from activities contrary to the interests of the principal. The principal, on his part, shall be responsible for damages which the commercial agent has had to meet for breach of industrial, commercial or intellectual property rights in respect of goods or services forming the subject-matter of his agency if the breach was caused by the principal.

9. Furthermore, even when the commercial agent is authorized solely to negotiate transactions on behalf of the principal, but not to conclude them unless the principal expressly empowers him to do so, he shall be presumed to have authority to perform certain activities, limitations of which shall be ineffective as against third parties unless they were aware or ought to have been aware thereof. Finally, both the principal and agent shall act fairly and in good faith towards each other. While the agent must perform his duties with the care which a sound businessman would exercise, the principal must make available to the agent all the assistance he needs for the performance of his tasks.

10. Chapter III deals with the remuneration of commercial agents in general, commissions due to them and the agent's right to inspect the principal's account books to check the amounts of commission to which he is entitled. In addition, there are specific provisions, regarding the agent's remuneration in cases where it has been impossible for the agent to fulfil his obligations under the agency contract or where the principal's conduct has prevented him from doing so. Provision is made for cases where the agent is entitled to reimbursement of expenses incurred.

11. Chapters IV and V each consist of one article. The first concerns the del credere agreement, that is one whereby the commercial agent guarantees in favour of his principal the payment of the price of goods or services by the customer.

The other governs the position of the agent in cases of bankruptcy of the principal or of the execution of the assets and income of the principal and where sums are outstanding to him from the principal.

12. Chapter VI deals with the making of the contract and the cessation of the contract. It confirms the irrenounceable right of each party to obtain from the other a signed written document setting out the terms of the contract and any terms subsequently agreed. It also lays down provisions for the making and the cancellation of the contract, setting out in detail the agent's right to goodwill indemnity, conditions where it is forfeited and rules for

the conduct of both parties after cessation of the contract where an agreement restricting competition exists.

13. Chapter VII contains general and final provisions governing the relationship between the two parties where the commercial agency is undertaken by a legal person or a company of a prescribed size. It sets out terms of limitation, claims under the contract and conditions in which derogations detrimental to the interests of the agent shall be void.

14. Finally, the directive requires the Member States to adopt and publish before 1 January 1980 the provisions necessary to make their laws comply with the directive. These provisions shall apply from 1 July 1980.

### III. EXAMINATION OF THE DIRECTIVE'S PROVISIONS

15. The legal basis for this proposal for a directive is Article 100 together with Article 57(2) of the EEC Treaty which lays down that the Council shall issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.

The present directive is also related to Council Directive 64/224/EEC of 25 February 1964 concerning the abolition of restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries.

16. The Commission has felt it appropriate, since the economic status of commercial agents is frequently inferior to that of their principals, to make reference to Article 117 of the EEC Treaty which lays down the principle of the improvement of working conditions and living standards for workers through the harmonization of the laws of the Member States.

#### 1. Definition of 'commercial agent'

17. The definition of 'commercial agent' within the meaning of the directive is contained in its Article 2:- '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 transactions in the name and for account of another person', i.e. the principal.

18. This definition is intended to comprise the characteristic features of the concept of 'commercial agent' in the legal systems of the various Member States. It should be noted that in some of these systems the concept is unknown, while in others it remains undefined or is defined only partially.

19. The commercial agent is primarily a self-employed person who arranges his activities as he thinks fit. This distinguishing feature of self-employment is clearly recognized in the legislation of the Netherlands, France, Italy and Germany. It has been adopted in a Belgian bill of 25 May 1976 subordinating legal provisions on commercial agencies to the terms of the Benelux Convention in the matter. British legislation on the subject has traditionally laid emphasis on the independence of the parties concerned.



20. The definition of commercial agent given in Article 2 of the proposal for a directive might be improved by mentioning the fact that 'independence' is a basic requirement for the conduct of his business. It would therefore be appropriate to include in Article 2 the principle laid down in Article 5(2)(e) of the proposal for a directive. In accordance with this principle, Article 2 should state that the agent 'may arrange his activities and use his time independently and as he thinks fit'.

21. Secondly, Article 2 of the directive specifies that the commercial agent is one who does not act in his own name but in the name and for the account of the principal he represents. In this respect he is to be distinguished in particular from the commission agent who acts for account of another but in his own name.

22. Finally, the directive stipulates that the relationship between the commercial agent and his principal should be of a permanent nature even though the assignment to act as his intermediary has been given by the principal for a fixed period only or - as Article 25 of the proposal states - for a 'determinable' period. The directive does not therefore cover cases where the principal appoints a person to act as his intermediary only temporarily for the purpose of concluding or negotiating a limited number of transactions.

## 2. Scope of application

23. Pursuant to Article 1<sup>1</sup>, the harmonization measures prescribed by the directive apply to the laws, regulations and administrative provisions of the Member States governing the relations between self-employed commercial agents and their principals. They also apply pursuant to Article 1 (2) to national laws and trade usages which are not inconsistent with the provisions of the directive.

24. Article 3 lists categories of intermediaries which fall outside the definition given in Article 2 and are thus expressly excluded from the scope of the directive's application.

To the categories which, under Article 3 of the proposal, fall outside the scope of the directive should be added the category of part-time agents involved in mail-order sales of a wide range of goods from catalogues published periodically.

25. Under Article 4(1) Member States are also free not to apply the provisions of the directive<sup>1</sup> to persons who act as commercial agents by way of secondary activity only. No definition is given of 'commercial agency by way of secondary activity'

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<sup>1</sup> Concerning commission and remuneration, notice of termination and goodwill indemnity.

because it is impossible to lay down suitable criteria for every possible case, and instead reference is made to commercial usage in individual Member States.

