

## II

(Preparatory Acts)

## COMMISSION

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

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

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

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

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

Whereas trade in goods between Member States should be carried on under conditions which are

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

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

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

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

## Scope of Application

## Article 1

1. The harmonization measures prescribed by this Directive apply to the laws, regulations and

<sup>(1)</sup> OJ No 56, 4. 4. 1964, p. 869/64.

administrative provisions of the Member States governing the relations between self-employed commercial agents and their principals.

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

#### Article 2

For the purposes of this Directive the expression 'commercial agent' means a self-employed intermediary who has continuing authority for a fixed or indeterminate period to negotiate and/or to conclude an unlimited number of commercial transactions in the name and for account of another person (who is hereinafter called 'the principal').

#### Article 3

This Directive does not apply:

- to intermediaries who are wage or salary earning employees within the meaning of Directive 64/224/EEC of 25 February 1964,
- to intermediaries who act in their own name,
- to intermediaries appointed to negotiate or to conclude in the name of the principal a specified transaction or a number of specified transactions only,
- to intermediaries who carry on their activities in the insurance or credit fields.

#### Article 4

The Member States are at liberty:

1. not to apply Articles 15 (4), last sentence, 19, 26 (2), 30 and 31 to persons who act as commercial agents but by way of secondary activity only; the question whether the activity is carried on in that way being determined in accordance with commercial usage in the State whose law governs the relations between principal and agent;
2. to apply some or all of the provisions of this Directive, as the case requires, to persons who carry on other trades or professions and who, although they work for their own account and/or in their own name, can under the national law be assimilated to commercial agents.

## CHAPTER II

### Rights and duties of the parties

#### Article 5

1. The commercial agent shall in carrying out his activities act fairly and in good faith *vis-à-vis* his principal and third parties. He shall perform his duties with the care which a sound businessman would exercise.

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

- (a) at all times supply to the principal the information he needs in order to conduct the business satisfactorily, especially as regards the solvency of third parties in current commercial transactions of which the agent is aware;
- (b) keep separately from his own moneys all sums received for the principal and pay them over to him without delay;
- (c) keep proper accounts relating to the accounts receivable and assets of his principal;
- (d) look after such property as is given into his possession with the care which a sound businessman would exercise;
- (e) comply with all instructions given to him by the principal for attaining the object of the agency, provided they do not basically affect the agents' independence. The agent may arrange his activities and use his time as he thinks fit.

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

#### Article 6

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

#### Article 7

1. The commercial agent may carry on business for his own account or for account of a third party provided that business is in goods or services which

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

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

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

#### Article 8

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

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

#### Article 9

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

2. The agent shall be presumed to have authority:

- to receive complaints from third parties where goods or services supplied are defective, and, where goods are not accepted, notices that they are available for collection,
- to protect the principal's rights to have the means of proof preserved.

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

#### Article 10

1. The principal shall in his relations with the commercial agent act fairly and in good faith. He

shall make available to the commercial agent all the assistance he needs, having regard to the circumstances, for the performance of his part of the contract.

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

- (a) supply the agent with samples, designs, price lists, printed advertising material, conditions of contract and other documents relating to the goods and services for which he has been appointed agent;
- (b) provide the commercial agent with all information which is requisite for the performance of the contract, particularly as regards current and prospective production, and inform the agent without delay when the principal foresees that the volume of commercial transactions that the principal will be able to execute will be considerably lower than the commercial agent could normally expect.
- (c) inform the commercial agent without delay of the acceptance, refusal or, in appropriate cases, the partial performance of a commercial transaction.

### CHAPTER III

#### Remuneration and reimbursement of expenses

#### Article 11

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

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

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

*Article 12*

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

- (a) where the transaction is procured by the commercial agent; or
- (b) where the transaction is entered into with a third party with whom the agent has previously negotiated or agreed a transaction falling within the terms of his agency; or
- (c) where the commercial agent is appointed to cover a specific geographical area or a specific group of people and the transaction is entered into in that geographical area or with a person belonging to that group, notwithstanding that the transaction was negotiated or agreed otherwise than by the commercial agent.

2. The commercial agent shall not be entitled to the commission referred to in paragraph 1 if by virtue of Article 13 that commission is payable to another agent.

*Article 13*

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

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

*Article 14*

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

*Article 15*

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

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

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

3. If the principal or the third party fails to perform his part of the transaction in full the amount of commission due shall be calculated by reference to the value of that part performed whose value is the higher.

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

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

*Article 16*

1. The right to commission shall be extinguished:

- (a) where the commercial agent has not fulfilled his obligations under Article 5 (2) (a), the principal having entered into the commercial transaction without being aware of the third party's insolvency and it being established that the third party has not or will not perform his part of the transaction; or
- (b) if and to the extent that it has become impossible to perform the transaction, this being in no way attributable to the principal; or
- (c) if performance of the transaction cannot reasonably be required of the principal, particularly where there exist in relation to the third party serious grounds for non-performance.

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

#### Article 17

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

#### Article 18

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

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

#### Article 19

1. The agent shall be entitled to remuneration if he has already fulfilled his obligations under the agency contract or if he has already taken steps to meet those obligations, even though the principal has made no use of his services or has used them to a considerably lesser extent than the agent could normally have expected, unless the principal's conduct is due to circumstances beyond his control.

