

Guidance Notes On The Commercial Agents (Council Directive) Regulations 1993

The Commercial Agents (Council Directive) Regulations 1993 (S.I. 1993/3053 As Amended By S.I. 1993/3173)

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Part I

(a) Historical Background To The Directive

The main purposes of the Directive were to harmonize the laws of Member States, which the Council of Ministers considered detrimental to the functioning of the Single Market, and to strengthen the position of the commercial agent in relation to his principal.

Independent commercial agents can be in a weak position when dealing with their principals, although it is acknowledged that this is not always the case. Agents have found difficulty obtaining written contracts and access to all the information they need to verify that they were being paid the correct amount of commission, and some have suffered financially because their commission has not been paid promptly and because their contracts were terminated with little or no notice.

(b) Preamble to the Directive

The preamble to the Directive includes the following recitals which are at the heart of the thinking behind the need for the Directive:-

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

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

(c) Implementation of the Directive

The Directive has been implemented as regards the law of England and Wales, and Scotland by Statutory Instrument No. 1993/3053 as amended by Statutory Instrument No. 1993/3173. Separate implementing provision is made in relation to Northern Ireland by the Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 (Statutory Rules for Northern Ireland No. 1993/483).

(d) Purpose of the Guidance Notes

The purpose of these notes is to assist commercial agents, principals, and their legal advisers to understand the effect of the Commercial Agents (Council Directive) Regulations 1993 by explaining why particular options for implementing the Directive were chosen and by setting out the Department's view on a number of points of difficulty. It must be emphasised that the Department's view is no more than that. As with other Community legislation, the Directive has to be interpreted uniformly throughout the Community and ultimately only the European Court can do that.

The guidance notes are in two parts. Part I continues by setting out, by regulation, the Department's general interpretation of the intention behind the

Directive and hence the Regulations. Part II deals with other more specific and general points which arose during the consultation.

The notes deal only with those provisions which are novel or about which, during consultation, specific queries were raised. **In that connection it should be noted that the text of regulations 5, 13, 14, 15, 18, 19, 21, 22 and 23 is not printed, nor do these notes contain any specific comment on them.**

Further issues on particular provisions may arise in the future, and the contact point is:

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The Department has taken the view that, for the most part, the substantive provisions of the Directive leave the Member States with little or no discretion as to implementation of the Directive in national law and therefore, the wording of the Regulations follows that of the Directive very closely.

(e) Details of the Regulations and the Department's Interpretation

REGULATION 1

1 (1) These Regulations may be cited as the Commercial Agents (Council Directive) Regulations 1993 and shall come into force on 1 January 1994.

(2) These Regulations govern the relations between commercial agents and their principals and, subject to paragraph (3), apply in relation to the activities of commercial agents in Great Britain.

(3) Regulations 3 to 22 do not apply where the parties have agreed that the agency contract is to be governed by the law of another Member State.

INTERPRETATION

This Regulation sets out the circumstances in which the Regulations will apply to an agency contract. If the agent carries out his activities as a commercial agent in Great Britain, then the Regulations will apply unless the parties expressly choose the law of another Member State as the law which is to apply to the agency contract. If the law of a non-EU country is chosen then the provisions of the Regulations are intended to override that choice of law in so far as any of the activities of the commercial agent are carried out in Great Britain.

Regulation 1(2) provides that the Regulations govern relations between commercial agents and their principals and apply in relation to the activities of commercial agents in Great Britain (whether or not the agent is physically based in Great Britain).

The provisions of the Regulations, where the agent carries on his activities outside Great Britain, do not, however, prevent the parties from choosing the law of a part of Great Britain (for example the law of England and Wales) and incorporating in the agency agreement some or all of the provisions of the Regulations which the parties might wish to agree should apply as though the agents activities were, in fact, to be carried on in Great Britain. However, in such a case, if litigation arises, the court hearing the action may or may not:- uphold the choice of law, and accept the validity of such incorporation.

The state of the law of the other Member States relating to commercial agents will depend, in part, on the manner in which the Directive has been implemented in those States, and advice as to the relevant foreign law (both within the EU and outside) should be sought in appropriate cases.

Some examples appear in the Annex to these notes which are intended to show the application (or otherwise) of the Regulations where the principal is based in one country and his agent performs his activities in another.

The Regulations apply to Great Britain (Regulation 2(5)). The Directive has been implemented separately in relation to Northern Ireland by the Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 (Statutory Rules for Northern Ireland No. 1993/483).

REGULATION 2

(Articles 1&2 of the Directive)

2 (1) In these Regulations -

"commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal; but shall be understood as not including in particular:

- (i) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association;**
- (ii) a partner who is lawfully authorised to enter into commitments binding on his partners;**
- (iii) a person who acts as an insolvency practitioner (as that expression is defined in section 388 of the Insolvency Act 1986) or the equivalent in any other jurisdiction;**

"commission" means any part of the remuneration of a commercial agent which varies with the number or value of business transactions;

"restraint of trade clause" means an agreement restricting the business activities of a commercial agent following termination of the agency contract.

(2) These Regulations do not apply to -

- (a) commercial agents whose activities are unpaid;**

(b) commercial agents when they operate on commodity exchanges or in the commodity market;

(c) the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979, or its subsidiaries.

(3) The provisions of the Schedule to these Regulations have effect for the purposes of determining the persons whose activities as commercial agents are to be considered secondary.

