



# The Law Commission

(LAW COM. No. 84)

## Law of Contract

### REPORT ON THE PROPOSED E.E.C. DIRECTIVE ON THE LAW RELATING TO COMMERCIAL AGENTS

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3(1)(E)  
OF THE LAW COMMISSIONS ACT 1965

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by Command of Her Majesty  
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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**THE PROPOSED EEC DIRECTIVE ON THE LAW  
RELATING TO COMMERCIAL AGENTS**

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## THE LAW COMMISSION

### THE PROPOSED EEC DIRECTIVE ON THE LAW RELATING TO COMMERCIAL AGENTS

*Advice to the Lord Chancellor under section 3(1)(e) of the  
Law Commissions Act 1965*

*To the Right Honourable the Lord Elwyn-Jones, C.H.,  
Lord High Chancellor of Great Britain*

#### PART I

#### INTRODUCTION

1. In April 1973 the Directorate for Social Affairs and the Directorate for the Internal Market of the EEC prepared a document for consultation with Denmark, Ireland and the United Kingdom. This document consisted merely of a draft directive together with an explanatory memorandum. The Commission of the European Communities proposed that the draft directive be discussed by representatives of the Commission and representatives of Denmark, Ireland and the United Kingdom at a Conference on 21 and 22 June 1973 and that after this Conference a proposed directive taking into account the views of the new members would be sent by the Commission to the Council of Ministers. The draft directive had been prepared by the Commission after detailed discussions with the Six over a period of some years. The Commission considered it to be in virtually final form, so that the proposed directive could be sent to the Council of Ministers shortly after the Conference.
2. The Solicitor of the Department of Trade and Industry asked the Law Commission whether they could assist the Department in handling the draft directive. The legal staff of the Law Commission gave the Department assistance between May 1973 and May 1975. A member of the legal staff of the Law Commission was made available for the meeting on 21 and 22 June 1973 (where the draft directive was discussed by representatives of the Commission of the European Communities and representatives of Denmark, Ireland and the United Kingdom) and further assistance was given to the Department at meetings with members of the staff of the EEC and in discussion of the detailed provisions of the directive. The Department was also assisted in dealing with the consultation which they conducted on the draft directive and at meetings with representatives of the Manufacturers' Agents' Association, the Confederation of British Industry, the Bar Council, The Law Society and other bodies.
3. At that stage the Law Commission's function was confined to assisting and advising the Department on the first draft of the directive, and between May 1975 and the end of 1976 no further assistance was requested of them. On 14 December 1976, the Commission of the European Communities sent to the Council of Ministers a proposed directive which differs in some respects from the previous draft. A copy of the directive and the explanatory memorandum under cover of a letter from the Commission of the European Communities to the Council of Ministers dated 5 January 1977 is attached as

Annex A. The Law Commission had played no part in the new draft. By letter dated 1 March 1977 we were asked to tender you our advice in accordance with section 3(1)(e) of the Law Commissions Act 1965 on the attitude which we would recommend the United Kingdom to adopt towards the proposed directive. You will appreciate that our advice was asked for as a matter of some urgency and we have not therefore been able to follow our usual practice of extensive consultation through the publication of a working paper.

## PART II

### OUR GENERAL APPROACH

4. Before we consider the content of the directive as such, we should say something about its *vires* in terms of the Treaty of Rome and its status as an instrument of community law. The Commission of the European Communities have indicated<sup>1</sup> that the directive is based on Articles 57 and 100 of that Treaty. Article 57 imposes on the Council of Ministers a duty to issue directives for the co-ordination of laws in Member States concerning the taking up and pursuit of activities as self-employed persons. Since Article 2 of the directive declares a defining characteristic of a commercial agent to be that he must be self-employed, it seems that the directive is *intra vires* Article 57 of the Treaty. Article 100 of the Treaty lays upon the Council of Ministers the duty to issue directives for the approximation of such laws in Member States as “directly affect the establishment or functioning of the Common Market”. It is, we think, possible to contend with some justification that the differences in the laws of Member States relating to commercial agents do affect the functioning of the Common Market in that they inhibit the commercial agent’s freedom of establishment in the EEC and may interfere with the freedom of movement of goods and services between Member States<sup>2</sup>. Our conclusion is that the directive as a whole is almost certainly *intra vires* the Treaty of Rome<sup>3</sup>.

5. A directive is, by Article 189(3) of the Treaty of Rome, “binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method”. Our view is that the directive, as presently drafted, contains provisions of such a detailed and complex nature as would in effect deprive the national authorities of the choice as to the method by which they should be implemented. We think that the contents of the directive are thus to some extent inconsistent with the status of a directive as an instrument of community law, and that the directive is an inappropriate vehicle for the creation of this kind of detailed set of rules of private law.

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<sup>1</sup> See Commissioner Gundelach’s letter to the President of the Commission accompanying the proposed directive and the explanatory memorandum, Annex A.

<sup>2</sup> Both these freedoms are treated by the Treaty of Rome as integral features of the Common Market (see Article 12 *et seq.*, and Article 52 *et seq.*).

<sup>3</sup> However, we take the view that some of the directive’s provisions, such as those dealing with the bankruptcy of the principal (Article 22) and with the agent’s relations with third parties (*e.g.*, Articles 5(1) and 9), may be *ultra vires* the Treaty.

6. The proposed directive contains detailed rules regulating the legal relationship between “commercial agents”, as defined by Article 2, and their principals. These rules relate to the rights and duties of the parties, remuneration and reimbursement of expenses, *del credere* commercial agents, bankruptcy of the principal and the making and cessation of the contract. It constitutes a fairly comprehensive codification of the law relating to the legal relationship between the commercial agent and his principal. Some of the rules are declaratory of terms of a general character that are implicit in the relationship of principal and agent, for example, the mutual obligations of good faith; others deal in detail with matters, such as the entitlement to remuneration, which one would expect to find provided for expressly in the agency contract, probably after negotiation. Many of the rules are made mandatory by Article 35; this article provides that any stipulation whereby the parties derogate, to the detriment of the agent, from a provision incorporating a mandatory rule is rendered void.

7. The proposed directive thus has three main features:—

- (a) it contains provisions, out of which the parties cannot contract, for the protection of the commercial agent;
- (b) it contains provisions which, in the absence of contrary agreement, will form the basis of the legal relationship between the principal and the commercial agent: it thus provides what might be described as a “model contract” for commercial agents;
- (c) it provides a codification of that part of the law of agency which deals with the relationship between the commercial agent and the principal.

8. Before we discuss any of these three features of the directive it is obviously necessary to determine precisely the category of persons who are called “commercial agents” and who thus fall within the scope of the directive.

### **The scope of the directive and its rationale**

9. “The word ‘agency’, to a common lawyer, refers in general to a branch of the law under which one person, the agent, may affect the legal relations of another person, the principal, as regards other persons, called third parties, by acts which the agent is said to have the principal’s authority to perform, and which are often regarded as the principal’s acts and not as those of the agent”<sup>4</sup>. “The mature law recognises that a person need not always do things that change his legal relations in person: he may utilise the services of another to change them, or to do something during the course of which they may be changed”<sup>5</sup>.

10. Under the directive a commercial agent is an intermediary who has authority to negotiate and/or to conclude commercial transactions in the name or for the account of his principal. Under Article 9(1) he only has authority to conclude agreements when the principal empowers him to do so. To the extent that the power to affect the legal relations of the principal appears to be the

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<sup>4</sup> *Bowstead on Agency* 14th ed., 1976.

<sup>5</sup> *ibid.*, p. 2.

exceptional situation rather than the normal one, the typical commercial agent differs from the typical agent of the English common law.

11. It is also necessary to comment on the categories of the business intermediaries who are *not* within the definition in Article 2. Under the article the intermediary must be self-employed and this serves to exclude a large number of representatives and commercial travellers who are employees and who are paid partly by wage or salary and partly by commission. Under the article the intermediary must negotiate or transact in the name of and for the account of another person. This will exclude distributors who carry out sales and services in their own name.

12. The term “commercial agent” has no precise connotation in English law. It does not represent a category of persons who have a common identifiable legal characteristic. Indeed, we are not convinced that the term has any precise connotation. Article 2 refers to the commercial agent’s authority to negotiate or conclude “commercial transactions”. Again, the English lawyer can attach no precise meaning to the term “commercial transaction”.

### **The directive and the German law**

13. The “commercial agent” of the directive is clearly based on the German *Handelsvertreter* and the provisions of the directive are based on sections 84–92c of the German Commercial Code, which were introduced in 1953<sup>6</sup>. “The concept of ‘*Handelsagent*’ or ‘*Handelsvertreter*’ is of an entirely different nature from either that of *Vertretung* or that of agency (in the English sense). A *Vertreter* or an agent (in the English sense) is a person who performs a certain function, no matter for whom and no matter whether he does so permanently or temporarily and in commerce or privately. A *Handelsagent*, too, is one who performs certain functions, but he must do so permanently in commerce and for a principal who must be his standing client. The law on *Handelsagenten* is thus a specialised branch of commercial law dealing with the affairs of a certain type of businessman, not one dealing with a technical legal function. It is the law of a social group, framed with due regard to the special social and economic needs and requirements of this group and of those who come in contact with it. The closeness of the definition (on which more will have to be said soon) has enabled the legislature to be definite in regard to the provisions which it could enact”<sup>7</sup>.

14. It is important to recognise that in German law the commercial agent is identifiable as a member of a particular social group with special social and economic needs. He appears to be a sort of quasi-employee, who, although he nevertheless retains some independence, is substantially dependent on his principal and so needs to be protected. “Commercial agents in the view of most contemporary continental laws, including German and Swiss law, are a group of men who deserve and require the special protection of the law in regard to their contractual relations. They are, or tend to be, it is thought, an exploited class so that the law must step in, in order to prevent or at least restrict

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<sup>6</sup> An English translation of these sections is attached, marked Annex B.

<sup>7</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn in British Institute of International and Comparative Law; Special Publication No. 3 (1964), p. 3.

their exploitation. The provisions intended to afford this protection are rules of strict law and in consequence incapable of being derogated from by these parties”<sup>8</sup>. The directive contains provisions similar to the mandatory provisions of sections 84–92c of the German Commercial Code and in addition contains further far-reaching mandatory provisions for the protection of the commercial agent.

15. All the rules in sections 84–92c of the German Commercial Code, the mandatory provisions and the other provisions, are, of course, understood by German lawyers and applied by the German courts in the context of the remainder of the German Commercial Code and the general provisions of German civil law. German lawyers and German courts will have this context to assist them in applying these sections, and in particular, they will be able to draw upon rules of German law in regard to interpretation of the rules, the ambit of the rules and the remedies available for the enforcement of the rules. However, an English lawyer in applying the directive will have no such body of law upon which to draw. The equivalent rules of English law will be inappropriate and may indeed be distorted by being so used.

16. There are two particularly striking mandatory provisions in the German law which we will mention at this stage:—

(i) Section 89b of the German Commercial Code entitles the commercial agent to a special adjustment claim on termination, a type of redundancy or severance payment. A similar, although more elaborate and less flexible, provision appears in the directive (Articles 30 and 31). This payment is called by the directive “a goodwill indemnity”.

(ii) Section 90a of the German Commercial Code provides that the principal must pay reasonable compensation, not provided for by his contract, to the agent, during the currency of a restraint clause by which he is bound after the termination of his contract. Again, a similar, although more elaborate and less flexible, provision appears in the directive (Article 32). This payment we will call an “Article 32 payment”.

17. Professor Cohn points out that the agent’s entitlement to the goodwill indemnity under section 89b of the German Commercial Code is “intended to compensate him for the fact that as a rule the agent’s work increases the goodwill of the principal and not that of the agent and that on termination of the agency the principal thus derives a benefit from this accrued goodwill, while the agent suffers a corresponding loss”<sup>9</sup>. Presumably the rationale of section 90a of the German Commercial Code is the assumed inferior bargaining position of the agent.

18. Section 84(1) of the German Commercial Code defines a commercial agent in much the same way as Article 2 of the directive. It seems that commercial agents comprise a social group, with particular social and economic needs, that can be identified in Germany.

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<sup>8</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn in *British Institute of International and Comparative Law; Special Publication No. 3* (1964), p. 4.

<sup>9</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn in *British Institute of International and Comparative Law; Special Publication No. 3* (1964), p. 17.



## The directive and English law

19. We are unable to identify such a social group in England. We are aware that there exists a class of persons who may be described as manufacturers' selling agents. We are also aware that the Manufacturers' Agents' Association is a body in this country which represents the interests of a number of such agents. We are also aware that this Association has been making representations to the relevant Department for many years for legislation to be enacted to protect its members' interests and that it has been making strenuous representations to the relevant Department in support of the proposed directive. We assume that the majority of its members fall within the scope of Article 2, although we do not know whether it is exceptional for such agents to be authorised to conclude transactions on behalf of their principals.

20. We do not know whether the present law sufficiently protects the social and economic needs of manufacturers' agents. It may be that they often have unequal bargaining power as compared with their principals, although it must be remembered that in English commerce and industry not all manufacturers are large corporations of great bargaining power and not all manufacturers' agents are one-man businesses of poor financial standing. It may of course be that there is a mischief and that manufacturers' agents do, as they contend, require special protection from English law. Such limited consultation as we have been able to engage in leaves us in doubt as to whether this is so. But manufacturers' agents do not comprise the whole, nor even a great proportion, of the persons who appear to be covered by Article 2. In the next paragraph we point out that wide categories of other intermediaries appear to be caught within the definition in Article 2. It is by no means clear that their social and economic needs are the same as those of manufacturers' agents and it seems highly improbable that they are in need of the extensive protection provided by the mandatory provisions of the directive.

21. It seems to us that, as drafted, Article 2 may very well catch persons such as travel agents, literary and theatrical agents, advertising agents, stockbrokers, loading brokers and forwarding agents to the extent that they act for particular principals over a period of time. Of course, to fall within Article 2 they must be self-employed and they must act in the name of and for the account of their principal, but it is suggested that this would not be an unusual relationship for many members of these classes of person. Indeed, solicitors, accountants and patent agents instructed on a retainer basis may also fall within Article 2. These examples are given by way of illustration only: in Germany it has even been held that a man employed to win customers for a dancing master fell within section 84 of the German Commercial Code, upon which Article 2 of the directive is based<sup>10</sup>.