26. By Article 4(2) Member States are left at liberty to apply some or all of the provisions of the directive 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 be assimilated to commercial agents.

### 3. Rights and duties of the parties

27. Several articles of the directive (Articles 5 to 10) concern the rights and obligations of the commercial agent and of the principal. The directive lays down the fundamental principle that both parties must act fairly and in good faith. Since this principle is not upheld in a uniform manner in the legislation of all the Member States, the directive, in Article 5 (1), lays this general duty on the commercial agent while Article 10 (1) lays it upon the principal.

28. Article 5 specifies that the commercial agent shall fulfil this obligation by:

- supplying to the principal at all times the information he needs for the satisfactory conduct of the business and particularly that regarding the solvency of third parties;
- conduct his business with the care which a sound businessman would exercise;
- comply with the instructions of his principal provided that they do not basically affect the agent's independence.

29. A further basic duty should be added to the list provided in Article 5 (2) viz. to

'make reasonable efforts to conduct and conclude the business with which he is entrusted'.

Furthermore, in line with the amendment proposed to Article 2 in order to make clear the commercial agents 'independence' the final sentence of Article 5 (2) (e) should be deleted.

30. Other duties of the commercial agent, stipulated in Article 6 of the Directive, concern the protection of commercial and industrial secrets even after the termination of his contract with the principal.

31. The wording of this article should be corrected inasmuch as it allows the commercial agent to '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', if he considers this compatible with professional ethics. In fact this course of action should be ruled out completely. Secondly the phrase 'turn to account' any such secrets is somewhat confusing. It should therefore be made clear that the 'turning to account' of commercial or industrial secrets can only be envisaged when it is generally accepted to be consistent with the principles of a sound businessman.

32. Further, Article 7 of the directive subjects to the principal's consent the carrying on by the agent of any activity which may compete with that performed by him for account of the principal.

33. The Committee on Economic and Monetary Affairs has pointed out in its opinion<sup>1</sup> that the term 'compete' in this connection is a very vague criterion.

However the possibility cannot be ruled out of a commercial agent obtaining the principal's consent to carry out an activity on his own behalf or for third parties which may be considered to compete with the goods or services for which he has been appointed to represent the principal. It is for the parties concerned to decide on the merits of each case. The important factor is that such an activity should be subject to the principal's consent and that this can be withheld if the principal considers such activity to be against his own interests<sup>2</sup>.

<sup>1</sup> PE 48.145/fin./corr., para.12

<sup>2</sup> Under the French decree of 23.12.58 the agent is permitted to take on other agencies without reference to the principal unless his contract contains a clause whereby the principal's consent is required for the agent to represent a rival undertaking. The agent, however, has a duty of loyalty to his principal throughout the duration of the contract.

In German law there is nothing to prevent a commercial agent from seeking to conclude other transactions in the same field of business as that in which he represents his principal. Any such prohibition must be stipulated in writing. Nevertheless, both the theory and the practice of the law uphold the general duty of loyalty (Treupflicht) of the agent towards his principal.

The Belgian draft law of 25.5.76 stipulates in Article 4 that the agent may accept other 'non-competing' agencies without reference to the principal.

34. In the matter of the agent's competences, the directive reflects the principles generally applying in the Member States. Under Article 9, the agent is authorized to negotiate transactions for account of the principal but may conclude them only when expressly empowered to do so. And in Article 9, the agent shall be presumed to have authority:

- to receive complaints from third parties concerning defective goods or services;
- to protect the principal's rights to have the means of proof preserved.

35. Article 9 (3) stipulates that limitations of the agent's authority shall be ineffective as against third parties unless they were aware or ought to have been aware thereof.

36. Finally Article 10 lays upon the principal, in addition to the general duty of loyalty referred to above, a number of specific obligations concerning the provision to the agent of such materials and information as are needed by him for the performance of his activities. Here it would be appropriate to correct the wording of Article 10 (2) (b) in order to take account of the fact that sometimes the principal may have reasons not to supply the agent with information which may influence the competitiveness of the company. Article 10 (2) (b) ought therefore to refer to 'all information necessary for the performance of the contract'.

37. The obligation on the principal to inform the commercial agent of the acceptance, refusal or, in appropriate cases, the partial performance of a commercial transaction pursuant to Article 10 (2) (c) is to be carried out 'in good time'. It should be pointed out here that the Italian text does not correspond to that of the other languages.

#### 4. Remuneration and reimbursement of expenses

38. Articles 11 to 20 of the directive lay down the principle - accepted more or less explicitly in the legislations of the Member States - that the commercial agent is entitled to be remunerated for his services<sup>1</sup>.

<sup>1</sup> The agent's right to remuneration, or merely to commission, is embodied for instance, in Article 75 (b) (1) of the Netherlands Commercial Code, in Article 1748 of the Italian Civil Code and in Article 87 (1) of the German Commercial Code.

On the other hand the French decree of 23.12.58 says nothing about the stipulation in the contract of the commission on transactions concluded.

The Belgian draft law of 25.5.76 stipulates in Article 7 (1) the commercial agent's entitlement to a commission.

a) The commercial agent's remuneration

39. According to Article 11 (1) of the directive the agent's remuneration may consist of commissions or a fixed sum or both. In any event, any parts of the remuneration calculated by reference to turnover shall be deemed to be commission.

40. It would be advisable to specify the elements of the agent's remuneration in greater detail. It may in fact take the form of a fixed sum, fixed commission and/or variable commission according to the type and area of business under consideration.