2. Usually, in calculating the remuneration referred to in paragraph 1, account shall be taken of all the circumstances, the basis being the average monthly remuneration of the commercial agent during the 12 months before the circumstances described in paragraph 1 arose. If the contract was concluded less than 12 months previously the remuneration shall be calculated on the basis of the average monthly remuneration paid during the currency of the contract.

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

- (a) the expenses incurred by the commercial agent for the purpose of setting up the agency and preparing to commence business;
- (b) the amounts which the commercial agent has saved on expenses, the amounts which he has earned in carrying on some other activity and those which he has deliberately not earned because he has declined some activity which was nevertheless suitable.

#### Article 20

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

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

### CHAPTER IV

#### Del credere

#### Article 21

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

2. (a) A *del credere* agreement covering transactions which were not negotiated or agreed by the commercial agent shall be void.
- (b) A *del credere* agreement shall be concluded in relation only to a particular commercial transaction or in relation to a series of such transactions with particular third parties who are specified in the agreement.
- (c) Any *del credere* agreement which amounts to an unlimited guarantee on the part of the commercial agent for transactions falling within the first sentence of paragraph 1 shall be void.

3. The commercial agent shall be entitled to be paid a separate commission, of reasonable amount,

for transactions entered into to which his *del credere* guarantee applies.

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

- (a) in which the place of business of the principal or of the third party is outside the territory of the Community or, if the principal or third party has no place of business, then his place of habitual residence is outside that territory; or
- (b) which the agent has been given full power to agree and to carry out.

#### CHAPTER V

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

##### Article 22

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

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

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

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

#### CHAPTER VI

#### Making of the contract and cessation of the contract

##### Article 23

Each party shall be entitled to receive from the other a signed written document setting out the terms of the contract and any terms subsequently agreed. Any purported waiver of this right shall be invalid.

##### Article 24

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

##### Article 25

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

##### Article 26

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

2. During the first year of the contract the notice shall be of not less than two months. After the first year the period of notice shall be increased by one month for each additional year which has begun. The Member States may prescribe a maximum period of notice which shall in no case be less than 12 months. Periods of notice shall coincide with the end of a calendar month.

##### Article 27

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

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

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

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

#### *Article 28*

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

2. In the cases referred to in paragraph 1 the commercial agent shall be entitled to claim a lump-sum indemnity in lieu of damages where the contract is terminated by the principal or declared by him to be at an end. The indemnity shall be calculated on the basis of the average remuneration paid to the agent during the period of 12 months preceding the declaration or termination. If the contract was concluded less than 12 months previously the indemnity shall be calculated on the basis of the average remuneration received during the currency of the contract up to the time when the relevant event took place. The indemnity shall be paid for the unexpired period of the contract but subject to a maximum period of two years.

#### *Article 29*

1. Upon cessation of the contract the commercial agent shall deliver up to the principal the materials and documents referred to in Article 10 (2) unless he has disposed of them in the normal course of business.

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

#### *Article 30*

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

- (a) where the agent has brought new customers to the principal or has appreciably increased the volume of business with the existing customers; and
- (b) where as a result thereof substantial benefits will continue to accrue to the principal; and
- (c) where, notwithstanding Article 13, the cessation of the contract results in his not receiving

remuneration for transactions negotiated or agreed, after the contract has come to an end, between the principal and the customers referred to in subparagraph (a) above.

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

3. The amount of the indemnity shall not exceed twice the average annual remuneration calculated in the manner provided in paragraph 2. Subject always to this maximum, either party may request that the amount of the indemnity be calculated otherwise than as provided in paragraph 2 where, having regard to all the circumstances, it would be equitable so to calculate it.

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

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

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

#### *Article 31*

No claim to goodwill indemnity shall arise:

- (a) where the principal terminates or could have terminated the contract under Article 27 (1) (a);
- (b) where the principal maintains the contract on foot with the agent's successor who was introduced by the agent himself or by his heirs, the successor being from the legal point of view substituted entirely in the place of the agent;

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

#### *Article 32*

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

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

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

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

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

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

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

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

## CHAPTER VII

### General and final provisions

#### *Article 33*

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

2. The European unit of account (EUA) means the unit of account defined in Commission Decision 3289/75/ECSC of 15 December 1975 <sup>(1)</sup>.

#### *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 10 years of the contract for commission which has not been included in the statement referred to in Article 15 (5), or for reimbursement of expenses under Article 20, the limitation period shall begin to run from the end of the year during which the contract came to an end.

#### *Article 35*

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

2. In addition to the cases of derogation permitted under Article 21 (4) and Article 33, the parties may derogate from the compulsory provisions specified in the foregoing paragraph in relation to those activities which the commercial agent carries on outside the Community.

#### *Article 36*

1. The Member States shall before 1 January 1980 adopt and publish the provisions which are necessary

<sup>(1)</sup> OJ No L 327, 19. 12. 1975, p. 4.



to comply with this Directive and shall inform the Commission thereof immediately. They shall apply those provisions from 1 July 1980.

2. From the time of notification of this Directive the Member States shall inform the Commission, in good time to enable it to communicate its observations, concerning the draft laws, regulations

and administrative provisions which they plan to adopt in the field governed by this Directive.

*Article 37*

This Directive is addressed to the Member States.

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