22. It is clear therefore that Article 2 extends to cover a large and amorphous body of very different persons. It is our view that although such persons have a continuing relationship with their principals, it would be wrong to assume that they have similar economic and social needs. Very many of them

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<sup>10</sup> District Court of Göttingen in *Monatsschrift für Deutsches Recht* 1956, p. 302. Quoted by Cohn, "An Introduction to the German Law on Agents and Sole Distributors", in *British Institute of International and Comparative Law; Special Publication No. 3 (1964)*, p. 5. fn. 10.

will be in no sense of the term, “quasi-employees” and indeed may well be firms or companies. With regard to many of them it would be misleading to assume a mischief arising from an inferior bargaining position<sup>11</sup>. It is inconceivable to us that all the detailed mandatory provisions of the directive would be appropriate to all, or even to many, of them. It is also inconceivable to us that the provisions of the directive would constitute a desirable or an appropriate model contract for all, or perhaps for any, of them. Our reading of the decided cases on the present rules of the English law of agency has not suggested to us that these rules need amending to do justice to all, many, or indeed any, of these persons.

23. Before turning to the detailed provisions of the directive it will be convenient to make some general remarks about the mandatory provisions. We start with the two provisions which we have mentioned above, because they are the most important and will lead to most practical difficulties, and we then turn to a few of the difficulties to which the mandatory nature of some of the other provisions of the directive may give rise.

### **Goodwill indemnity**

24. It is stated in the explanatory memorandum that “The indemnity is, of course, payable *inter alia* to the agent because on his side he provides a consideration which is not fully paid for by the normal remuneration”<sup>12</sup>. The equivalent claim granted to the agent by section 89b of the German Commercial Code is intended to compensate him for the fact that his work increased the goodwill of his principal<sup>13</sup>. Articles 30 and 31 of the directive “zig-zag” between the two bases of entitlement; between remunerating the agent for his work and the principal paying for benefits which he has received. Thus Article 30(1) indicates that the entitlement is based on the benefit accruing to the principal as a result of the commercial agent’s activities, while Articles 30(2) and (3) indicate that the computation of the amount of the indemnity is based on the effort expended by the commercial agent measured by the time over which this effort was expended.

25. When a principal and an agent enter into an agency contract in England the terms of the contract reflect the principal’s assessment of the benefits accruing to him as a result of the agent’s activities and the agent’s assessment of the value of the efforts to be expended by him. It is difficult to see why in general the agent should receive a payment, for which he has not bargained, when the contract terminates. This is particularly so where the agency contract is for a fixed period and makes no provision for such a payment. Surely in such a case the commercial agent takes the risk that the particular source of income will dry up at the end of the period, and this risk will no doubt be reflected in his rate of commission. The argument is even stronger when the agency contract is for a relatively short period (and no qualifying period is included in Article 30(1)). It seems even more difficult to justify such a

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<sup>11</sup> Indeed recent English decisions in the entertainment field indicate the opposite: *Instone v. A. Schroeder Music Publishing Co. Ltd.* [1974] 1 W.L.R. 1308; *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.* [1975] 1 W.L.R. 61.

<sup>12</sup> Explanatory memorandum, p. 21.

<sup>13</sup> See para. 17, above.

payment where the agent terminates the contract of his own free will, perhaps to retire or to take up more remunerative work. On what commercial or moral ground is the right to such a payment based? The general position in England is that self-employed persons themselves have to make provision for their own retirement. No convincing case has been made for any special favourable treatment for commercial agents.

26. In some ways the directive treats the agent's connection with his principal as his property. Thus it provides that if the agent dies during the period of the contract, his "heirs" are entitled to the goodwill indemnity. The explanatory memorandum<sup>14</sup>, commenting on Article 31(b) explains that "there is the situation where the principal continues to contract with the agent's successor by agreement either of the agent or of his heirs, the new agent succeeding to all the rights and duties of the old. One would, no doubt, be justified in supposing that in these circumstances the old agent will receive a lump sum payment from his successor which will include the goodwill indemnity". Accordingly, Article 31(b) provides that there shall be no claim where the principal maintains the contract on foot with the agent's successor who was introduced by the agent or by his "heirs". Another surprising feature of the claim is that there is no entitlement where the principal closes down his business, even though substantial benefits would have continued to accrue to him had he remained in business<sup>15</sup>.

27. It is interesting to compare the commercial agent's entitlement to his goodwill indemnity with the employee's entitlement to redundancy pay under English law. For the commercial agent there is no qualifying period; the commercial agent gets his goodwill indemnity if he dies or retires; the commercial agent is not entitled to his goodwill indemnity if the principal closes his business down. In the first and second respects the commercial agent is better off than the employee and in the third respect he is worse off.

28. Section 89b of the German Commercial Code is simpler and more flexible than Articles 30 and 31. The German Commercial Code provides for payment which is "fair and reasonable in all the circumstances". As will appear from our detailed discussion of Articles 30 and 31 below, the rules relating to entitlement under the directive are complex and give rise to much difficulty. We believe that it would be quite inappropriate to incorporate the provisions of Articles 30 and 31 into English law, and that no case has been made out for granting such compensation to *all* the persons who fall within the scope of Article 2, although it might be argued that some or all manufacturers' agents should be entitled to some compensation in certain circumstances on the termination of their contract. It is suggested, however, that the normal and acceptable way to provide for such compensation would be to ascertain the extent of the mischief; that is to say, to ascertain the class of persons who suffer hardship in this country, the precise circumstances in which this hardship arises and the type of compensation to which they should be entitled to alleviate this hardship. Apart from the detailed criticisms of Articles 30 and 31 which we make in the next Part of this paper, we consider these provisions to be wholly unacceptable.

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<sup>14</sup> Explanatory memorandum, pp. 21-22.

<sup>15</sup> Article 30(1)(b).

### **“Article 32 payment”**

29. The explanatory memorandum to the directive refers to this payment in the following manner: “After termination of the contract the principal must pay to the agent a suitable indemnity throughout the whole period of currency of the agreement restricting competition”<sup>16</sup>. It is difficult to see the need for this type of payment. When the commercial agent and the principal are negotiating the terms of their contract, the restraint clause will be bargained for in the normal way and its inclusion will thus be reflected in the other provisions of the contract and in particular in the agreed rate of commission. Why should the commercial agent get an extra payment for observing it? Article 32 extends to restraint clauses entered into as part of an agreement made on the termination of the agency contract, and in these circumstances it seems particularly objectionable for the agent to receive such a payment. It also seems inappropriate for the agent to receive payment if he voluntarily terminates the contract in order, for example, to retire altogether or to take up more remunerative work in another area, or by selling other goods.

30. Section 90a of the German Commercial Code merely provides for the payment of “reasonable compensation in respect of the period of the restriction on competition”. Cohn comments: “Perhaps the best advice that a draftsman can give to his clients in view of the existing provisions may well be not to provide for a non-competition clause in respect of the period following upon the termination of the agreement, though this is in some cases not a very fortunate solution from the point of view of the principal”<sup>17</sup>.

31. Article 32 of the directive is more complicated than section 90a and gives rise to many difficulties, as appears from our detailed discussion of Article 32 below.

32. Article 32 would put the commercial agent in a better position than the employee who is, of course, entitled to no such payment during the currency of a period of a valid restraint clause. As a matter of policy we see no basis for such a payment and, in any event, Article 32 as drafted would be quite unjustified, even if there were a basis for some such payment to some agents in some circumstances.

### **Mandatory nature of the provisions**

33. Although the rules regarding the goodwill indemnity and the Article 32 payment are the most striking of the mandatory provisions there are many others. Most of the others concern topics (such as the circumstances in which commission is payable) which would in the ordinary way be dealt with in the contract by express provision. Such express terms would be overridden by the directive with the result that the parties would find themselves bound by terms quite different from those that they had agreed. The directive thus represents a substantial, and, we believe, unwarranted interference with freedom of contract. This general point is most easily illustrated by supposing the following set of facts:—

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<sup>16</sup> Explanatory memorandum, p. 22.

<sup>17</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn in *British Institute of International and Comparative Law; Special Publication No. 3 (1964)*, p. 17.

A UK company wishes to promote the sale of certain drinks on the Italian Riviera. An Italian company, with a paid up capital of 100 000 EUA or less, is engaged to canvass for orders, over a 12-month period, from customers on the Italian Riviera and, in particular, from hoteliers and bar proprietors. An agreement is negotiated and reduced into writing which requires the Italian company to organise and pay for a poster campaign (promoting the drinks in question) and to collect, and guarantee, payment in respect of orders placed during the 12-month period by customers introduced by them. The UK company agrees to pay a substantial monthly retainer together with 25% of the value of the first order (only) placed and paid for by each customer introduced by the Italian company during the 12-month period. The agreement provides that no commission will be payable in any other circumstances and that there will be no reimbursement for expenses. The agreement provides that the Italian company may deduct the agreed commission from monies collected and remit the balance at the end of each month, and that they are not entitled to a lien over goods or samples entrusted to them by the UK company. Finally the agreement provides that there is a possibility of "passing off" proceedings in Italy in respect of a new vermouth that the UK company is marketing; the canvassing of orders for this product is to be at the Italian company's risk; there is to be no right of indemnity by the UK company if the promotion of this product by the Italian company results in proceedings.

34. An agreement along the lines indicated above would fall foul of the directive in a number of respects:—

- (a) The Italian company would be entitled to *extra* payments (notwithstanding the terms expressly agreed)—
  - (i) for the cost of the poster campaign (Article 20(2));
  - (ii) for collecting money (Article 14);
  - (iii) for guaranteeing payment (Article 21(3));
  - (iv) for repeat orders from customers introduced by the Italian company (Article 12(1)(b));
  - (v) for orders from customers in the area introduced by persons other than the Italian company (Article 12(1)(c));
  - (vi) for repeat orders from old customers (Article 12(1)(c));
  - (vii) for orders executed but not paid for (Article 15(2)(a)).
- (b) On the other hand the Italian company would be in breach of Article 5(2)(b) in deducting commission from money received and in not paying over the balance until the end of the month.
- (c) The guarantee would be invalidated by Articles 21(2)(a) and 21(2)(b) and 21(2)(c).
- (d) The Italian company *would* be entitled to a lien (Article 29(2)).
- (e) If the Italian company were involved in court proceedings over the new vermouth there *would* be a right of indemnity (Article 8(1)).

There are thus many respects in which the directive prevents the principal and the commercial agent from making a binding arrangement which is acceptable to them both. However sensible, reasonable and fair it may be

in its effect, it is liable to be converted by the directive into something which is intrinsically unfair and which makes a nonsense of the bargain that was made.

### **Uncertainty created by the directive**

35. The explanatory memorandum states<sup>18</sup> that the directive is intended to remove the uncertainties that may at present exist as to what the rights of commercial agents are. So far from removing uncertainties the mandatory provisions, just considered, are likely to create them wherever there is a conflict between what the directive provides and what the parties have in fact agreed. This might be acceptable if the mandatory provisions were themselves simple and clear, but they are intricate, confusing and inconsistent one with another. Our detailed analysis of the provisions in the directive follows, in Part III; a recurring theme is that even if the policy behind the directive is sound, which we doubt, its provisions are likely to produce great uncertainty across a very wide area.

## **PART III**

### **THE DETAILED PROVISIONS OF THE DIRECTIVE**

36. In this Part we consider the detailed provisions of the directive article by article. We draw attention, in particular, to—

- (a) the policy considerations on which the mandatory provisions appear to be based and the relevance of these policy considerations to the various different groups of people who come within the Article 2 description of “commercial agents”;
- (b) the policy considerations on which the non-mandatory provisions appear to be based and the extent to which the model contract<sup>19</sup> thus produced is appropriate to the needs of the various different kinds of “commercial agent” (see (a), above);
- (c) the consequences of superimposing the provisions of the directive upon the English law of contract;
- (d) the obscure, complex and unsatisfactory nature of the directive’s provisions.

37. There are, however, some general observations to be made about the preparation and drafting of the directive and about the legal concepts incorporated into it which it is convenient to deal with first.

### **General points on the drafting of the directive**

38. We realise that directives are not prepared by utilising the same drafting techniques which are used by Parliamentary Counsel when drafting English statutes. We also realise that the style of drafting is that of states whose legal system is based on civil law rather than on common law. We think, however, that the points we are going to make are nevertheless valid and that their

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<sup>18</sup> Explanatory memorandum, p. 2.

<sup>19</sup> See para. 7(b), above.

validity can be appreciated when a detailed comparison is made between the articles of the directive and the corresponding provisions of the German Commercial Code (sections 84–92c). Many of the criticisms which we make below cannot, or cannot to any great extent, be levelled at the German text. There are many faults in the directive which may merely be faults of translation or be minor drafting errors, but only part of our criticism is directed to these faults. The German provisions have been extensively adapted, changed and elaborated and many of our comments relate to these alterations. This does not mean that as a matter of content we would welcome any or all of the German rules, but at least we understand, or think we do, the meaning and ambit of most of the German rules, whereas we have found the directive much harder to follow and in places completely incomprehensible.

39. There are three major drafting defects which run through the directive:—
- (a) it lays down rules without specifying what consequences flow from their breach (see, for example, Articles 21(1), 23, 24, 26(1) and 27(2));
  - (b) it uses a number of different words to express the same idea (a list of examples is included in an Annex, identified as Annex C);
  - (c) it uses the same word to express a number of different ideas (a list of examples is included in the Annex referred to above).
40. There are other points to be made about the draftsmanship which merit general comment not just because they make this particular directive hard to construe but because unless exception is taken to them they are likely to occur in other instruments within the Commission of the European Communities:—
- (a) there is a tendency to make the same point twice, once positively and once negatively (compare, for example, Article 3 (first 7 lines) with Article 2; also Article 7(1) and Article 7(2));
  - (b) statements of general principle are followed by non-exhaustive, ill-chosen and misleading lists of illustrations (Articles 5 and 10);
  - (c) particular instances are given of a general principle which is nowhere stated (Article 8);
  - (d) a technique of descriptive drafting is used which does not exhaust all the possibilities (see, for example, Articles 9(2) and 11(1)).

41. We draw attention, in our article by article analysis, to provisions in the directive which we consider are badly drafted, unclear, ambiguous, internally inconsistent or which contain *lacunae* or are otherwise objectionable. We recognise that some of these points, taken in isolation, are of minor importance. But we suggest that the cumulative effect is that, irrespective of the objections that there are to the policies in the directive and the content of its rules, the directive in its present form is quite unworkable.