41. This provision should also take into consideration a factor which is not infrequently present in the relations between the principal and the commercial agent. In certain cases the parties agree that a certain proportion should be paid in kind or, in other words, goods produced by the principal.

42. Article 11(2) is more specifically concerned with commission. The amount of this shall as a general rule be agreed between the parties, but in the absence of an express agreement the agent shall be entitled to the commission that is customarily allowed for the goods or services which form the subject matter of his agency in the place where he carries on his activities.

Paragraph 3 of the article makes all contracts which exclude the agent's right to remuneration void.

b) Remuneration: entitlement and calculation

43. Article 19 (1) of the directive provides that the agent is entitled to remuneration even where the principal has not used his services or used them to a lesser extent than the agent might reasonably have expected.<sup>1</sup>

44. Article 19(2) of the directive stipulates the basis of suitable remuneration for the agent. It is to be determined by reference to all the material circumstances and to the agent's average monthly remuneration during the preceding twelve months or to the average of his remuneration during the currency of the contract.

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<sup>1</sup> Article 11 of the Belgian draft law of 25.5.76 which reflects the most recent thinking on this subject entitles the commercial agent to indemnity if the principal fails to use his services or uses them to an extent substantially less than the agent could reasonably have accepted.

45. More particularly, paragraph 3 specifies that expenses incurred by the agent in setting up the agency and preparing to commence business as well as the amount he has saved on expenses or earned in carrying on some activity or deliberately not earned by declining a suitable activity should all be taken into account in the computation.

(c) Commission: entitlement and calculation

46. According to Article 15 (1) of the directive, the agent's right to commission arises at the moment when the principal and the third party enter into the commercial transaction. Within the meaning of the directive, therefore, the agent's entitlement to the commission arises in advance, in contrast to the provisions of those legal systems which make entitlement to commission dependent on the fact and the extent of the execution of the transaction by the principal.

47. Pursuant to Article 15 (2) commission is therefore payable:

(a) as soon as and to the extent that the principal has performed his part of the transaction, even if the performance differs partly or completely from the manner prescribed on conclusion of the transaction;

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

48. Since pursuant to Article 15 (2) (a) commission is payable as soon as and to the extent that the principal has performed his part of the transaction, Article 15(2) (b) should make express reference to performance by the third party. Therefore paragraph 2(b) should be worded as follows:

(b) as soon as and to the extent that the client has fulfilled the obligations laid down in the contract'.

49. Article 15(3) of the proposal for a directive lays down that 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.

This provision requires no comment.

50. Article 15(4) however establishes two distinct principles. On the one hand the payment of a suitable amount on account during the month following the month in which the principal fulfilled his obligations, if the parties have agreed that commission be payable only after performance of the transaction by the principal.

On the other hand, the general principle according to which commission is payable in every case on the last day of the third month following that in which the principal has completed the performance of his part of the contract.

51. Without modifying the contents of this paragraph, its logic should be clarified by bringing together the two sentences concerning agreements between the parties. The general principle of when commission is due would therefore come at the end of the paragraph.

52. It seems inappropriate to include Article 15(5), which stipulates the monthly presentation to the agent of a statement of the amount of commission earned and the amount of commission payable and also the possibility of an agreement between the parties to extend the deadline of presentation to up to three months, within the context of provisions essentially laying down the agent's right to commission. Article 18 seems more suitable for this, since it establishes the commercial agent's right to demand from the principal all the information regarding the commission due to him.

53. Article 17 governs the method of calculation of the commission. Its provisions aim to provide some protection for the agent, prohibiting the deduction of cash discounts, fidelity rebates etc.

54. By Article 18(1) the agent is entitled to be supplied with all relevant information and to inspect the principal's account books for the purpose of checking the amounts of commission due to him. Reference is made to provisions of Article 6 on the duty to preserve commercial secrecy.

55. It is in this context that we must consider the provisions relating to the forwarding by the principal of a statement of account of the commission owing to the agent. As stated above referring to Article 15(5) it seems more logical to insert this provision in Article 18. Thus paragraph 1 of this article would specify the general obligation to forward a regular statement of commission to the agent.

56. This provision could logically be followed by the present paragraph 1 of Article 18 which lays down the right of the agent to obtain from the principal all information relevant to the calculation of the commission due to him and also the provisions of the present paragraph 2 concerning the right of access to the principal's books of account to determine the exactness of the information supplied. The prohibition contained in Article 6 of the proposal for a directive should be mentioned at the end of the last paragraph of Article 18.

d) Payment of the commission

57. Articles 12 and 13 of the directive govern the payment of commission on transactions entered into during the currency of the contract and after its termination.

Pursuant to Article 12 (1), commission is due to the agent during the currency of the contract:

- a) where the transaction is procured by the commercial agent;
- b) where the agent has previously negotiated or agreed a transaction with the client;
- c) where the agent is appointed to cover a specific geographical area or a specific group of people and the transaction has been concluded in that area or with a member of that group, even though the agent has had no part in it.

58. It should be pointed out that the wording of sub-paragraph (b) needs to be made clearer. For the agent to be entitled to commission it does not seem sufficient that he should simply have 'negotiated' previously with the client. His activities should have produced concrete results and the third party be counted by the principal as one of the clients acquired through the agent.

59. Pursuant to Article 13 after termination of the contract the commission shall be due to the agent:

- a) where the transaction has been negotiated by him;
- b) where it is due principally to his activities during the currency of the contract<sup>1</sup>.

This last stipulation is, however, qualified by the provision that the transaction originally promoted by the agent must be entered into 'within a reasonable period' after termination of contract.

