Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)

COUNCIL DIRECTIVE

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on the coordination of the laws of the Member States relating to self-employed commercial agents

(86/653/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

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

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

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

Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents *vis-à-vis* their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States;

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

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

Whereas it is appropriate to be guided by the principles of Article 117 of the Treaty and to maintain improvements already made, when harmonizing the laws of the Member States relating to commercial agents;

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

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Scope

Article 1

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

2 For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.

3 A commercial agent shall be understood within the meaning of this Directive as not including in particular:

— a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association,

— a partner who is lawfully authorized to enter into commitments binding on his partners,

— a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy.

Article 2

1 This Directive shall not apply to:

— commercial agents whose activities are unpaid,

— commercial agents when they operate on commodity exchanges or in the commodity market, or

— the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries.

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

CHAPTER II

Rights and obligations

Article 3

1 In performing has activities a commercial agent must look after his principal's interests and act dutifully and in good faith.

2 In particular, a commercial agent must:

a make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;

b communicate to his principal all the necessary information available to him;

c comply with reasonable instructions given by his principal.

Article 4

1 In his relations with his commercial agent a principal must act dutifully and in good faith.

2 A principal must in particular:

a provide his commercial agent with the necessary documentation relating to the goods concerned;

b obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

3 A principal must, in addition, inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

Article 5

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

CHAPTER III

Remuneration

Article 6

1 In the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities. If there is no such customary practice a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

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

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

Article 7

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

a where the transaction has been concluded as a result of his action; or

b where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

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

— either where he is entrusted with a specific geographical area or group of customers,

— or where he has an exclusive right to a specific geographical area or group of customers,

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

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

Article 8

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

(a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or

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

Article 9

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

Article 10

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

a the principal has executed the transaction; or

b the principal should, according to his agreement with the third party, have executed the transaction; or

c the third party has executed the transaction.

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

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

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

Article 11

1 The right to commission can be extinguished only if and to the extent that:

— it is established that the contract between the third party and the principal will not be executed, and

— that face is due to a reason for which the principal is not to blame.