### **Problems for the common law**

42. There are a number of legal concepts and techniques which underlie or are found in the provisions of the directive which have no counterpart in English law. This does not, of course, in itself render them objectionable. Indeed, they should be considered as possible reforms of the law and evaluated as such. They do need to be examined, however, in the light of the wide scope of the directive

which would make major changes in a broad, but quite ill-defined, area of the law of agency. Any uncertainty so engendered has to be balanced against the advantages, if any, that these new concepts might bring to English law. Three examples may be given:—

- (a) extraordinary termination;
- (b) secondary activities; and
- (c) the effect of failure to comply with the requirement of writing in the formation of the contract.

**(a) Extraordinary termination**

43. Article 27(1)(b) provides that either party may terminate a contract at any time—

“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.”

This provision is mandatory. Section 89a of the German Commercial Code provides that

“(i) the contractual relationship may be put to an end by either party without notice for important reasons. This provision may not be excluded or limited.”

Professor Cohn comments thus: “No doubt this rule introduces some measure of uncertainty into the relationship between principal and agent. German lawyers do not mind this so very much; they are accustomed to the principle embodied in section 89a from numerous other instances in which it applies. The rule that a contract may be terminated for ‘important reasons’ is, in fact, a fundamental principle of German law applicable to all contracts concluded for a period of any length. It finds its explanation in part in the desire not to tie parties for too long to obligations undertaken at a time when the future turn of events could not well be appreciated. No doubt, the turbulent history of the country during its last fifty years has contributed to rendering such a rule commendable”<sup>20</sup>. Perhaps English lawyers would be surprised at this measure of uncertainty. The concept of “extraordinary termination” is very much wider than the English doctrine of frustration, and “the colourful variety of grounds of termination”<sup>21</sup> to be found in German decisions and in German legal writings would be new to the common law. In addition, whereas in English law the frustrating event brings the contract to an end without more, Article 27(2) requires that there should be an act of termination as such. These differences are likely to cause problems if Article 27 is superimposed upon the English law of contract. We are not convinced that the innovation is necessary or desirable.

**(b) Secondary activities**

44. An important distinction is drawn in the directive between the main

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<sup>20</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn, in *British Institute of International and Comparative Law*; Special publication No. 3 (1964), pp. 9–10.

<sup>21</sup> *ibid.*, p. 11.



category of commercial agents and those who act as commercial agents by way of “secondary activity” only (Article 4(1)).

45. Unfortunately, the directive does not say what is to constitute a “secondary activity”. Apparently, (from what is said in the explanatory memorandum<sup>22</sup>) a person may be an agent as a secondary activity although he has no other form of commercial activity that may be described as “primary”. He may, it seems, carry on secondary activities with more than one principal. The explanatory memorandum fairly concedes that it is impossible to lay down suitable criteria which apply in every case, and yet the directive provides, in Article 4, that the question whether the activity is carried on by way of secondary activity is to be determined “in accordance with commercial usage in the State whose law governs the relations between principal and agent”. Since there is, so far as we know, no established commercial usage in England regarding persons who act as commercial agents by way of secondary activity, any legislation introducing such a classification would, in order to comply with the directive, have to be cast in very general terms. This might well give rise to considerable litigation in a wide variety of agency relationships.

*(c) The function of writing in the formation of the contract*

46. Article 23 of the directive provides that either 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, and that any purported waiver of this right shall be invalid. Section 85 of the German Commercial Code provides:

“Either party is entitled to demand that the terms of the contract together with any subsequent additional agreements thereto shall be set out in writing and signed by the other party thereto. This provision may not be excluded by agreement.”

As Professor Cohn points out, “the German legislator’s desire to protect the agent begins literally with the moment of the conclusion of the agency agreement”<sup>23</sup>. He continues: “the right to demand written fixation is not merely academic: it can be enforced by proceedings in court which will lead to a judgment in which the court will lay down authoritatively the terms which the parties have been found to have agreed. Although little use has been made of these sweeping and beneficent powers of the court, the rule may well serve to illustrate the wide powers entrusted by the legislature to the judiciary. That the court will not make the contract for the parties is not a proposition with which a modern civilian will be able to find himself in agreement”<sup>24</sup>. Whilst a procedure could no doubt be devised in this country for compelling the principal to deliver a written agency agreement to the agent and for the agent to deliver one to the principal, we doubt whether such a procedure would be appropriate in the present broad but uncertain context.

**Article by article analysis**

47. In the rest of this Part we analyse the directive article by article.

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<sup>22</sup> At pp. 5 (last para.) and 6.

<sup>23</sup> “An Introduction to the German Law on Agents and Sole Distributors”, E. J. Cohn, in *British Institute of International and Comparative Law; Special publication No. 3 (1964)*, pp. 8–9.

<sup>24</sup> *ibid.*, p. 9.

## Article 1

We make no comment on this article at this stage although its terms are relevant to what we say about the directive's provisions in relation to third party rights (Articles 5(1) and 9) and rights on bankruptcy (Article 22).

## Article 2

(a) The main thrust of the directive seems to be to provide protection for commercial agents who are engaged to canvass orders for their principals' goods. Although the directive does not distinguish between buying agents and selling agents it seems that selling agents are the ones that the directive aims to protect: Article 17 (which provides that the commission should be geared to the gross amount of the invoice) and Article 30(1)(a) (which mentions "new customers") would produce some strange results if applied to buying agents. Similarly, although the directive covers the supply of services as well as goods it is clear from Articles 10(2)(a) and (b) that goods are the directive's prime concern.

(b) Article 2 is far too wide to be acceptable to English law and wider, it seems, than is necessary to serve the policies on which the directive is based. There is, we believe, no ground for extending its scope beyond selling agents dealing in goods. In particular no case is made out for the inclusion of buying agents and agents for services and we think they should be omitted.

(c) The policy of protection *may* be justified in regard to those individuals who rely for their livelihood on the sale of their principals' products (quasi-employees) but we can see no justification for extending the protection to

- (i) legal persons other than private individuals (for example, limited companies) or to
- (ii) intermediaries such as travel agents, advertising agents, literary and theatrical agents, stockbrokers, loading brokers, forwarding agents, solicitors, accountants, patent agents, etc.<sup>25</sup>

(d) The policy of providing protection *may* be appropriate where the agent's income is derived wholly or partly from commission, but it is clearly inappropriate where his services are paid for by a fixed retainer. We think that Article 2 ought to limit the directive to commercial agents who are remunerated either wholly or in part by commission<sup>26</sup>.

(e) The requirement that the agent should have a "continuing authority for a fixed or indeterminate period" would seem to be satisfied in the case of an agent appointed for the duration of a motor show; we would have expected the definition to include a requirement of "permanence" as a characteristic of the agent's appointment.

(f) The requirement that the agent's authority must extend to "an unlimited number of commercial transactions" is likely to lead to confusion. Presumably a manufacturer who limited his agent's sales by a quota system of so many sales a year would be outside the scope of Article 2.

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<sup>25</sup> See para. 21, above.

<sup>26</sup> See our further comment on this point in our analysis of Article 11, below.

### Article 3

(a) The first and third exclusions seem to be otiose as they add nothing to what is already excluded by Article 2 itself.

(b) The second exclusion causes difficulties where the agent has authority to act in his own name but doesn't use it and also where the agent has no such authority but acts as if he had.

(c) The exclusion of "those who carry on their activities in the insurance or credit fields" seems to be wider than the exclusion of those who act for insurance or financial institutions<sup>27</sup>. The looser terminology of the directive is likely to lead to uncertainty.

(d) We should, perhaps, add that the very wide definition of commercial agents given by Article 2 would not be made acceptable by adding further specific exclusions, such as travel agents, stockbrokers etc. This would not be a satisfactory way of identifying the social group to whom the directive's provisions should apply.

### Article 4

(a) The term "by way of secondary activity" corresponds with the term "*Nebenberuf*" in section 92b of the German Commercial Code. The Code does not contain a definition of "*Nebenberuf*". In German law the test seems to be whether there is another, not necessarily commercial, activity which may be treated as primary. For these purposes students, pensioners and housewives who do agency work in their spare time are doing it by way of secondary activity. Presumably the full-time employee who does agency work on the side (whether during or out of his ordinary hours of employment) is acting "by way of secondary activity" whatever relation his income from one activity bears to his income from the other. Plainly there will be much uncertainty as to what constitutes a secondary activity; the entitlement to a goodwill indemnity may depend on which side of the line the particular agency falls.

(b) Assuming that those who act as commercial agents by way of secondary activity can be identified as a group (the housewife with a mail-order agency seems to be regarded as typical) the group should be excluded altogether from the scope of the directive, on the ground that its members are not quasi-employees and do not need special protection.

### Article 5

(a) This article purports to set out the subsidiary duties of the agent (to keep proper accounts, etc.) and to say how he should conduct himself (fairly and carefully) without saying what his main duty is. What seems to be missing is a general duty that the agent should obtain business for his principal<sup>28</sup>.

(b) Article 5(1) requires the agent to act fairly *vis-à-vis* third parties. The rights

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<sup>27</sup> Explanatory memorandum, p. 5.

<sup>28</sup> Such a duty is laid down by section 86 of the German Commercial Code.

of third parties *vis-à-vis* agents are a matter for national law and there is no justification for legislating for third parties in this directive<sup>29</sup>.

(c) The references to the standard of care exercised by a sound businessman (Articles 5(1) and 5(2)(d)) derive from section 86(3) of the German Commercial Code. We are not altogether clear how English courts would fit this novel duty into the English law of agency.

- (d) Articles 5(2)(a) to (e) pose various difficulties of construction, for example:—
- (i) under (a) is it sufficient for the principal to supply such information as he has?
  - (ii) under (b) does “without delay” mean “the same day” “at the end of each month” or what?
  - (iii) under (e) what kind of instructions “basically affect the agent’s independence”? What if the principal were to require the agent to visit certain named principals at certain stated intervals?

#### Article 6

(a) “The principles of a sound businessman” is a novelty for English lawyers and it is doubtful whether it is apt here; a standard of “fair dealing” rather than “sound business” might be more appropriate.

(b) The directive precludes the agent from making disclosures to third parties even where this is justified by the public interest, or so it seems. How are the English courts to apply this article to facts such as occurred in *Initial Services Ltd. v. Putterill*?<sup>30</sup>

#### Article 7

(a) The drafting of Articles 7(1) and 7(2) is cumbersome and apparently self-contradictory whereas, presumably, all the directive means to say is that the agent may not compete with the principal in relation to the goods (or services) in question without the principal’s consent.

(b) We doubt whether this article is appropriate for inclusion in a model contract. It runs contrary to the English law approach which is, broadly, that if the principal wants to restrict the agent from working for other principals at the same time he must say so. Why should not a housewife who runs an agency for one mail order firm be allowed to run one for another firm as well, unless of course the contract expressly provides that she should not?

(c) There is a more general objection to Article 7 and, more particularly Article 7(3), that it would appear to make covenants in restraint of trade binding which would otherwise be invalid in English law. The conflict between this article and the existing state of English law is likely to lead to much confusion and uncertainty.

#### Article 8

(a) This article does not seem appropriate for a model contract, at least not in

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<sup>29</sup> The same point arises in Article 9. See the scope of the directive outlined in Article 1.

<sup>30</sup> [1968] 1 Q.B. 396.

English law, as it only deals with some, not all, of the situations in which an agent is entitled to be indemnified by his principal. The law relating to contribution and indemnity (and not just damages as stated in Article 8(1)) is part of the law of agency but it is also regulated in this country by rules of equity and statutory provisions<sup>31</sup>; this article would not fit very well with our existing law.

(b) Furthermore, we see no justification for making this article a mandatory provision; the parties should be permitted to make arrangements suitable to themselves by contract<sup>32</sup>.

(c) It is not clear whether “the rules of fair competition” mean the rules of the Community itself or those of the Member State.

#### Article 9

(a) Article 9(2) cites two situations in which an agent shall be presumed to have authority but does not say what is to happen in other similar situations, for example where notice is given to the agent that goods have been delivered in the wrong quantity, on the wrong date or at the wrong place.

(b) Article 9(3) is another example of the directive going beyond the terms laid down in Article 1 (and perhaps the *vires* provided by the Treaty of Rome) by legislating for the rights of third parties<sup>33</sup>. The inappropriateness of this is emphasised in this instance by the fact that the article is not mandatory so may be excluded by agreement—to the prejudice, presumably, of third parties. If the article were *not* excluded it could be in conflict with the English maxim “*nemo dat quod non habet*” in cases where the agent disposed of his principal’s products without authority.

#### Article 10

(a) This article is a good example of the unsatisfactory character of the directive as a mandatory code and as the basis for a model contract. For instance:—

- (i) the principal is in breach of Article 10(2)(a) if he fails to supply “other documents relating to the goods and services”. What other documents?
- (ii) the principal is in breach of Article 10(2)(b) if he fails to give certain information depending on what the agent could “normally expect”. How is the principal to know what this is?
- (iii) the principal is in breach of Article 10(2)(c) unless he informs the agent without delay of partial performance of a commercial transaction even, apparently, where the transaction is running smoothly, for example where the principal himself has made a part delivery. This seems quite unnecessary.

(b) Article 10(2)(b) (which puts a *general* duty on the principal to supply all requisite information) is mandatory: Article 10(2)(a) (which deals with the

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<sup>31</sup> We reported recently (Law Com. No. 79) on certain reforms that should be made by statute in the law of contribution and indemnity.

<sup>32</sup> See paras. 33–34, above.

<sup>33</sup> Another example is under Article 5(1), above.

particular duty to provide samples, printed advertising material, etc.) is not. Thus where the principal and agent have agreed that no samples will be supplied (thereby contracting out of Article 10(2)(a)) the failure to supply samples may still involve a breach of Article 10(2)(b).

(c) The obligations to provide what is “necessary” or “requisite” or what the agent “needs” ought, surely, to be qualified in each case by the word “reasonably”.

#### *Article 11*

(a) Presumably Article 11(1) means that a commercial agency is affected by the terms of the directive even where no commission is payable, for example, where the agent is to receive £10 a day plus expenses. Most of the mandatory provisions, and particularly those relating to the goodwill indemnity, seem to assume that there will be remuneration by commission. The policy of the directive would be much easier to understand and its provisions would be much easier to apply if agents who were not entitled to commission were excluded from Article 2.