<sup>1</sup> Article 7(2) of the Belgian draft law of 25.5.76 provides that the commercial agent shall be entitled to remuneration for preparatory work done by him on transactions concluded after termination of contract.



60. 'A reasonable period' being a rather vague term, the directive specifies that the period should be proportionate to the type of transaction in question and to the volume thereof. This provision should not, however, exclude the possibility of the parties reaching an agreement on the period of time the agent's right to commission shall be held to subsist.

61. Article 14 contains a special provision concerning commission on the collection of payments. Where the agent is under duty to the principal to collect money due on the transactions concluded, commission on this should be calculated separately from the ordinary commission.

e) Forfeiture of entitlement to commission

62. Article 16 (1) specifies the cases where entitlement to commission due on transactions concluded between the principal and a third party shall be extinguished. This may happen if the agent fails to provide the principal - as stipulated in Article 5 of the directive - with information he needs to conduct the business satisfactorily and information on the solvency of third parties. In those circumstances, if it is established that a third party has not, or will not perform its part of the transaction, the agent's entitlement to commission is forfeited by negligence.

63. Other cases where the agent's right to commission shall be extinguished are failure to perform the transaction owing to force majeure or to serious grounds for non-performance on the principal's part.

64. In all such cases Article 16(2) stipulates that any commission already received by the agent shall be refunded.

(f) Reimbursement of expenses

65. By Article 20 of the directive the agent is denied any right to reimbursement of expenses incurred in the usual course of his activities, unless the parties have agreed otherwise or there is custom to the contrary. However, the principle is modified to the extent that expenses incurred for special activities and undertaken on the instruction of the principal shall be reimbursed.

5. 'Del credere' agreements

66. This is defined in Article 21 of the directive. Under this type of agreement the commercial agent guarantees in favour of his principal that a third party will be paid the price of goods or services forming the subject-matter of commercial transactions which the agent has negotiated or agreed. It provides greater security for the principal, in consideration of which he pays the agent a special separate commission.

67. Because of the increased risk involved for the agent in this type of agreement, Article 21(1) of the Directive stipulates that the agreement must be evidenced in writing or by cable, telex or telegram.

68. In order to clarify the arrangements governing the relationship between parties who have decided on such a clause, it would be appropriate for Article 21(2) to include the principle under which a del credere clause can be agreed only for a particular transaction or a series of such transactions with particular clients specified in the clause itself. Such a provision would correspond to the present text of paragraph 2(b).

Paragraph 2 ought thus to read, reworking sub-paragraphs (a) and (c):

'Any del credere agreement shall be void which:

- (a) covers transactions which were not negotiated or agreed by the commercial agent, or
- (b) amounts to an unlimited guarantee on the part of the commercial agent for transactions negotiated or concluded by the agent'.

<sup>1</sup> cf. Article 1 of the French decree of 23.12.58, Article 75(e) of the Netherlands Commercial Code, the Italian collective agreement of 30.6.68 etc.

By Article 5 of the Belgian draft law of 25.5.76, the agent's responsibility is limited to a guarantee that the third party is solvent (paragraph 2), but save for some exceptions (paragraph 3), does not allow him to commit himself for amounts exceeding the commission payable to him.

69. By analogy with the commission payable under Article 14 for collection of monies, Article 21(3) of the directive provides for a special separate commission of reasonable amount under del credere agreements<sup>1</sup>.

70. Paragraph 4 of the Article lays down that the parties may derogate from these provisions if, for example, the principal or the third party is established outside the Community or if the agent is given unlimited authority to negotiate and execute transactions.

6. Bankruptcy of the principal

71. The proposal for a directive seeks to protect natural persons carrying on the activities of commercial agent in cases of bankruptcy of the principal, composition and execution.

72. By the provisions of Article 22(1) the agent is treated as an employee of the principal as regards funds owing to him for remuneration or reimbursement of expenses in bankruptcy or similar proceedings concerning the principle.

73. The same principle applies, under Article 22(2) to funds exempted from distraint of the principal's assets and, under paragraph 3, to assignment of funds owing to the agent by the principal.

74. The provisions protecting the agent in the case of bankruptcy of the principal are justified as seeking to protect the economically weaker partner in the agency contract. However the Legal Affairs Committee points out that these provisions clearly conflict with the definition of a commercial agent given in Article 2 of the proposal for a directive (self-employed intermediary). Moreover, to stress this special feature of the commercial agent, the Legal Affairs Committee decided to add a new paragraph to this Article specifying that 'The agent may arrange his activities and use his time independently and as he thinks fit'.

75. The Legal Affairs Committee feels that in view of the independent legal status conferred on the agent, it is not right to treat him as an employee of the principal. Article 22 should therefore be deleted.

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<sup>1</sup> Article 86(b) of the German Commercial Code provides for a special bonus to an agent who accepts the burden of such a clause.

7. Making of the contract and cessation of the contract

76. In the matter of proof of contract, the directive differs from French Law, where Article 1 of the Decree of 23.12.58 requires such contracts to be concluded in writing.

On the other hand, the parties are, however, free to choose the form of contract under Belgian law (although the Law of 30.7.63 introduced the legal presumption of the existence of the contract), in Italian law (where a written contract is required only to meet certain provisions of fiscal legislation) and in German law (where Article '85 of the Commercial code stipulates, nevertheless, an obligation similar to that contained in the directive).

(a) Written proof of contract

77. Article 23 of the directive gives each of the parties the right to receive from the other party a 'signed written document' setting out the terms of the contract and any terms subsequently agreed. This formula avoids imposing upon the parties a written form of contract and has the advantage of invalidating any purported waiver of this right.