(b) Article 11(3) would appear to provide that where the agent’s right to remuneration is excluded the whole contract is void, but this result cannot be intended because it would mean that the obligations under Articles 5 and 10 would not arise.

(c) Article 11(3) is mandatory although we can see no justification for it. Why should the parties not be allowed to agree on a consideration other than remuneration?

#### *Article 12*

(a) The references in Article 12(1) to entry into a commercial transaction highlight once again the confused drafting of the directive. Article 9(1) distinguishes between a commercial agent’s negotiating a commercial transaction and concluding an agreement. Article 12(1) talks of entry into commercial transactions, and of the procuring, the negotiating and the agreeing of a transaction. One can assume that when a commercial agent negotiates a commercial transaction, this means taking steps preparatory to entry into a contract by his principal with a third party—that latter step being described as entry into the commercial transaction. Where the agent actually enters into a contract with the third party, on his principal’s behalf, this seems to be described as concluding an agreement. However, this also seems to fall within the phrase “entry [by principal and agent] into the commercial transaction.” Whether procuring or agreeing a transaction is to be equated with concluding an agreement or negotiating a transaction is, like so much of this terminology, quite unclear.

(b) Article 12(1) is mandatory and seems to entitle the agent to commission in circumstances where the parties might reasonably agree that he should not have any<sup>34</sup>, for example:—

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<sup>34</sup> See too the points made in paras. 33–34, above.

- (i) where the agent procures a sale in his area to a large organisation like Boots, Tesco, British Rail, etc., he would be entitled to commission on all sales to such persons outside his area, according to Article 12(1)(b);
- (ii) where two agents are appointed to work in the same geographical area, the principal would have to pay two lots of commission for every order obtained, according to Article 12(1)(c), although only one of the two agents would have earned it.

(c) The effect of Articles 12(1)(b) and (c) is to create a species of sole agency, whether the parties want this or not. If this is what the directive intends should not the remedy for derogation from the sole agency be damages rather than the payment of commission for work that the agent did not do?

(d) Article 12(2) is obscure but seems to be directed at the transitional problem where an agent concludes negotiations that were started by his predecessor. We comment on this problem in our analysis of Article 13, below.

#### Article 13

(a) No doubt difficulties arise when one agent takes over from another. However, instead of allowing the principal and his agents to work out transitional provisions by agreement Article 13 lays down a set of circumstances in which the predecessor is to have the commission and his successor accordingly gets none. There seems no good reason why this crude all-or-nothing solution should be made mandatory.

(b) The rules that entitle the predecessor to his commission depend on fine distinctions (for example between “negotiation” and “preparatory work”) and difficult questions of fact (like who is “mainly” responsible and what period after the change-over would be “reasonable” having regard to the type and volume of the transaction in question). The rules are singularly inappropriate for a model agency contract and would cause problems if superimposed on English law.

#### Article 14

(a) The requirement that a commercial agent *must* be paid a *special* commission for collecting payment has no justification that we can see and is likely to lead to great difficulty in cases where the parties treat the remuneration from collecting payment as a factor in calculating the overall rate of commission or retainer<sup>35</sup>.

(b) The “special commission” is not defined. No guidance is given as to when it becomes payable or on what basis or at what rate the commission is to be calculated.

(c) It is not clear whether the *del credere* agent is entitled to Article 14 commission when he makes the payment out of his own pocket.

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<sup>35</sup> See paras. 33–34 above.

## Article 15

(a) The provision that the right to commission should arise at the moment when the principal and third party enter into a commercial transaction is presumably intended to link up with the bankruptcy provision in Article 22, which provides that 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 on the principal's bankruptcy. The policy, according to a somewhat bland statement in the explanatory memorandum<sup>36</sup>, is to allow the commercial agent to prove in the bankruptcy for commission that has not yet become payable, as if it were already due. We believe that this is inconsistent with the principles of bankruptcy law and with honest dealing, and as such should find no place in a directive on agency.

(b) There appears to be a conflict both in the explanatory memorandum and in Article 15 of the directive as to the policy on which the entitlement to receive the commission is based. The explanatory memorandum asserts that payment of the commission is generally dependent on payment by the third party and states that "The general rule is that the principal is not bound to pay commission unless the third party performs his part of the transaction"<sup>37</sup>. This seems inconsistent with a later statement that "The agent knows that where the third party has not performed his part of the contract, and however long that state of affairs continues, commission will be paid *as a general rule* at the end of the third month following that in which the principal performs his part. The exceptions to this are set out in Article 16"<sup>38</sup>. Article 15(2)(a), however, starts with a proposition that conflicts with the "general rules" in the explanatory memorandum, namely, that the commission is to be payable 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. This provision is mandatory and yet Article 15(4) (which is also mandatory in some cases) allows the parties to agree that commission shall be payable at a later time so long as the third party has not performed his obligations! Article 15(4) provides a back stop of three months from performance by the principal as the date beyond which payment of the commission may not be postponed by agreement, but this depends on *complete* performance by the principal whereas Article 15(2) does not. The principal might postpone the payment of commission beyond three months by holding back say the last 5 of 100 articles that were due for delivery. This article is riddled with gaps and inconsistencies.

(c) It seems that although the agent has a "right to commission" when the principal and the third party first enter into the commercial transaction, no commission is ever payable if neither party performs the contract at all or if the contract is cancelled by mutual agreement. It is all very puzzling.

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<sup>36</sup> "It follows from this article that where the principal is declared bankrupt . . . the commercial agent may prove in those proceedings for the amount of his claims. This is the main advantage of the provisions set out on this subject in the present proposal as compared with the legal systems in which the right to commission arises at some later time." Explanatory memorandum, p. 12.

<sup>37</sup> *ibid.*, p. 13.

<sup>38</sup> *ibid.*, p. 13. Emphasis has been added.



(d) Article 15(3) is badly drafted, complex in its structure and would be very difficult to apply in practice. Likewise with Article 15(5) it seems ridiculous, having regard to the wide variety of persons to whom Article 2 is likely to apply, to restrict them to monthly or quarterly accounting periods.

#### *Article 16*

(a) Article 16(1)(a) extinguishes the agent's right to commission for breach of his duty under Article 5(2)(a). However Article 5(2)(a) describes a general duty to supply the principal with information that he needs and also a special duty as regards information on the solvency of third parties. Is the right to commission extinguished for breach of the general duty (which seems too wide) or only for breach of the special duty to keep the principal informed about the solvency of customers? The explanatory memorandum suggests the latter<sup>39</sup> which is obviously too narrow.

(b) Article 16(1)(c) envisages that the principal has reasonable grounds for supposing that the third party will not perform but that the contract has not been frustrated and the third party is not actually in breach and has not repudiated. In English law this gives the principal no legal excuse for not performing the contract with the third party<sup>40</sup>. There is thus likely to be difficulty if Article 16 (which is mandatory) is superimposed on English law. Moreover, under Article 16(1)(c) the principal is absolved from having to pay commission as soon as "serious grounds for non-performance" exist even though the third party later defies expectations and performs after all. The explanatory memorandum points out that it is impossible to spell out in the directive the precise meaning of "serious grounds", the scope and significance of which has been "settled by the law or by the case law or in the juristic writings in the Member States"<sup>41</sup>. However, this is a novel concept in English law where its introduction is likely to cause considerable confusion and uncertainty.

#### *Article 17*

(a) It is doubtful whether this provision (that commission should as a general rule be calculated on the gross amount of the invoice) is appropriate for a model contract. Sometimes the cost of transit may represent a large part of the amount of the invoice.

(b) The reference to "invoiced separately" is confusing. It is not clear whether it means "stated as separate items on the same invoice" or "stated in a separate invoice".

#### *Article 18*

(a) Article 18 is mandatory and gives the commercial agent a right to see copies of extracts from the principal's books and, in certain circumstances, access to the books themselves. It is not clear whether this is necessary (having regard to the principal's duties under Article 10(1)) or desirable.

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<sup>39</sup> Explanatory memorandum, p. 14.

<sup>40</sup> *Universal Cargo Carriers Corpn. v. Citati* [1957] 2 Q.B. 401, 449-450, per Devlin, J.

<sup>41</sup> Explanatory memorandum, p. 14.

(b) If the requirement in Article 18(1) is necessary and desirable (which we doubt) surely the procedure for its enforcement should be left to the laws of Member States. Article 18(2) is an absurdly over-elaborate rule. Its implementation (and it is of course mandatory) would entail the creation of a new category of auditors, “auditors-on-oath”<sup>42</sup> and the making of special rules of procedure.

(c) The option allowed by Article 18(2) enables the principal to compel the agent *not* to employ a professional adviser. We find this objectionable.

#### Article 19

(a) The policy underlying this article is unclear. It seems to go beyond the requirement that the principal should act in good faith (Article 10). Why should the agent be entitled to “fall-back” pay when he has merely “taken steps” towards performing his obligations or has fulfilled them by doing nothing more strenuous than caring for the samples? It will be remembered that he has no general obligation under Article 5 to promote his principal’s business.

(b) The circumstances in which the principal is *not* required to make payments under Article 19 are likely to cause confusion in English law since they depend on a concept of “circumstances beyond his control” and this is not the same as the legal doctrine of frustration<sup>43</sup>.

(c) Assuming that money is payable under Article 19 it is by no means clear when the right to payment arises. As for the basis of the computation, Article 19(2), which is geared to the loss of expected earnings, seems to be in conflict with Article 19(3) which is geared to the amount of money expended by the agent in setting up the agency.

#### Article 20

(a) We can see no justification for including Article 20(2) in the directive. Why should the parties not be allowed to agree that “special activities” should be at the agent’s expense or that they should be taken into account in fixing the level of commission or retainer?

(b) Article 20(2) is extremely loosely drafted. How is the court to decide what are “special activities”?

#### Article 21

(a) The entitlement to a “separate commission” in respect of certain *del credere* transactions is in some circumstances mandatory. It is likely to cause confusion when it runs contrary to what the parties have expressly agreed<sup>44</sup>.

(b) Nowhere in the article is it provided when the agent becomes entitled to be paid his separate commission. Payment cannot be governed by Article 15 as that article depends on performance by (principal or third party) and a *del credere* agent is paid his commission for his promise.

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<sup>42</sup> They exist in Germany.

<sup>43</sup> *Emanuel v. Sammut* [1959] 2 Lloyd’s Rep. 629, 640.

<sup>44</sup> See paras. 33 and 34, above.

(c) Article 21(1) requires that *del credere* agreements be evidenced in writing. Such agreements are not within the provisions of our Statute of Frauds and accordingly are not required by English law to be evidenced by writing. Confusion is likely to arise where some of the activities of an English *del credere* agent are affected by the directive and some are not.

(d) The effect of non-compliance with the requirement of written evidence (Article 21(1)) is not clear. Presumably the agent is not liable to the principal if the third party does not pay, but suppose the third party does pay. Can the agent get his *del credere* commission under Article 21(3) or is he barred by want of written evidence?

(e) Article 21(4) allows the parties to derogate from the earlier provisions as regards transactions “which the agent has been given full power to agree and to carry out”. It is hard to see what situations are described by this provision; it seems to allow “contracting out” in every case.

(f) There are various obscurities in the text that are likely to cause difficulty:—

- (i) Who are “particular parties . . . specified” (Article 21(b))? Do they have to be named or will a class description suffice? If the latter, can the class be “any customer introduced by the commercial agent”?
- (ii) Does “unlimited” (Article 21(2)(c)) mean “without financial limit”? If so, the provision is useless unless a financial limit is specified. Will 99% pass muster?
- (iii) What is “the place of business” (Article 21(4)(a)) where the principal (or the third party) has several?

#### Article 22

(a) This article goes beyond the relations between self-employed commercial agents and their principals (Article 1). It seeks to change the laws on insolvency so as to give commercial agents preferential rights against the general body of creditors. We can see no justification for such provisions in this directive and doubt whether they have a sound jurisdictional basis.

(b) Remarkably this article is not mandatory. This is particularly odd because Article 15(1), which *is* mandatory, provides that a right to commission arises at the moment when the principal and the third party enter into the commercial transaction and so gives the agent improved rights on bankruptcy.

(c) It is by no means clear how Articles 15(1) and 22 are meant to work when the principal becomes insolvent. Article 15(1) is intended to allow the agent to prove for commission although neither the principal nor the third party have performed at all; but for what sum does he, in fact, prove?

(d) The broad aim of Article 22 is to make the agent a preferred creditor in respect of his commission as if he were an employee claiming for wages. However the agent may only so prove where his income is “mainly derived from a commercial agency” (Article 22(1)). The relevance of the agent’s other income (for example from investments) is not clear. Moreover, the line may often be hard to draw in practice and is not effective to exclude stockbrokers, forwarding

agents and so on, nor even to exclude those who act as agents as a secondary activity. It is unsatisfactory in every possible way.

(e) Employees are preferred creditors in English law for some of the wages that are payable but unpaid at the date of bankruptcy<sup>45</sup>. Articles 15(1) and 22 do not merely put self-employed commercial agents on a par with wage-earners — although this would be hard enough to justify<sup>46</sup>— but they purport to give the agent a preferential right to prove for commission that is not even payable at the date of the bankruptcy.

#### *Article 23*

The explanatory memorandum makes it clear<sup>47</sup> that the entitlement by the principal and the agent to receive a signed written document from each other arises on the request of the other party. What is the effect of failure to comply with the request? Under Article 23 no consequences appear to flow. It would be absurd if the result was that the contract was void. Does it impose a duty, the breach of which might justify termination and could give rise to damages, if it should lead to loss? Is it mere exhortation?

#### *Article 24*

(a) Presumably failure to comply with Article 24 has no more effect than failure to comply with Article 23. This being so it is hard to see why the parties should bother to comply with Article 24.

(b) It is odd that the provision in Article 24 is not mandatory whereas Article 23 is. Presumably the invalidation of any waiver of rights given by the article is imported from Article 23, so that the parties, in order to release each other from the right to receive a written document upon request setting out the terms of the mutual termination, would have expressly to provide in their contract that Article 24 was not to apply. This is a good example of a wholly inappropriate provision for insertion into a model contract.

#### *Article 25*

No comment.

#### *Article 26*

(a) Article 26(1) is mandatory and provides, amongst other things, that the period of notice must be the same for both sides. This is not always appropriate and confusion will arise where the parties make more sensible arrangements in breach of the article.

(b) No sanction is specified where the notice of termination is not given in writing. The contract presumably continues (?)

(c) It is not clear what happens when the proper period of notice is not observed. One would have expected the notice to be ineffective but Article 28(1) seems to contemplate that an agreement may be “terminated” by a defective notice.

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<sup>45</sup> Bankruptcy Act 1914, s. 33(1)(c); Companies Act 1948, ss. 319(1)(b) and 319(2).

<sup>46</sup> Particularly if Article 22 were to apply to *del credere* commission.

<sup>47</sup> See p. 49, below.

### Article 27

(a) This article provides that the agreement may be terminated on grounds that are not recognised in the English law of contract. Difficulties are likely to follow from the superimposition of this article upon English law. One of the novel grounds of termination is the other party's "fault"; an idea that may be well-established in civilian systems but is not part of the English law of contract.

(b) Another novel ground is the happening of "events which justify termination". It is clear that this goes beyond the English doctrine of frustration since the example given<sup>48</sup> in the explanatory memorandum is of an agent who finds it impossible to continue in business for reasons of health, old age or serious and unforeseeable family circumstances. We can only guess at the other kinds of "events" that might justify termination. What about Japanese competition which undermines the financial prospects of the agency after it has run for two years? What if the principal (as opposed to the agent) becomes old or ill or has family problems? Or where it has become unprofitable for him to sell a particular line of goods? The inter-relation between the grounds for termination under this article and the grounds for non-payment of commission under Article 16(1)(c) remains unclear.

(c) Article 27(1)(b) differs from frustration in another respect which is likely to cause difficulties in English law, namely that the events justifying termination do not by themselves end the agreement: one party or the other has to "terminate" as well.

(d) The relation between this article and Article 13 should be noted. It seems that the agent may still be entitled to commission on a transaction negotiated by him, even though "at fault" in relation to the very transaction justifying his dismissal<sup>49</sup>. Is this a desirable rule?

(e) Article 27(1)(a) uses the phrase "cannot be required", whereas in Article 16(1)(c) the phrase is "cannot reasonably be required". A similar point occurs in Article 27(1)(b). Is the difference intended to have a significance or is it just sloppy drafting?

(f) Article 27(2) refers to "termination *vis-à-vis* the other party". Presumably the communication would have to be in writing; otherwise the provision that the reasons for termination have to be given in writing is anomalous. But the point is not dealt with expressly.

### Article 28

(a) Article 28(1) seems to draw a distinction between "termination" and "declaring the contract to be at an end" although it is not clear what it is; it is unknown to English law. It is likely to cause uncertainty.

(b) Article 28 tells us nothing about the effects of failure to give *written* notice under Article 26(1) or to give *written* reasons under Article 27(2). In other words, it does not tell us what happens where the notice is good in substance

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<sup>48</sup> See p. 49, below.

<sup>49</sup> Contrast, in English law, *Andrews v. Ramsay* [1903] 2 K.B. 635 (no commission on a transaction where the agent has received a secret commission from the third party).

but bad in form. Does the notice terminate the contract or does the contract nevertheless continue?

(c) Article 28(2) introduces the concept of the “lump sum indemnity” which is a novelty in our law of agency. It seems that the agent gets his average monthly earnings for the unexpired contract period, subject to the two year limit. Why should he get the whole “average remuneration” without allowing for the fact that he does not have to incur the expense of earning it? Why are the factors, relevant under Article 19(3)(b), not also relevant here? The English law requires that employees who have been wrongfully dismissed should only recover their real loss, after taking into account the extent to which the loss was or should have been mitigated. The directive aims to put the commercial agent in a better position, in this regard, than the ordinary employee.

#### *Article 29*

There seems no reason why the agent’s right of lien should be mandatory and in full force in all cases. There may be circumstances in which it would be fair and reasonable for the agent to contract for a qualified right of lien, or, perhaps, no such right at all. Furthermore Article 29(2) seems to allow a general lien covering, for example, goods entrusted to the agent for use only; this is in conflict with the existing English law<sup>50</sup> and must result in uncertainty.

#### *Articles 30 and 31*

*Policy considerations relevant to whether there should be any payment at all*

(a) We have already pointed out that we are not satisfied that any case has been made out that a goodwill indemnity should ever be payable unless the principal and the agent, in their contract, have bargained for such a payment<sup>51</sup>.

(b) However, even if a case were made out for such a mandatory entitlement it should only be payable where the agency is for an indeterminate period and it certainly could never be justified where the agency is for a fixed term<sup>52</sup>.

(c) Whatever justification there might be for giving the “quasi-employee” a goodwill indemnity there certainly can be none for giving it to:—

- (i) persons such as advertising agents, theatrical agents, stockbrokers, etc., who are caught by Article 2;
- (ii) persons acting as commercial agents as a secondary activity;
- (iii) companies or corporations: although Article 33(1) permits large companies to contract out of Article 30 we are of the view that not only is the mandatory rule inappropriate for small companies, but the entitlement is also inappropriate as a term of a model contract for large companies.

(d) We can see no justification for allowing the agent to claim the indemnity when he retires and terminates the contract by notice under Article 30(4). The agency is treated by the directive as alienable<sup>53</sup>. If it is worth something then

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<sup>50</sup> *Rolls Razor Ltd. v. Cox* [1967] 1 Q.B. 552.

<sup>51</sup> See para. 25, above.

<sup>52</sup> See para. 25, above.

<sup>53</sup> See para. 26, above.

presumably the agent should be able to recover its value by selling it; if it is not worth anything then presumably he should not be entitled to anything. Furthermore, a principal may be prejudiced by having to pay out a lump sum at a time not of his own choosing. The right of indemnity on resignation could be abused by the agent if, after an interval (so that 30(1)(b) is satisfied) he begins to negotiate transactions between the customers he introduced to his former principal and a new principal with whom he subsequently has taken up work.

(e) Even if the goodwill indemnity ought sometimes to be payable to the agent whose services are dispensed with—so as to provide him with something comparable to redundancy money—it does not follow that the right to the indemnity should automatically pass to his estate if he dies while the contract is still on foot (as Article 30(1) appears to contemplate).

(f) On the other hand if the policy behind the goodwill indemnity provisions is that the agent should get a reward for effort it is hard to see why he should be deprived of it just because he receives something by virtue of Article 13. If under Article 13 the commercial agent receives commission on one or two transactions entered into after the contract has come to an end with two customers introduced by him, it seems that his right to goodwill indemnity is excluded. Can this be right? The position seems to be different if he gets Article 13 commission in respect of one customer and not in respect of the other: that is, he is then entitled to the *full* goodwill indemnity. Is this distinction defensible? The general policy of Article 30(1)(c) seems to be that the commercial agent is not to get goodwill indemnity in respect of a source of income that is in fact continuing. But the attempt to express this policy has been unsuccessful.

(g) Assuming, as in (f), that the basis of the goodwill indemnity is to provide a reward for effort it is remarkable that the agent who puts in many years of work gets no recompense if the principal does not as a result receive “substantial benefits [that] will continue to accrue”, for example, where the principal decides to close down his business because it is no longer profitable.

*Policy considerations relevant to the calculation of the amount payable*

(h) Articles 30 and 31 “zig-zag” between two different principles for calculating the remuneration, one that it should be a reward to the agent for the work he has done, the other that the principal should account for the benefit that he is left with when the agent has left<sup>54</sup>. The result is confusing and must create difficulties for the courts.

(i) There is no direct relationship between the conditions in which the right arises (Article 30(1)) and the amount to which the agent is entitled (Article 30(2)). Suppose the principal gets a slight benefit by introducing two new customers while also negotiating transactions with 98 old customers (with whom the volume of business is not “appreciably increased”). The minimum amount of the goodwill indemnity under Article 30(2) is based on the *whole* of his average annual remuneration—not on the *extra* amount attributable to the

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<sup>54</sup> See para. 24, above.

new customers. This might be adjusted under Article 30(3). But this confused position shows that sensible rules for computation have not been formulated: and, because of the conflicting bases of the entitlement (benefit/efforts), certainly cannot be formulated.

(j) The first sentence of Article 30(4) envisages payment to the agent who terminates by notice without justification of an indemnity not exceeding the amount payable under Article 30(2), whereas the second sentence of Article 30(4) provides that the agent who terminates with justification might be entitled to the maximum indemnity in Article 30(3). It is quite possible, if the agent has worked for 20 years, for his minimum entitlement under Article 30(2) to be equal to his maximum entitlement under Article 30(3): the effect of providing a different way of calculating the indemnity is not clear. In any event, where the agent's termination was justified by the principal's conduct, the agent would presumably have his remedy in damages for breach.

(k) Article 30(4) provides for a very unsatisfactory mixture of goodwill indemnity and some form of punitive damages. The principal becomes liable to the maximum amount (whether it is otherwise available or not) simply because he is in breach, even though the loss to the agent is much less.

*Points which are likely to give rise to difficulties in practice*

(l) The question whether a right to goodwill indemnity exists may be very hard to answer in view of the words "appreciably" in Article 30(1)(a) and "substantial" in Article 30(1)(b). The latter provision also prompts the question, for how long must the benefit continue to accrue? Is one month long enough after ten years of agency?

(m) In Article 30(2) it is not clear what "the preceding five years" precedes. If it is intended to denote the five years preceding the cessation of the contract, then it appears to be inconsistent with the provision that the basis for the calculation for the indemnity should include Article 13 commission in respect of transactions concluded *after* the cessation of the contract. If the words are not intended to mean that period, it is hard to see what they do mean.

(n) Article 30(4), second sentence, seems to create some anomalies. It only applies (so as to give the commercial agent the right to the "maximum amount" — that is, two years' average pay) if the commercial agent gives due notice *and* the termination is justified; at least this seems to follow from the phrase "*such* termination". Why, if termination is "justified" must the notice periods be observed for this purpose? What, moreover, is meant by "justified"? Is the reference to "the principal's conduct" one to "fault" within Article 27(1)(a)? If so, why is this not stated? If not, what *does* "the principal's conduct" mean? Is the reference to a kind of constructive dismissal but without breach by the principal? What are "reasons which are particular to the agent"? Is the reference to circumstances listed in Article 27(1)(b) or is it to something wider? Do the words cover the case where the commercial agent is simply too old to carry on and wants to retire? What, finally, is supposed to be the effect of the last four words? Do they once again leave the assessment completely at large? Although Article 30(4) is concerned with quantification rather than entitlement, it contains many obscurities and badly needs clarification.



(o) Article 31(c) provides that the commercial agent loses his right to goodwill indemnity if he miscalculates the period of notice by so much as one day. Should not the test rather be whether his failure to give proper notice causes serious prejudice to the principal? A somewhat similar point can be made about a commercial agent who terminates (or purports to do so) believing in good faith, and reasonably, that he has grounds under Article 27(1), but who then finds that he cannot substantiate those grounds. In view of the obscurity of Article 27(1)(b), this is no improbable contingency.

(p) Article 31(b) exempts the principal from having to pay the goodwill indemnity where one agent is replaced by another whom he has introduced. In English law there would, in such circumstances, either be an assignment of the agency by one agent to the other or (more likely) a new contract with the new agent. The directive contemplates that the old contract may be "maintained on foot" with the new agent being "substituted entirely". It is not clear whether this would apply to an assignment and very doubtful whether it would apply where there was a new contract. The article is likely to cause confusion and uncertainty in this country.

#### Article 32<sup>55</sup>

(a) It is extraordinary that this is not one of the articles which, under Article 4(1), Member States need not apply to persons who act as commercial agents by way of secondary activity.

(b) The weakness of Article 32(2) is that it will often be impossible to tell, when the agreement restricting competition is drafted, whether it is going to be valid. The agency agreement may last for many years; but in the last few months the agent may cease to be "entrusted" with a small part of his original territory. The result is that the restrictive agreement no longer satisfies the test of Article 32(2), though when made it did satisfy the test. What is the effect? Is the agreement wholly void? Can it be severed? Article 32(1) says nothing about failure to comply with substantive requirements.

(c) It should be noted that the restraint clause may be void by English law even if it is for a period of less than two years and this possibility does not seem to have been envisaged in Article 32.

(d) The meaning of Article 32(3) is unclear. Does it mean that only restrictive covenants of two years' duration are valid? If a restrictive covenant is for more than two years, would it be void *in toto*, or could the court sever the covenant, holding the first two years to be valid and the rest to be void?

(e) Is the payment provided for in Article 32(4) only available if the restrictive covenant is valid, or also, if it is invalid, but nevertheless observed?

(f) It is not clear what happens if the contract of agency is terminated by principal and agent, by mutual consent. Does the restriction run on under Article 32(3)? Can it not be ended by agreement of the parties? Presumably

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<sup>55</sup> The more general aspects of Article 32 have been discussed in Part II above and we will not repeat in this Part of the paper the points made there.

not since Article 32(3) is mandatory. There is a related problem under Article 32(5)(b). What happens if the agent terminates the contract under Article 32(5) but does not terminate the restriction in writing? Apparently it continues in force.

(g) In Article 32(6), line 1, why only “before the contract has come to an end” and not after?

(h) What, for instance, if after giving notice, the principal goes out of business? Why must he pay the indemnity for six months even though during those six months the agent is free to compete, does so, and suffers no loss of earnings at all?

(i) Article 32(6) provides that if the agent gives notice of termination in accordance with Article 26, then the principal during the currency of the notice can terminate the restrictive covenant, but only to release himself of the obligation to pay indemnity after a period of six months has elapsed. There seems no good reason why the principal should still have to pay the indemnity to the agent during the part of this period falling after the termination of the contract.

(j) Why should the agent who voluntarily resigns to work for another principal either in another area or selling other goods, be paid goodwill indemnity under Article 30, plus (possibly) Article 13 commission, plus an Article 32 payment equivalent to a maximum two years’ remuneration.

#### *Article 33*

Article 33 attempts to distinguish between small companies which require protection granted by all the mandatory provisions of the directive and large companies which, presumably because of their financial standing, only require the protection of some of the mandatory provisions. The distinction is turned on the paid-up capital of the company. In our view, the paid-up capital of the company is not a reliable index of its financial strength and to turn the distinction on it is totally unrealistic.

#### *Article 34*

No comment.

#### *Article 35*

Article 35(2) permits the parties to derogate from the mandatory provisions in the directive in relation to activities which the agent carries on outside the EEC. It would obviously be cumbersome to have an agreement which was partly valid and partly invalid.