Under Article 24 the right to claim a signed written document remains valid even after termination of the contract.

78. Article 23 could be drafted in stricter terms while still leaving the parties free to choose the form of contract that suits them best. The article as it stands makes no explicit reference to a written contract and confines the parties' right to that of obtaining a 'signed written document' setting out what the parties had agreed.

79. In view of the importance to the parties concerned of having at their disposal adequate proof of the existence of a contractual bond either at the time of its conclusion, or during the currency or at the termination of the contract, it would be advisable to amend Article 23 as follows :

'Article 23

If requested by either party, the contract between the commercial agent and the principal and any terms subsequently agreed shall be made in writing.

If the contractual relationship between the commercial agent and the principal does not arise from a written contract, each party shall be entitled to receive from the other party, either during the currency of the contract or upon its cessation, a signed written document setting out all the rights and obligations of the parties. Any purported waiver of this right shall be invalid.'

The present Article 24 would then be deleted.

(b) Duration of contract and period of notice

80. Articles 25 and 26 of the directive deal with the duration of commercial agency contracts. Article 25 refers to the duration of contracts for a fixed or determinable period. If a contract for a fixed or determinable period continues to be performed after that period has expired, it is deemed to be converted into a contract for an indeterminate period.

81. The concept of a 'contract for a determinable period' as laid down in Article 25 might give rise to divergent interpretations. It would thus be advisable to specify that the contract may be 'for a fixed period or a period to be determined by the parties'.

82. Pursuant to Article 26 (1) contracts concluded for an indeterminate period may be terminated by either party by notice. Notice must be given in writing and the period must be the same for both parties.

83. The length of the period of notice laid down in Article 26 (2) seems excessive for two important reasons: first of all, the relationship between the parties - particularly in the initial stages - should have a certain flexibility to enable the contract to be terminated within a limited time; secondly, if the relationship between the principal and his agent deteriorates, it would be counterproductive to prolong its duration. Consequently the period of notice ought to be one month during the first year in which the contract enters into force. This period should successively be increased. The Legal Affairs Committee proposes that it be increased by fourteen days for each additional year which has begun. In any case even if it is for the Member States to determine, pursuant to Article 26(2), the maximum period of notice, it should not be less than three months.

84. As the Committee on Economic and Monetary Affairs points out in its opinion<sup>1</sup> Article 26(2) seems to be unnecessarily detailed when one considers that the proposal for a directive is intended to coordinate the laws of the Member States relating to this subject. Even if it is necessary to stipulate the general principles governing notice it seems superfluous to lay down as in the last sentence of paragraph 2 that 'periods of notice shall coincide with the end of a calendar month'. This provision may therefore be deleted.

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<sup>1</sup> PE 48.145/fin./corr., p. 7.

(c) Termination of the contract

85. Article 27(1) enables either party to terminate the contract before its expiry and without notice in cases where one of the parties has committed a fault such that the other party cannot continue to perform the contract (paragraph 1(a)). This may occur in cases of force majeure or other circumstances altering the basis of the contract (paragraph 1(b)).

86. The Legal Affairs Committee feels that paragraph 1(a) of this Article should specify that one party may terminate the contract also in cases where the other party demonstrates by his negligence that he does not hold the contractual agreement in due regard.

(d) Damages

87. The main provision concerning damages is contained in Article 8 of the directive which protects the agent in cases where the owner of a patent, trade mark, design or model may bring proceedings against the agent in order to prevent him from selling or using the protected product. By paragraph 1, the principal is expressly made responsible for damages suffered by the agent who had been acting on his instructions. Under paragraph 2, the same principle is applied to cases of infringement of the rules of fair competition.

88. Since by Article 8 of the proposal for a directive the onus for damages lies upon the principal, this provision ought to impose on the commercial agent the obligation to inform the principal of any legal action to be taken against him by third parties following a breach of industrial, commercial or intellectual property rights or in the event of a breach of the rules of fair competition. A paragraph 3 should therefore be added to Article 8 worded as follows:

'The commercial agent shall inform the principal of any legal action to be taken against him in respect of the breaches referred to in paragraphs 1 and 2 above'.

89. Article 28 lays down the principle that where either the principal or the agent terminates the contract without observing the period of notice provided for by the contract or by law, and the grounds for termination set out in Article 27 do not apply, that party shall be liable for damages to the other.

90. Article 28 (2) makes provision for the payment of a lump sum by the principal to the agent in lieu of damages.

91. Under Article 27(3) of the directive, the party through whose fault the other party is prevented from performing the contract to its expiry is liable for damages.

(e) Right of retention

92. Article 29 of the directive governs the relations between the parties after the cessation of the contract in respect of restitution of materials and other items held by the agent in the performance of his activities on account of the principal. It concerns particularly materials and documents which should be furnished by the principal to the agent pursuant to Article 10 of the directive.

93. The point should be made in Article 29(2) that whereas the commercial agent has a lien over the principal's movables and other property in order to secure his rights as regards remuneration and reimbursement of expenses, there is nevertheless an obligation on him to maintain the property in his possession in good condition.

8. Goodwill indemnity

94. Under Article 30 of the directive, the agent or his heirs shall be entitled to require payment by the principal of goodwill indemnity after cessation of the contract. This Article therefore requires the Member States to provide in their law that a commercial agent or his heirs shall be entitled to goodwill indemnity irrespective of whether this is already recognized in law or not<sup>1</sup>.