## PART IV OUR CONCLUSIONS

48. As we have seen, the directive attempts:—

- (a) to isolate a social group, “commercial agents”, with special economic and social needs;

- (b) to lay down mandatory rules to give these agents protection commensurate with these needs;
- (c) to provide a model contract incorporating terms that ought to be implied between these agents and their principals unless the contract provides to the contrary;
- (d) to produce a clear and rational statement in the form of a code covering the relationship between these agents and their principals, in particular the rules governing the formation, performance and termination of their contracts.

49. With regard to (a) we are satisfied that the social group has not been identified and no case seems to have been made out for the alleged social and economic needs of all the persons falling within the ambit of the directive.

50. With regard to (b) we consider the directive to be one-sided and the mandatory rules to consist of an elaborate advancement of a sectional interest for which no case has been made out. The rules, as drafted, appear to us to be cumbersome and unworkable. Moreover, parties who devise clearer or more sensible rules to suit themselves do so at their peril.

51. With regard to (c) we do not consider that the provisions of the directive would constitute in English law appropriate terms to be incorporated in a model contract between any agent and any principal. With regard to many of them it seems inconceivable that the parties to such a contract would wish them to govern their mutual relationship. Yet this is what they will do, unless the parties expressly provide that they should not.

52. With regard to (d) we do not consider that the attempted codification has done anything to clarify the existing law. On the contrary, the rules which the directive purports to declare are full of uncertainties, gaps and inconsistencies and, in many respects, offend against basic principles of the English law of agency. Furthermore, they depend for their operation upon a corpus of law which is not stated in the directive. Their introduction would necessitate the distortion of the common law of agency and of other areas of commercial law. In our opinion, no justification, social or legal, has been made out for such a step.

53. Our conclusion is, therefore, that the directive's defects of substance, presentation and drafting are such that it fails even to provide a basis for negotiation.

(Signed) SAMUEL COOKE, *Chairman*.  
STEPHEN EDELL.  
DEREK HODGSON.  
NORMAN S. MARSH.  
PETER M. NORTH.

J. M. CARTWRIGHT SHARP, *Secretary*.

3 June 1977.

ANNEX A

EUROPEAN COMMUNITIES  
The Council

Brussels, 5 January 1977  
R/3/77 (ES 1)

*Translation*

*Letter from:* The Commission of the European Communities, signed by Mr F. GUNDELACH, Member.

*Dated:* 17 December 1976.

*To:* Mr VAN DER STOEL, President of the Council of the European Communities.

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

Sir,

I enclose a proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents.

As the proposal is based in particular on Articles 57 and 100 of the Treaty establishing the European Economic Communities, consultation of the European Parliament and the Economic and Social Committee is mandatory.

The Commission believes that it should be possible for the Council to act on the proposal before the end of 1978. Given this time-scale, the European Parliament and the Economic and Social Committee should deliver their Opinions during the first half of 1977.

(Complimentary close).

(Signed) Finn GUNDELACH  
Member of the Commission.

*Encl.:* COM(76) 670 final

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R/3 e/77 (ES 1) ard/JM/jn  
EEC

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(76) 670 final

Brussels, 14 December 1976

**Proposal for a Council Directive  
to coordinate the Laws of the Member States relating to  
(self-employed) Commercial Agents**

*(submitted to the Council by the Commission)*

EXPLANATORY MEMORANDUM

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

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

After examining the laws which are currently in force and consulting the various trade and professional organisations, it was clear that the first subject which should be dealt with was coordination of the laws relating to commercial agents. Such agents play a very important part in interpenetration of markets and, for that reason, in the growth of intracommunity trade. The need to coordinate national laws in the field of commercial representation in its widest sense became apparent when the restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by Council Directive 64/224/EEC of 25 February 1964<sup>56</sup>.

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

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

In the interests of the common market the said differences between legal systems must not be allowed to impede to any significant extent the making and operation of contracts between a principal who is established in one Member State and a commercial agent who is established in another. In point of fact the coordination here proposed applies not only to cases involving two or more Member States but also to cases arising in one Member State only, since trade in goods and the provision of services should always be effected in

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<sup>56</sup> No. 56, 4/4/1964, p. 869.

### *Explanatory Memorandum*

the Community under conditions which are similar to those of a single market. It would, moreover, be inconsistent with this objective to superimpose on the existing laws of Member States relating to commercial agents Community legislation applicable solely to transactions which involve a foreign element. Furthermore it would create unequal conditions of competition within one and the same State if commercial agents who carry on business in one Member State were subject to substantially different legal systems depending upon whether their activities were governed by the law of the Member State in which they carry them on or by some other system of law.

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

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

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

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

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

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

### EEC Directive

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

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

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

## *Explanatory Memorandum*

### CHAPTER I—SCOPE OF APPLICATION

#### *Article 1*

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

Council Directive 64/224/EEC of 25 February 1964, which has already been referred to, was very wide in scope, whereas this proposal is concerned only with self-employed commercial agents as defined in Article 2. Agents of this kind and salaried or wage-earning commercial travellers resemble each other in that the continuing task of both is to represent their principal. Due consideration will have to be given to this similarity in their roles when the future Directive harmonising the law relating to salaried or wage-earning commercial travellers is being prepared. Article 3 specifies which types of commercial agent are not covered by the definition contained in Article 2 or are expressly excluded from it.

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

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

#### *Article 2*

It is essential to have a definition of “commercial agent”. In some Member States the concept of “commercial agent” is unknown, whilst in others it remains undefined or is defined only partially. What is required is a line of demarcation between the activities of commercial agents and the activities of other intermediaries. The commercial agent is self-employed, that is, he arranges his activities as he thinks fit and uses his time as he pleases (see Article 5(e) of this Directive). It is in this respect that he differs from the salaried or wage-earning commercial traveller. Another distinguishing feature of the commercial agent is that he acts not in his own name but in the name and for account of his principal. This is the difference between the commercial agent and the commission agent (*commissionaire, Kommissionär*), the latter acting for account of another but in his own name. The third important distinguishing feature of the commercial agent is the continuing nature of his contractual tie with the principal. Where a person is appointed to act temporarily as intermediary to negotiate or conclude agreements for a specific number of transactions in the name of the principal, he is not on that ground alone to be taken to be the commercial agent of that principal.

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

#### *Article 3*

For the sake of clarity this Article sets out the most important classes of



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

### *Article 4*

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

No definition is given of "commercial agency by way of secondary activity" because it is impossible to lay down suitable criteria which apply in every case. All the surrounding circumstances must be considered in each individual case in deciding whether a commercial agent is carrying on business by way of secondary activity. Moreover, opinions on this subject vary from one country to another. The Directive here refers back to the usages of trade in the State whose law governs the contract. Where the commercial agent does carry on his business by way of secondary activity the provisions of the Directive, in principle, apply. The Member States may allow the parties to derogate only from those mandatory provisions which are specified in this Article.

The provisions in question would in point of fact involve the principal in financial burdens which would be unreasonable in relation to the economic importance of the business carried on. To make these provisions compulsory would have the effect of restricting substantially the entry into and carrying on of the business of commercial agent by way of secondary activity for a large number of people who derive appreciable revenue from it, e.g. persons who collect group orders for mail order establishments—very often they are married women who normally do not carry on any trade or business.

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### CHAPTER II—RIGHTS AND OBLIGATIONS OF THE PARTIES

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

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

#### *Article 5*

The first paragraph sets out the general principle that the commercial agent must act fairly and in good faith *vis-à-vis* his principal and must protect his interests with all proper care. Paragraph (2) contains a non-exhaustive list of obligations which flow from that principle and which are incumbent upon the commercial agent. In the first place there is the obligation not to act as intermediary in relation to, nor to conclude transactions with, third parties whom the agent knows to be insolvent. He must accordingly (sub-paragraph (a)) inform the principal concerning the solvency of third parties with whom transactions are in course of negotiation or execution. Sub-paragraph (c) requires the agent to keep certain accounts which must, if appropriate, include accounts relating to moneys owed by customers. Sub-paragraph (e) emphasises the commercial agent's obligation to comply with all instructions given him by the principal within the framework of the agency. It is for the principal alone to decide, for example, whether and on what terms a commercial transaction is to be entered into and performed. In this respect therefore the agent's independence is limited.

#### *Article 6*

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

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### *Article 7*

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

### *Article 8*

It can sometimes happen that the proprietor of a patent, trademark, design or model brings legal proceedings against the agent in order to prevent him from selling or using the protected product. The agent may be required to pay damages for infringement of the rights in question. National laws and international conventions allow action to be brought directly against the person who commits the infringement. In these circumstances it is of small importance whether the infringer of industrial, commercial or intellectual property rights acted in his own name or in the name of another, on his own initiative or at the request of a third party. As the Directive in no way purports to make changes in relation to the exercise of these rights of protection, it could not possibly prohibit the bringing of legal proceedings against commercial agents who act on behalf of their principals. The Directive does, however, expressly provide that the principal must indemnify the agent who suffers damage because one of those rights has been infringed in the course of carrying on the agency, if the infringement was attributable to the principal. Where the agent considers that he would be entitled to claim damages from the principal if, in the action brought by the proprietor of the right of protection against the agent, judgment were to be given in favour of the former, the agent shall be entitled to require the principal to be joined as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings pursuant to the national law (see Article 6(2) of the Judgments Convention of 27 September 1968 and Article V of the Protocol annexed thereto).

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

### *Article 9*

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

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

Paragraph (2) sets out certain presumptions. The agent always has authority to receive notices of complaint from third parties concerning defective goods

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or services. Similarly he always has authority to receive notices to the effect that goods are available for collection, in cases where the person to whom they were supplied declines to accept them. Lastly, he always has authority to protect the principal's rights as regards the preservation of evidence.

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

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

#### *Article 10*

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

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

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### CHAPTER III—REMUNERATION AND REIMBURSEMENT OF EXPENSES

The provisions of this chapter, namely Articles 11 to 20, are based on the principle that the commercial agent is entitled to be remunerated for his services. These Articles indicate also the various elements that go to make up his remuneration, the conditions under which the agent is entitled to commission on transactions entered into during the currency of the contract and after termination, the time at which commission is payable, the way in which the amount of commission is to be calculated, and the cases in which the right to commission is extinguished. These Articles confer on the commercial agent the following rights: the right to examine the principal's books for the purpose of verifying the correctness of the commission statement, the right to special commission for collecting payment of moneys, the right to be remunerated in cases where the principal does not make use of his services or where the principal makes less use of them than the agent could in the normal course of events have expected.

#### *Article 11*

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

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

#### *Article 12*

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

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

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

Paragraph (2) provides that a principal who, under Article 13, owes commission to a former agent for a transaction entered into after termination of

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the contract is not under obligation to pay commission to the new agent unless it was otherwise agreed.

#### *Article 13*

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

#### *Article 14*

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

#### *Article 15*

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

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

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value of that part of the transaction which has been executed by the principal or third party. Where the principal or third party fails to perform his part of the transaction in full, the amount of commission is to be calculated on the basis of the value of that part performed which is the higher.

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

1. The general rule is that the principal is not bound to pay commission unless the third party performs his part of the transaction.
2. Where the principal performs his part of the contract first, payment of commission in full may be postponed for so long as the third party fails to perform his part. A suitable payment on account must, however, be made to the agent.
3. The agent knows that where the third party has not performed his part of the contract, and however long that state of affairs continues, commission will be paid as a general rule at the end of the third month following that in which the principal performs his part. The exceptions to this are set out in Article 16.
4. The period of three months which is allowed for preparation of the commission statement will facilitate the accounting involved.
5. The commission statement must include not only commission which is actually payable but also commission earned though not yet payable, so as to give the agent the opportunity of proving his debt, if necessary, in insolvency proceedings (see Article 22).
6. The wording of the Article makes it clear that in the event of partial performance of the transaction by one party, only a partial commission is payable. Where both parties perform only part of their obligations, the amount of commission will be proportionate to that part whose value is the higher. But where one party performs in full and the other only in part, commission will be payable on the whole value of the transaction.

### Article 16

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

Where subparagraph (a) applies, the transaction was entered into with a customer who was insolvent and, because the agent failed in his duty under Article 5 and omitted to inform the principal thereof, the principal was unaware of the insolvency. In addition, the customer has not performed his part of the contract. Here the loss of entitlement to commission is due to the negligence of the agent. The only cases intended to be caught by this subparagraph are those in which the agent fails to exercise his duty of care, with consequent loss to the principal or potential loss to him if he had executed the transaction.

Where subparagraph (b) or (c) applies the transaction was validly entered into but was not executed for some such reason as *force majeure*, or because the customer's business has ceased to exist or has ceased payment, so that the

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principal cannot perform his part of the transaction or is unwilling to do so. It will be mainly for national law to determine which cases are covered by these two subparagraphs. In any event it is impossible to spell out in the Directive the precise meaning of such concepts as “impossibility” and “serious grounds”, the scope and significance of which have been settled by the law or by the case-law or in juristic writings in the Member States.

### *Article 17*

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

### *Article 18*

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

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

### *Article 19*

The commercial agent is entitled under Article 11 to be remunerated for his work. In certain circumstances he is entitled to be paid even though he does no work for the principal or less work than anticipated. This would be the case, for example, where the commercial agent has begun to negotiate transactions for the principal or where the agent has done whatever is necessary to enable him to carry out his part of the agency contract but, as regards the sector entrusted to the agent, the principal has not developed his business to the extent that the agent could reasonably have expected having regard to the economic development of the undertaking and to market movements.

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

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



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

*Article 20*

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

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

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CHAPTER IV—DEL CREDERE

*Article 21*

This Article defines the *del credere* agreement whereby the commercial agent guarantees in favour of the principal that a third party will pay for goods or services supplied in execution of commercial transactions which the agent has negotiated or agreed. It also protects him when he gives a *del credere* guarantee. The protection afforded is about on a par with the average throughout the various Member States. The written form is mandatory. *Del credere* agreements concluded by cable, telex or telegrams are treated as satisfying this requirement. The draft proposal for a Directive on suretyship contains a like provision in keeping with developments in modern business. *Del credere* agreements may be in the form of a suretyship agreement or of an indemnity agreement.