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<sup>1</sup> To clarify the idea of goodwill indemnity it may be useful to quote here a judgment of the French Civil Supreme Court of Appeal of 18 January 1957 which states that

'goodwill indemnity is not the price for the assignment of customers from the agent to the principal; its purpose is to provide the agent, whose contract has been terminated for reasons beyond his control, with compensation for the loss suffered by him in being prevented from continuing to draw profits from a clientele which he has established or developed'.

95. Pursuant to Article 30(1) the indemnity shall be payable:

- where the agent has brought new customers to the principal or has appreciably increased the volume of business with existing customers;
- where, as a result thereof, benefits will continue to accrue to the principal;
- 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 recruited by him.

96. Detailed provisions concerning goodwill indemnity are contained in the remaining paragraphs of Article 30 of the directive. In accordance with paragraph 2, the amount must be equitable and not less than one-tenth of the annual remuneration for each year of the contract on the basis of the average remuneration over the preceding five years, or over the period of the contract, whichever is the shorter.

97. The introduction of 'goodwill indemnity' into systems of law in which it has hitherto been unknown may involve some difficulties. It would be advisable to specify in Article 30 (2) that this indemnity shall be equal to one-tenth (and not more) of the annual remuneration calculated on the basis of the average remuneration during the preceding five years, or during the period of the contract.

98. Article 30(3) ought to state that the goodwill indemnity may not exceed the average annual remuneration calculated in the manner provided in paragraph 2.

99. Finally, Article 30(4) ought to be worded more clearly and should also make reference to paragraph 2. It should in the first place state the general principle according to which even if it is the commercial agent who terminates the contract, goodwill indemnity is due to him if he respects the period of notice required by the contract or by law.

Secondly, if termination of the contract is not justified having regard to the principal's conduct or for reasons which are particular to the agent, goodwill indemnity should not exceed the sum calculated on the basis of Article 30(2).

100. Article 30(5) stipulates that the right to goodwill indemnity may not be contracted out of or restricted by prior agreement and may be exercised only during the period of three months following cessation of the contract.



101. Paragraph 6 is particularly important in that the right to goodwill indemnity remains unaffected by compensation for damages following termination of the contract or the payment of a lump sum indemnity in lieu.

102. However, under Article 31, no claim to goodwill indemnity shall arise;

- where the principal terminates or could have terminated the contract because of a fault committed by the agent;
- where the successor or the heirs of the agent maintain the contract with the principal;
- where the agent terminates the contract without giving notice and without proper grounds under Article 27 (1).

9. Agreements restricting competition

103. Article 32 of the directive deals with agreements restricting competition. These are agreements between the parties which restrict the business activities of the commercial agent following cessation of the contract. They must be made in writing - if not, they are void - and may not exceed a period of two years after cessation of the contract. Furthermore, the agreement must be limited to the geographical area in which the agent had worked or to the clientele entrusted to him or the goods and services covered by his agency at the time when the contract came to an end.

For as long as the agreement restricting competition is in force, the principal must pay the commercial agent a suitable indemnity having regard to all the circumstances of the case.

104. Article 32 (5) lists three cases of termination of contract, bearing upon the validity of an agreement restricting competition:

- the agreement is valid but the payment of the indemnity is not compulsory if the contract is terminated by the principal because of a serious fault on the part of the agent;
- the agreement restricting competition shall apply, unless the agent notifies termination in writing, if the contract is terminated by the agent because of a serious fault on the part of the principal;
- termination of the agreement, effected in writing, may be requested by the party who has been notified of the termination of the contract because of some circumstance which makes it impossible to execute.

105. Finally, paragraph 6 lays down that the principal may terminate the agreement restricting competition before the contract has come to an end. If he does so, he is under no obligation to pay an indemnity.

10. Binding and non-binding provisions

106. Article 33 (1) of the directive allows the parties to derogate from the directive's provisions on payments on account to and remuneration of the commercial agent and, with regard to the 'del credere' clause, the period of notice and the goodwill indemnity. These derogations are permissible only where the commercial agency is undertaken by a company or legal person whose paid-up capital exceeds 100,000 EUA.

107. The Committee on Economic and Monetary Affairs has expressed reservations about the differential treatment as between large and small agents in accordance with Article 33<sup>1</sup>. The ability to derogate from certain provisions of the directive implies greater contractual freedom for the parties to determine their respective rights and obligations.

108. However, this greater measure of freedom reserved to companies and legal persons having a certain capital does not necessarily mean that natural persons and smaller companies are in a less favoured position since they have been excluded in order to maintain intact their entitlement - laid down in Article 15(4) - to receive payment of commission in all cases not later than 'the last day of the third month or in the month during which the principal completed the performance of his part of the contract'.

109. Similar considerations hold good for the other provisions derogation from which is permitted under Article 33 since for a natural person acting as a commercial agent a derogation from Article 19 would in all probability lead to exclusion from the minimum remuneration in the case in which the principal has not made reasonable use of his services. A further example is that a derogation from Article 21 would mean the exclusion from the benefit of the 'del credere' clause etc.

110. However, Article 35 of the directive expressly lists those provisions of national law to be promulgated in accordance with the directive which may not be derogated from by the principal or the commercial agent. These are measures which confirm the obligation on the parties to act fairly and in good faith, the agent's right to remuneration, his right to reimbursement of expenses and normal and special commission, the agent's right to damages, the 'del credere' provisions, the right to demand a written contract, the period of

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<sup>1</sup> PE 48.145/fin./corr., paragraph 13

notice, the goodwill indemnity, the agreement restricting competition and the limitation of rights.