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

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

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

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CHAPTER V—BANKRUPTCY OR WINDING-UP OF THE PRINCIPAL EXECUTION AND ASSIGNMENT

*Article 22*

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

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### CHAPTER VI—MAKING OF THE CONTRACT AND CESSATION OF THE CONTRACT

#### Articles 23 and 24

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

#### Articles 25, 26, 27 and 28

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

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

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

Article 27 deals with the two common cases in which the parties may terminate the contract without observing any period of notice or waiting for the contract to run its normal term. First there is the case where one of the parties has in relation to the contract committed a fault such that the other party cannot be required to keep it in being until the end of the period of notice or until the end of the agreed period of duration of the contract. Secondly there are the cases of *force majeure*, inevitable accident, change in the surrounding circumstances, etc., which substantially undermine the commercial basis of the contract. An example would be the case where the commercial agent finds it impossible to continue in business for reasons of health, old-age or serious and unforeseeable family circumstances.

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

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

### *Article 29*

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

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

### *Article 30*

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

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

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

All three conditions must be satisfied.

The amount of indemnity must be reasonable having regard to all the circumstances. As a general rule it would be reasonable that the agent receive in respect of each year of the agency at least one tenth of the average annual remuneration received by him during the preceding five years. In making this calculation account is to be taken of the entitlement to commission under Article 13 following termination. The agent can never require an indemnity of more than twice the average annual remuneration. Usually he will be entitled to the maximum indemnity after twenty years. Exceptionally, either party may request that the rule fixing the amount of the indemnity at one tenth of the average annual remuneration over the preceding five years, for

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each year of the agency, be waived if it would be equitable to do so. The amount of indemnity arrived at is not, however, to exceed an amount which is equal to twice the average annual remuneration. Below that figure the waiver may operate to the advantage of the agent, so that he receives more, or to the advantage of the principal, so that he pays less. If the parties cannot agree, the amount of indemnity will be determined by the Court.

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

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

### *Article 31*

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

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

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

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

### *Article 32*

The question of restraint of competition after termination of the contract is

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

The present proposal specifies in which cases the obligations arising under an agreement restricting competition may be modified. The cases mainly in point are those where the principal terminates the contract on the ground of fault committed by the agent, where the agent terminates on the ground of fault committed by the principal, where either party terminates because of *force majeure*, inevitable accident or for some personal reason, which makes it impossible for him to continue with the contract.

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CHAPTER VII—GENERAL AND FINAL PROVISIONS

*Article 33*

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

“Article 15(4): Agent’s right to receive a suitable payment on account.

Article 19 : Agent’s right to remuneration where the principal has not made use of his services or has made less use of them than the agent could ordinarily expect.

Article 21 : Agent’s right to separate commission for giving *del credere* guarantees.

Article 26(2): Agreement as to minimum period of notice for termination of an agency contract concluded for an indeterminate period.

Article 30 : Agent’s right to goodwill indemnity.”

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

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

*Article 34*

This Article is concerned with limitation periods in relation to rights which flow from the provisions of the Directive. The periods of limitation vary in length from one Member State to another, depending on the particular subject-matter, from six months to thirty years. Article 34 fixes a uniform period of four years calculated from the end of the year in which the right arises. Derogations are, however, allowed as regards rights which arise during the period of ten years preceding termination of the contract to sums of money which have been omitted from the commission statement referred to in Article 15(5) or to reimbursement of expenses under Article 20. In these cases the period of limitation begins to run from the end of the year during which the contract expires, the object being to obviate the difficulty which the agent would experience if he had to commence legal proceedings during the currency of the contract. In proposing a period of ten years prior to termination it is considered that certainty as to the law would thereby be assured whilst at the same time taking account of the fact that in all Member States a limit is imposed upon the length of time during which books of account and relevant documents have to be preserved.

*Article 35*

This Article is based on the principle that principal and agent are not entitled to derogate from the mandatory provisions contained in the Directive, or more precisely from the mandatory provisions of national law adopted in application of the Directive. They are prohibited from doing so only in so far



as the derogation would be inconsistent with the provisions which are designed to protect the agent. Member States will thus have to ensure that terms agreed between the parties are void under the national law if they are contrary to the mandatory provisions.

The relevant provisions are as follows<sup>57</sup>:

Article 5(1): Duty of the commercial agent to act fairly and in good faith.

Article 8 : Agent's right to damages from the principal where the agent has had to meet a claim for infringement of industrial, commercial or intellectual property rights, the infringement being attributable to the principal.

Article 10(1)  
and

Article 10

(2)(b) and (c): Duty of the principal to act fairly and in good faith, especially to provide the agent with all the information he requires in order to carry out the contract, and to inform him of the acceptance, refusal or partial execution of commercial transactions.

Article 11(1)

and (3) : Agent's right to be remunerated for his services.

Article 12(1): Conditions governing the right to remuneration.

Article 13 : Right to commission on transactions entered into after termination of the contract.

Article 14 : Right to special commission for collection of moneys.

Article 15 : Time at which the right to commission arises.

Article 16(1): Cases in which commission does not become due.

Article 18 : Agent's right to examine the books of account.

Article 19(1)

and (2) : Right to remuneration where principal does not make use of agent's services to the extent expected; basis of calculation of remuneration in these circumstances.

Article 20(2): Right to reimbursement of expenses.

Article 21(1)

(2) and (3) : The *del credere* provisions, which as provided in paragraph 4 may be derogated from only where the principal or the third party is established or is habitually resident outside the Community, or where the agent has been given full authority to conclude contracts.

Article 23 : Right to receive a signed written statement of the terms of the contract.

Article 26 : Formal requirements relating to notice and minimum period of notice.

Article 27 : Notice in case of serious fault or undermining of the commercial basis of the contract.

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<sup>57</sup> Some of the mandatory provisions in the Directive (e.g., Articles 1, 2, 3 and 22) do not relate to the contract itself and in this respect are different from the provisions listed here.

### *Explanatory Memorandum*

Article 28 : Right to damages or lump-sum indemnity for wrongful termination, at the agent's option.

Article 29(2): Agent's right of lien.

Article 30 : Goodwill indemnity.

Article 32 : Agreements restricting competition—formal requirements, scope and duration.

Article 34 : Limitation periods.

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

#### *Articles 36 and 37*

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

**Proposal for a Council Directive to  
coordinate the Laws of the Member States relating to  
(self-employed) Commercial Agents**

The Council of the European Communities,

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

Having regard to the Proposal from the Commission;

Having regard to the Opinion of the European Parliament;

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

Whereas the restrictions on freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries were abolished by Council Directive 64/224/EEC of 25 February 1964<sup>58</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 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 harmonisation 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 harmonising 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 :

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<sup>58</sup> OJ No. 56, 4.4.1964, P. 869/64.

**Article 1**

1. The harmonisation measures prescribed by this Directive apply to the laws, regulations and administrative provisions of the Member States governing the relations between self-employed commercial agents and their principals.
2. National laws and trade usages which are not inconsistent with the provisions of this Directive shall continue to apply to the relations referred to in paragraph 1.

**Article 2**

For the purposes of this Directive the expression “commercial agent” means a self-employed intermediary who has continuing authority for a fixed or indeterminate period to negotiate and/or to conclude an unlimited number of commercial 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 agent's independence. The agent may arrange his activities and use his time as he thinks fit.

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

**Article 6**

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

**Article 7**

1. The commercial agent may carry on business for his own account or for account of a third 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 twelve months before the circumstances described in paragraph 1 arose. If the contract was concluded less than twelve months previously the remuneration shall be calculated on the basis of the average monthly remuneration paid during the currency of the contract.

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

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

**Article 20**

1. The commercial agent shall not be entitled to reimbursement of expenses

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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.

**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 twelve months. Periods of notice shall coincide with the end of a calendar month.

**Article 27**

1. Either party may terminate the contract at any time:
  - (a) where the other party has in relation to the contract committed a fault such that the party who terminates cannot be required to keep it in being until the end of the period of notice or until the end of its agreed period of duration, or
  - (b) where some circumstance arises which makes it impossible to perform the contract, or which seriously prejudices its performance, or which substantially undermines the commercial basis of the contract, so that the party who terminates cannot be required to keep it in being until the end of the period of notice or until the end of its agreed period of duration.
2. Termination must be effected *vis-à-vis* the other party as soon as the fault becomes known or as soon as the events which justify termination have occurred. The party who terminates shall upon request of the other inform him in writing of the reasons therefor.
3. Where the contract is terminated under paragraph 1(a) the party who is at fault shall be liable in damages to the other.

**Article 28**

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

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

**Article 29**

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

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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.

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

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



CHAPTER VII—GENERAL AND FINAL PROVISIONS

**Article 33**

1. Where the commercial agency is undertaken by a company or legal person whose most recent annual accounts show that it has a paid-up capital exceeding the equivalent of 100 000 European Units of Account, the parties may derogate from the provisions of Articles 15(4), 19, 21, 26(2) and 30.
2. The European Unit of Account (EUA) means the unit of account defined in Commission Decision No. 3289/75/ECSC of 15 December 1975<sup>59</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 ten years of the contract for commission which has not been included in the statement referred to in Article 15(5), or for reimbursement of expenses under Article 20, the limitation period shall begin to run from the end of the year during which the contract came to an end.

**Article 35**

1. Any stipulation whereby the parties derogate, to the detriment of the agent, from the provisions next hereinafter mentioned shall be void: Article 5(1), 8, 10(1), 10(2)(b) and (c), 11(1) and (3), 12(1), 13, 14, 15, 16(1), 18, 19(1) and (2), 20(2), 21(1) (2) and (3), 23, 26, 27, 28, 29(2), 30, 32 and 34.
2. In addition to the cases of derogation permitted under Article 21(4) and Article 33, the parties may derogate from the compulsory provisions specified in the foregoing paragraph in relation to those activities which the commercial agent carries on outside the Community.

**Article 36**

1. The Member States shall before 1 January 1980 adopt and publish the provisions which are necessary to comply with this Directive and shall inform the Commission thereof immediately. They shall apply those provisions from 1 July 1980.
2. From the time of notification of this Directive the Member States shall inform the Commission, in good time to enable it to communicate its observations, concerning the draft laws, regulations and administrative provisions which they plan to adopt in the field governed by this Directive.

**Article 37**

This Directive is addressed to the Member States.

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<sup>59</sup> OJ No. L 327, 19 December 1975, p. 4.

## ANNEX B

### Law amending the German Commercial Code<sup>60</sup>

#### *(Commercial Agents)*

August 6, 1953

BGBI. 1953 I Nr. 45, p. 771

The Bundestag has enacted the following:

#### *Article 1*

The Seventh Part of the First Book of the German Commercial Code is to be amended as follows:

#### Seventh Part

#### *Commercial Agents*

#### §84

(1) A commercial agent is he who is permanently entrusted as an independent person engaged in business to negotiate transactions for another person engaged in business (the principal) or to conclude transactions in the principal's name. A person is independent if he is in general permitted to arrange his activities freely and to determine his own hours of work.

(2) Any person who, without being independent within the meaning of subsection (1), is permanently entrusted with the negotiation of transactions for a principal or to conclude transactions in his principal's name, is deemed to be an employee.

(3) The principal may himself be a commercial agent.

#### §85

Either party is entitled to demand that the terms of the contract together with any subsequent additional agreements thereto shall be set out in writing and signed by the other party thereto. This right may not be excluded by agreement.

#### §86

(1) It is the duty of the commercial agent to concern himself with the negotiation or conclusion of transactions; he must act therein in the best interests of the principal.

(2) It is his duty to keep the principal properly informed and in particular to advise him immediately of each negotiation and the conclusion of any transaction.

(3) He must carry out his duties with the diligence of a prudent businessman.

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<sup>60</sup> Based on "Commercial Agency and Distribution Agreements in Europe", British Institute of International and Comparative Law; Special Publication No. 3 (1964), pp. 56-75.

#### §86a

(1) The principal must make available to the commercial agent all those materials which are necessary for the performance of his duties, such as samples, drawings, price lists, promotional literature, and the terms and conditions of business.

(2) The principal is under a duty to give to the commercial agent all necessary information. He must keep him immediately informed of the acceptance or refusal of all transactions negotiated by the agent or concluded by him without authority. The principal must notify the agent of cases where the principal is only able or willing to execute an appreciably smaller order than was to be expected in the circumstances; this right may not be excluded by agreement.

#### §86b

(1) Where the commercial agent himself undertakes to guarantee the fulfilment of the obligation arising out of a transaction he is entitled to a special remuneration (*del credere* commission); this claim may not be excluded by agreement. The undertaking may only be assumed with respect to a specified transaction or to transactions with specified third parties which are negotiated or concluded by the commercial agent. Such undertaking is required to be in writing.

(2) The claim to the *del credere* commission arises at the conclusion of the transaction.

(3) Subsection (1) does not apply where the principal or the third party has his establishment or failing that, his residence, abroad. Nor does it apply to transactions for the conclusion and execution of which the commercial agent has unlimited authority.

#### §87

(1) The commercial agent is entitled to commission on all transactions concluded during the term of the contract which are the result of his activity or are concluded with third parties which he has introduced as customers for business of a similar nature. He is not entitled to commission where this is due to his predecessor in accordance with subsection (3).

(2) Where the commercial agent is allotted a particular district or a particular *clientèle*, he is also entitled to commission on transactions concluded without his intervention with persons within his district or among his *clientèle* during the term of his contract. This does not apply where the commission is due to his predecessor under subsection (3).

(3) For a transaction which is not concluded until after the term of the contract has expired, the commercial agent is only entitled to commission where he has negotiated it or has initiated and so prepared it that its conclusion is preponderantly due to his activity and provided that the transaction is concluded within a reasonable time after the expiry of his contract.

(4) In addition to the entitlement to commission for concluded transactions, the commercial agent is entitled to commission in respect of all sums collected by him in accordance with the terms of his instructions.

#### §87a

(1) The commercial agent is entitled to commission from the time when, and to the same extent as, the principal has executed the transaction. A contrary

agreement may be made but the commercial agent is nevertheless on the execution of the transaction by the principal entitled to an adequate advance which is payable at the latest on the last day of the succeeding month. Apart from any agreement, however, the commercial agent is entitled to commission from the time when, and to the same extent as, the third party has performed the transaction. The right to partial commission on a transaction partly executed may be excluded, so long as it is agreed that the principal shall pay to the commercial agent commission on the whole transaction as soon as a defined proportion thereof has been executed.

(2) Where it is established that the third party fails to perform, entitlement to commission is extinguished; any sums already paid by way of commission must be repaid.

(3) The commercial agent is also entitled to commission when it is established that the principal has not executed the transaction either in whole or in part, or has executed it in a manner otherwise than in accordance with its terms. This does not apply where, and in so far as, the execution of the transaction has become impossible, without the principal being responsible for such impossibility, or in circumstances where it was not reasonable to expect him to fulfil it, in particular on the ground that the conduct or position of the third party has provided a sufficient reason for its non-execution.