111. The Legal Affairs Committee feels that this long list of measures in Article 35 has the effect of making the directive as a whole too inflexible. It would therefore prefer to see the existing version of Article 35 deleted and requests the Commission to redraft it.

#### 11. Limitation periods

112. Article 34(1) lays down a uniform period of limitation of four years, commencing from the end of the year during which the claim arose, in respect of claims arising under the provisions of this directive. This period seems excessive taking account of the fact that the parties would be forced to carry a not inconsiderable burden maintaining archives and documents merely in order to comply with the obligation to keep written proof for the whole period laid down in the proposal for a directive. Consequently it would be appropriate to reduce the limitation period referred to in Article 34 (1) to **three years**.

113. However, the limitation period begins from the end of the year during which the contract came to an end in the case of claims arising during the last ten years of the contract for amounts not been included in the statements of earned commission. This also applies to the reimbursement of expenses under Article 20 of the directive.

#### 12. Entry into force of the provisions

114. Article 36 lays down that Member States must adopt before 1 January 1980 the legislation necessary to bring their regulations into line with the provisions of the directive. This legislation must be applied as from 1 July 1980. This fairly lengthy period is justified by the complexity of the process of harmonization under the directive.

#### IV. CONCLUSIONS

115. The aims of the proposal are to:

- harmonize Member States' laws with regard to the legal status of self-employed commercial agents;
- abolish the existing differences between legal provisions governing commercial agencies since these tend to perpetuate certain disparities in the conditions of competition within the Community;

- introduce measures designed to give common protection to commercial agents mandatory on all Member States;
- encourage the making and execution of agency contracts between parties living in different Member States or in the same State to ensure that this sector also benefits from the conditions obtaining in a single market;
- introduce maximum legal certainty into the provisions governing the subject of this directive.

116. The Legal Affairs Committee has considered the provisions of the present proposal for a directive and proposes the amendments and deletions set out above.

117. These amendments and deletions concern in particular:

- The definition of commercial agent (Article 2);
- Scope of application of the Directive (Article 3);
- The commercial agent's rights and obligations (Article 5, 6 and 8)
- The principal's obligations (Article 10);
- Remuneration and reimbursement of expenses (Articles 11, 12, 13 and 15);
- Statement of amount of commission and examination of books of account (Article 18);
- Del credere agreements (Article 21);
- Bankruptcy of the principal (Article 22);
- Proof of contract (Articles 23 and 24);
- Cessation of the contract (Articles 25, 26 and 27);
- The agent's lien over the principal's property (Article 29);
- Goodwill indemnity (Article 30);
- Limitation periods (Article 34).
- Provisions from which there may be no derogation (Article 35)

118. Since the proposal for a directive contains a balanced series of measures to regulate the main aspects of the contractual relationship between agent and principal, the Legal Affairs Committee, subject to the reservations expressed above, is able to approve it.

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

Draftsman : Mr O. Guldberg

On 15 February 1977 the Committee on Economic and Monetary Affairs appointed Mr O. GULDBERG draftsman.

It considered the draft opinion at its meeting of 1 April 1977 and adopted it unanimously with 3 abstentions.

Present: Mr Glinne, Chairman, Mr Notenboom, Vice-Chairman;  
Mr Guldberg, draftsman; Mr Alber (deputizing for Mr De Keersmaecker),  
Lord Ardwick, Lord Bruce, Mr Cousté, Mr Covelli (deputizing for Mr Clerfaÿt),  
Mr Haase, Mr Nyborg, Mr Ripamonti, Mr Spinelli, Mr Würtz (deputizing for  
Mr Prescott), Mr Zeyer.

1. Freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small-craft industries were introduced in a 1964 directive<sup>1</sup>. The purpose of the present proposal for a directive is to make it easier to exercise this freedom in practice and to guarantee or improve legal protection for commercial agents.

2. The proposal for a directive relates to self-employed commercial agents. It excludes agents who are regarded as wage-earners (commercial travellers) or agents who carry on their activities in the insurance or credit fields. Separate directives are being drawn up for these two groups and it is to be hoped that the principles agreed on for self-employed commercial agents will also be adopted for commercial travellers.

The Committee on Economic and Monetary Affairs is not however convinced of the advisability of submitting related directives such as these one by one. It would have preferred to have been able to form an impression of how the principles now proposed by the Commission would affect other areas of legislation.

3. Commercial agents play an important marketing role, especially across the Community's internal land frontiers and consequently also in the growth of intra-Community trade.

Information on the importance of commercial agents is however incomplete. The Commission estimates that some 800,000 commercial agents will be covered by the proposed directive but this would appear to be an exaggerated estimate.

As a further example of the importance of commercial agents, it should be noted that there are about 90,000 commercial agents in West Germany of which about 30,000 belong to a union; these 30,000 account for 35% of all sales. 65% of West German industrial concerns work with commercial agents and 40% of the West German commercial agents represent foreign suppliers (12% in the mid-1950s)<sup>2</sup>.

The importance of the commercial agent varies however from country to country and from industry to industry.

4. The Committee on Economic and Monetary Affairs agrees with the Commission that Member States' diverse rules governing contracts between commercial agents and principals represent obstacles to the carrying-on of their business in the Community and to friction-free trade in the common market.

<sup>1</sup> OJ No. 56, 4.4.1964, p.869

<sup>2</sup> Source of information on West Germany: Journal of the Ministry for Foreign Affairs, Copenhagen, March 1977

The commercial agent's right to commission and a goodwill indemnity when the contract is terminated also has a considerable effect on the costs to be borne by a principal who has contractual ties with a commercial agent. Costs are obviously highest in Member States where commercial agents have most legal protection. The different rules applicable in different countries therefore create unequal conditions of competition.

For both these reasons, the Committee on Economic and Monetary Affairs endorses the Commission's efforts to introduce greater uniformity in Member States' rules governing the relationship between commercial agents and principals and compliments the Commission on its painstaking and well-presented proposal.

5. On the other hand, however, the commercial agent as defined in the proposals for a directive is traditionally self-employed<sup>1</sup>.

As far as the Committee on Economic and Monetary Affairs is concerned, it is therefore a question of how far the Commission's proposal has achieved the right balance between providing fair social and legal protection of the 'economically weaker' partner to a contract and maintaining the self-employed status of the commercial agent.

6. In this connection, the Committee on Economic and Monetary Affairs draws the attention of the Legal Affairs Committee to the fact that the rules proposed by the Commission provide the commercial agent with greater protection than does present West German legislation which, together with French and Belgium legislation in this area, is the most advanced in the Community.

In addition, the present proposal provides greater protection for the commercial agent than did the proposal which the Commission had almost finalized in 1971 but which was held back to take account of the situation in the three new Member States; this tightening-up of the rules is paradoxical since the three new Member States do not have any particularly extensive legislation.

7. The implementation of the proposed directive may particularly affect the interest of export firms in concluding agreements.

A firm planning an export drive has several options: advertising, commercial travellers, exhibitions, wholesalers, commercial agents, subsidiary companies etc. The type of sales drive it opts for obviously depends on

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<sup>1</sup>One-third of the West German commercial agencies have only one travelling representative apart from the commercial agent and his wife, whilst the two largest firms have eight travelling representatives. The number of clerical workers varies from the agent's wife to 24 (same source as previously)

estimated costs and profits. More stringent rules governing agency agreements would influence the firm's choice between the different alternatives.

In this connection it is not insignificant that the present proposal does not allow for the possibility of agreements for a trial period. In many cases the procedure followed so far by export firms has been to first conclude a trial agreement with a commercial agent<sup>1</sup> and then to go over to a more binding agreement if the trial period is a success. Subsequently, it may prove to be more expedient for the firm to set up a subsidiary company, possibly with the former commercial agent as director.

The Commission's proposals may mean that many agreements could simply come to nothing because, with the cost and risk involved in such agreements, the firm would decide right at the start of an export drive to use its own commercial travellers or to set up a subsidiary company.

8. One of the main reasons why commercial agents are attractive partners for manufacturing industries is, in the opinion of the Committee on Economic and Monetary Affairs, the very fact that they are self-employed businessmen with the responsibility and independence that this implies. Greater social and legal protection should not have the effect of making them less attractive in this respect.

9. The Commission's decision to base the proposal on Article 117 of the EEC Treaty<sup>2</sup> and to try and introduce minimum standards for Member States' laws which, if anything, are more stringent than the most advanced national law clearly involves a risk of extreme difficulty in reaching agreement in the Council.

In the opinion of the Committee on Economic and Monetary Affairs, this risk is further heightened by the fact that to start with there are considerable differences in Member States' laws and that some of the provisions of the proposed directive are unnecessarily detailed.

Differences in Member States' laws are more superficial than real, often arising from differences in legal systems. The United Kingdom, for instance, has 'rules of conduct', 'institutions' and 'charters' rather than legislation as such.

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<sup>1</sup> Especially if the firm is not familiar with this form of marketing and/or if it does not know the commercial agent involved

<sup>2</sup> '... to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.'



An example of the unnecessarily detailed nature of the proposal for a directive is Article 26 which states that periods of notice must coincide with the end of a calendar month. The directive would be no less valuable in promoting freedom of establishment, freedom of trade and equal conditions of competition if such provisions were deleted.

10. The Committee on Economic and Monetary Affairs recommends that in order to increase the possibility of achieving some uniformity in national rules and to maintain the flexibility which is a characteristic of commercial agents' contracts, the Legal Affairs Committee should collaborate with the Commission on toning down the most stringent rules or at least increasing the areas in which the partners can decide freely on their terms of co-operation. Apart from these general but important reservations, the Committee on Economic and Monetary Affairs endorses the Commission's proposals.

11. Lastly, the Legal Affairs Committee should note two particular problems.

12. Under Article 7(2) and (3), the commercial agent must obtain the 'consent' of the principal for the carrying-on of activities for his own account or for account of a third party if those activities involve goods or services which compete with those for which he has been appointed to represent the principal. The term 'compete' in this connection is a very vague criterion. It is obviously not advisable for a commercial agent with the agency for skirts for instance to sell other skirts on his own or a third party's behalf without the knowledge or consent of the principal. On the other hand, it would be natural for a commercial agent with the agency for skirts to be able to sell dresses and slacks too without concluding an agreement with the principal. The committee therefore recommends that the term 'compete' be clarified, possibly by distinguishing between cases that require the principal's consent and those where the principal's knowledge is enough.

13. Under Article 33, it is possible to derogate from some of the mandatory provisions in the Directive where the agency is undertaken by a company or legal person whose paid-up capital is more than 100,000 EUA. Several members of the committee wished the Committee on Legal Affairs to take note in their discussions of this differential treatment as between large and small agents. The Commission pointed out that this limit had been introduced at the request of the Member States; moreover, it said in its explanatory memorandum<sup>1</sup>: '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'.

The Committee on Economic and Monetary Affairs decided, having regard to the general reservations mentioned above, to leave it to the Legal Affairs Committee to adopt a position on this provision.

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<sup>1</sup>Page 23 of the Commission's proposal