(4) The commission is payable on the last day of the month in which in accordance with §87c(1) the accounting for the commission is to take place.

(5) No agreements may be made which place the commercial agent in a less favourable position than he would otherwise enjoy under subsections (3) and (4).

#### §87b

(1) Where the amount of the commission has not been fixed, the customary rate is deemed to have been agreed.

(2) Commission is to be calculated on the amount which the third party or the principal has to pay. Discounts for cash are not to be deducted; the same applies to subsidiary charges, particularly in respect of transport, packing, customs duties and taxes except if such subsidiary charges are separately invoiced to the third party. Turnover tax which is separately invoiced solely by reason of the provisions of the tax laws is not regarded as separately invoiced.

(3) In respect of agreements relating to rental and uses intended for a period of certain duration, commission is to be calculated on the basis of the amount payable in respect of the duration. In the case of contracts of uncertain duration, commission is to be calculated on the basis of the amount payable in respect of the time between the commencement up to the time from which it is first possible for the third party to determine the contract; the commercial agent is entitled to further commission as appropriate in the event of the contract continuing.

#### §87c

(1) The principal must account monthly in respect of the commission to which the commercial agent is entitled; the period of accounting may not in any event be extended beyond three months. The account must be rendered immediately, and in any event before the end of the succeeding month.

(2) The commercial agent is at the rendering of the account entitled to an extract from the books relating to all transactions in respect of which he is entitled to commission in accordance with §87.

(3) The commercial agent is also entitled to information in respect of all matters relating to his entitlement to commission, when it becomes payable, and its calculation.

(4) In the event of a refusal to supply extracts from the books or where there is a reasonable doubt as to the accuracy or completeness of the account or the extracts from the books, the commercial agent is entitled to demand that either himself or an auditor or an "under oath" accountant nominated by him, at the option of the principal, shall be entitled to inspect the books and other relevant documents to such an extent as may be necessary to establish the accuracy or completeness of the account or the extracts from the books.

(5) These rights of the commercial agent may not be excluded or limited.

#### §87d

The commercial agent is only entitled to reimbursement of his expenses incurred in the proper course of business where this is customary in the trade.

#### §88

The rights arising out of the contractual relationship shall become barred after four years, commencing from the determination of the year in which they accrued.

#### §88a

(1) The commercial agent may not in advance abandon his claim to any legal rights of lien or retention.

(2) After the determination of the contractual relationship the commercial agent has in accordance with general legal provisions an existing right of lien on all material placed at his disposal (§86a(1)) but only in respect of such claims as have fallen due in respect of commission and reimbursement of expenses.

#### §89

(1) If the contractual relationship has been entered into for an indefinite period, it may be determined during the first three years of the contract by six weeks notice to expire at the end of any calendar quarter. Where any other period of notice is prescribed, there must be a minimum period of one month; the period of notice must be such as to expire at the end of a calendar month.

(2) After the contract has subsisted for more than three years such contract may only be determined by notice of at least three months in length expiring at the end of a calendar quarter.

(3) Any period of notice agreed upon must be the same for both parties. Where such periods differ the longer period shall apply to both parties.

#### §89a

(1) The contractual relationship may be put an end to by either party without notice for important reasons. This provision may not be excluded or limited.

(2) Where the ground of termination by one party is conduct for which the other is responsible, the latter is liable in damages for any loss thereby occasioned to the other party as a result of the cessation of the contract.

#### §89b

(1) The commercial agent is entitled to demand from the principal after the termination of the contractual relationship a reasonable compensation for loss of goodwill provided and as far as:

- 1 the principal has derived after the determination of the contractual relationship substantial advantages from his business relations with new customers which have been introduced by the commercial agent
- 2 the commercial agent has, by reason of the termination of the contract, lost rights to commission which he would have had on transactions already concluded, or to be concluded in the future with customers introduced by him if the contract had continued and
- 3 the payment of compensation in respect of loss of goodwill is fair and reasonable in all the circumstances.

It is the equivalent of the introduction of a new customer if the commercial agent so appreciably expands the principal's commercial relations with an existing customer that this amounts as a matter of business to the introduction of a new customer.

(2) Such compensation shall not exceed the average of the annual commission or other annual remuneration for the last five years of the activity of the commercial agent; for a shorter period of duration of the contractual relationship the average during the period of activity is to apply.

(3) The claim does not arise where notice to determine the contractual relationship has been given by the commercial agent unless justified by the conduct of the principal. The same rule applies where the principal has given notice to determine the contractual relationship and has given notice for an important reason arising out of any "fault" of the commercial agent.

(4) This claim may not be excluded in advance. It must be asserted within three months of the determination of the contractual relationship.

(5) [Refers to insurance agents and is not relevant to this paper.]

#### §90

The commercial agent may not exploit or divulge any commercial or industrial secrets which have been confided to him or which have come to his notice in the course of his activity on behalf of the principal, even after the termination of the contractual relationship, in so far as this would in all the circumstances be contrary to rules of behaviour of a decent businessman.

#### §90a

(1) Any agreement whereby the commercial agent is after the determination of the contractual relationship restricted in his business activity (agreement for restriction on competition) is required to be in writing and a document containing the agreed restrictions signed by the principal is to be delivered to the commercial agent. Such an agreement may only extend for a maximum of two years from the determination of the contractual relationship. The principal

is bound to pay to the commercial agent a reasonable compensation in respect of the period of the restriction on competition.

(2) The principal may, in writing, up to the termination of the contractual relationship, renounce the restrictions on competition with the result that after the expiry of six months following upon such declaration, he shall be relieved of any obligation to pay compensation. Where the principal determines the contractual relationship for an important reason arising out of any "fault" on the part of the commercial agent, the latter has no claim to compensation.

(3) Where the commercial agent determines the contractual relationship for important reasons arising out of any "fault" on the part of the principal, he may within one month after such termination, in writing declare himself free from the restrictions on competition.

(4) No agreement may be made which is less favourable for the commercial agent.

#### §91

(1) §55 also applies to a commercial agent authorised to conclude transactions on behalf of a principal who is not normally engaged in business.

(2) A commercial agent even though he has no authority to conclude transactions is regarded as authorised to receive complaints in respect of defective goods, declarations that the goods are available for collection as well as similar declarations whereby a third party claims or reserves his rights in respect of defective performance; he may act on behalf of the principal in respect of the principal's rights in connection with perpetuating testimony. A third party is only to be bound by the limitation of such rights where he knew or ought to have known of such limitation.

#### §91a

(1) Where a commercial agent who is only engaged to enter into negotiations has concluded a transaction in the name of the principal, and the third party was not aware of such want of authority, the transaction is to be regarded as being made with the consent of the principal provided he does not give notice terminating the transaction without delay on being informed by the commercial agent or the third party of the conclusion and the substantial content of the transaction.

(2) The same rule applies where the commercial agent who is engaged to conclude transactions concludes a transaction in the name of the principal which he is not authorised to conclude.

#### §92

[Refers to insurance agents and is not relevant to this paper.]

#### §92a

(1) In respect of the contractual relationship of a commercial agent who is under an obligation not to act for other principals or who is not able to do so by reason of the nature and extent of the duties demanded of him the Federal Minister of Justice in conjunction with the Federal Ministers for Economics and Labour, after having heard the associations representing the commercial agents and the principals may make orders, which do not require the assent of

the Bundesrat, laying down the minimal contractual obligations of the principal in order to ensure the required social and economic needs of the commercial agent or of a particular group of commercial agents. Such obligations as therein laid down may not be excluded or limited by the terms of the contract.

(2) [Refers to insurance agents and is not relevant to this paper.]

#### §92b

(1) §§89 and 89b are not applicable to a part-time commercial agent. Where the contractual relationship is for an indefinite period, it may be determined by one month's notice to expire at the end of a calendar month; in the event of any other period of notice being agreed, such period must be the same for both sides. The claim to an adequate advance under §87a(1), second sentence, may be excluded by agreement.

(2) Subsection (1) hereof may only be applied by a principal who has engaged the commercial agent expressly as part-time commercial agent to negotiate or conclude transactions.

(3) Commercial usage determines whether a commercial agent is a part-time commercial agent only.

(4) [Refers to insurance agents and building society agents and is not relevant to this paper.]

#### §92c

(1) In the event of a commercial agent having no establishment in Germany any agreement deviating from any of the provisions of this Part may be concluded.

(2) The same applies where the commercial agent is authorised to negotiate or conclude transactions having as their object the chartering or equipping of vessels or the carriage of passengers in vessels.



## ANNEX C

### Inconsistencies and confusions in terminology

See Part III, paragraph 39—

- (1) *Use of a number of different words (or phrases) to express the same idea*
  - (a) A commercial agent may (like an English agent) make a contract between a principal and a third party. This is described by the following phrases: “conclude . . . transactions” in Article 2, “conclude agreements” in Article 9, and “agreed a transaction” in Article 12(1)(b) as well as (in effect) in Articles 21(2)(a), 21(4)(b) and 30(1)(c).
  - (b) The commercial agent is generally called “commercial agent” but sometimes just “agent”. There seems to be no system behind these different uses: for example, in Article 10(2), line 2 and in 10(2)(a) we have “agent” but in 10(2)(b) and (c) “commercial agent”; in Article 12(1), line 1, 12(1)(a) and (c) we have “commercial agent” but in 12(1)(b) “agent”. These are random examples. There is no ambiguity, but this is very untidy drafting.
  - (c) The relations between a principal and a third party are generally called “commercial transactions” but sometimes just “transactions”. For example, in Article 12, lines 1–2, we have “commercial transactions” but in 12(1)(a), (b) and (c) “transaction”; in Article 21(2)(a) and (c) we have “transactions” but in 21(2)(b) “commercial transaction”. Again the usage seems random and untidy. The description of the relations between a principal and a third party as “agreements” in Article 9 and as “the contract” in Article 15(4) is even more objectionable. Usually in the draft Directive “contract” refers to the relations between a principal and a commercial agent: see note (2)(a) below; as to “agreement” see notes (1)(d) and (2)(b) below.
  - (d) A particular term of the contract between a principal and a commercial agent is in Article 32 called an “agreement” (*cf.*, also Articles 21 and 30(5)), but a “stipulation” in Article 35.
  - (e) Article 15(1) refers to the time when the right to commission “arises”. The reference to commission being “earned” in Article 15(5) seems to be to the same point (since “earned” is there contrasted with “payable”). Whether “due” in Article 15(3) means “earned” or “payable” is totally unclear.
  - (f) The relations between a principal and a commercial agent are generally referred to as “the contract” (see note (2)(a), below), but in Articles 11(2), 12(1)(b) and 32(2), the draft Directive uses “his agency” (*cf.*, also 5(2)(e)). Article 19(1), line 2 and Article 24 have the best of both worlds by using “the agency contract”. (“The agency” is also used in another sense: see note (2)(d), below).
  - (g) Normally, where the commercial agent does not make a contract between a principal and a third party he is said to “negotiate” a transaction (for example, Articles 2 and 9), but Article 12(1)(a) says that in this situation the transaction is “procured” by the commercial agent, presumably meaning negotiated.

- (h) In Article 15(2)(a) both the principal and the third party “perform” their “part”. In Article 15(4) the principal still “performs” his “part”—but the third party “performs” his “obligations”. In Article 16(1)(a) the commercial agent has “not fulfilled his obligations”—while the third party does not “perform his part”.
- (i) There seems to be no difference between “without delay” in Articles 5(2)(b) and 10(2)(b), and “promptly” in Article 15(5). “As soon as” in Article 27(2) seems to mean much the same thing.
- (j) For collecting payments, the commercial agent gets a “special” commission (Article 14), but as *del credere* agent he gets a “separate” commission (Article 21(3)).
- (k) There is probably no difference between what Article 11(2) calls “a fair commission” and what Article 21(3) calls “a . . . commission of reasonable amount”.
- (l) There probably is meant to be some difference between “terminating” a contract and “declaring it to be at an end” (Article 28) but it is not easily discernible to an English lawyer.
- (m) “Cessation” in the Chapter VI heading, and in Articles 29, 30, 32(1) and (3) seems to mean the same thing as “came to an end” in 32(2) and 32(6): whether “termination” in Article 27(2) also means the same thing is not clear: the draftsman may be drawing the same distinction that is suggested in the previous note.
- (n) Article 30 sometimes refers to “goodwill indemnity” (30(1), (2), line 1, (5) and (6)) and sometimes just to “indemnity” (30(2), line 7, (3) and (4)). There is no ambiguity but it is untidy.
- (o) Under Article 5(2)(a), the commercial agent must “at all times supply” information; under Article 10(2)(b) the principal must “provide” information. Do the two verbs mean different things? Is the omission of “at all times” in 10(2)(b) significant?
- (p) Article 30(1)(c) refers to transactions “negotiated *or agreed*”. One would suppose that the words in italics refer to the situation in which a commercial agent has made a contract between a principal and a third party (see note (1)(a), above). But in that case they have no counterpart in Article 13, so that the cross-reference to Article 13 is meaningless. Perhaps “or agreed” here means something else, but this is totally unclear.
- (2) *Use of the same word to express a number of different ideas:*
- (a) “Contract” in Article 6 seems to mean the totality of the relations arising between a principal and a commercial agent out of the contract between them; it also seems to mean this in Article 12(1) and in Article 13, in the Chapter VI heading, and throughout Chapter VI (that is, Articles 23–32). Yet in Article 11(3) “contracts” seems to mean particular terms in contracts.
- (b) “Agreements” in Article 9 appears to mean the whole of the contract between a principal and a third party; in Article 32 it means a term of the contract (in the sense of note (2)(a)) between the principal and a commercial agent; it seems to have the same meaning in Articles 21 and 30(5). “Agreement” throughout Article 21 appears to mean one of

the terms of the contract between a principal and a commercial agent, whereas the word "agreed" in the same article is used to refer to the contract between a principal and a third party.

- (c) "Contract" generally means the relations between a principal and a commercial agent (see note (2)(a), above); but in Article 15(4) it appears to mean the totality of the relations between a principal and a third party; so also in 10(2)(a) ("conditions of contract").
- (d) "The agency" sometimes means the relationship between a principal and a commercial agent: see note (1)(f), above. But in Article 19(3)(a) it seems to refer to the commercial agent's business establishment.

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