(4) These Regulations shall not apply to the persons referred to in paragraph (3) above.

(5) These Regulations do not extend to Northern Ireland.

INTERPRETATION

The Regulation sets out the definitions of the terms used within the Regulations and also excludes those agents where the activities are considered secondary.

The expression "self-employed" is derived from Articles 52 and 57 of the Treaty of Rome (which deal with freedom of establishment and freedom to provide services) and is consistent with Community law, to be understood as including, for example, companies as well as self-employed individuals.

If an agent is appointed for a specified number of transactions, then he would be excluded from the scope of the Regulations, owing to his lack of continuing authority.

"Goods" clearly has to be interpreted in accordance with the EC Treaty and, for that reason, the Regulations do not define the word. However, it is considered that the definition of "goods" in section 61(1) of the Sale of Goods Act 1979 as including, inter alia, all personal chattels other than things in action (e.g. shares) and money, may offer a reasonable guide, without necessarily being absolutely co-extensive with the Directive meaning.

Interpretation of the term "secondary activities" and the provisions of the Schedule to the Regulations are dealt with later in these notes.

Some agents only effect introductions between their principals and third parties. The question arises as to whether such agents are commercial agents for the purposes of the Regulations. Such agents are sometimes known as "canvassing" or "introducing" agents. As such, they generally lack the power to bind their principals and are not really agents in the true sense of the word. However, to the extent that such an agent "has continuing authority to negotiate the sale or purchase of goods" on behalf of his principal, even though, as a matter of fact, he merely effects introductions, it seems that he would fall within the definition of "commercial agent" in Regulation 2(1). It is clear that an "introducing" agent who lacks such authority falls outside the scope of the definition of "commercial agent". It may be that the courts would give a wide interpretation to the word "negotiate" and that, as a result, "introducing" agents will, in general, have the benefit of the Regulations.

It is thought that the Regulations do apply to **del credere** agents who exhibit the characteristics set out in definition of "commercial agent". The Department does not consider that the additional features of a del credere agency causes the agent to fall outside the definition. Questions can, however, arise as to whether a person is an agent at all who, in consideration of extra remuneration, guarantees

to his principal that third parties with whom he enters into contracts on behalf of the principal will duly pay any sums becoming due under those contracts (and thus appears to be a del credere agent), or, whether that person is really acting on his own account.

Regulation 2(2)(b) provides that the Regulations do not apply to commercial agents when they operate on commodity exchanges or in the commodity market. A "commodity" is any tangible good. So called "commodity exchanges" deal in such goods and, to a large extent, in commodity "futures" i.e. the right to buy or sell a particular commodity at a particular price at a particular time in the future, hence e.g. "coffee futures".

REGULATION 3

(Article 3 of the Directive)

3 (1) In performing his activities a commercial agent must look after the interests of his principal and act dutifully and in good faith.

(2) In particular, a commercial agent must -

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

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

(c) comply with reasonable instructions given by his principal.

INTERPRETATION

This Regulation sets out the duties which the agent owes to the principal and, in effect, restates the duties owed at common law by an agent to his principal.

It is not certain how an agent's duty to "communicate to his principal all the necessary information available to him" is to be fulfilled where an agent is acting for several principals. However, parties to contracts of commercial agency will doubtless wish to explore the possibility of agreeing on express terms to cover that situation.

REGULATION 4

(Article 4 of the Directive)

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

(2) In particular, a principal must -

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

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

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

INTERPRETATION

This Regulation deals with the principal's duties to the commercial agent. It is thought that these duties merely amplify the position at common law.

A principal is required to inform his commercial agent accordingly once the principal knows that business will decrease significantly or where an order will not be concluded.

REGULATION 6

(Article 6 of the Directive)

6 (1) In the absence of any agreement as to remuneration between the parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities and, if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.

(2) This Regulation is without prejudice to the application of any enactment or rule of law concerning the level of remuneration.

(3) Where a commercial agent is not remunerated (wholly or in part) by commission, Regulations 7 to 12 shall not apply.

INTERPRETATION

This Regulation is applicable only where the parties have not agreed on the remuneration payable by the principal to the agent. In the event of a dispute as to the remuneration payable, the court would be likely to have regard to custom in the commercial area concerned. Should there be no identifiable custom in the area concerned, then it is considered that the agent would be entitled to a reasonable amount of remuneration. The position under the Regulations is thought to be similar to the position at common law.

It should be noted that where the commercial agent is not remunerated (wholly or in part) by commission, Regulations 7-12 do not apply.

REGULATION 7

(Article 7 of the Directive)

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

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

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

(2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group.

INTERPRETATION

This Regulation sets out the circumstances in which the agent may be considered to have earned his commission, and in that connection the view is taken that a transaction is "concluded" when the principal and the third party have entered into a contract. The provisions of (2) include so called "House Accounts" held by the principal i.e. where the principal deals directly with the third party although the agent has the rights to that area.

REGULATION 8

(Article 8 of the Directive)

Subject to Regulation 9, a commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if -

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

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

INTERPRETATION

This Regulation sets out when the agent is entitled to commission on commercial transactions concluded after the agency contract has come to an end. In particular where the transaction, was mainly a result of the agents efforts during the contract and the transaction was entered into within a reasonable period after the end of the agency contract.

The principal and agent may attempt to define "reasonable period" in their agreement. However, in the event of a dispute, despite any such definition, the matter would be ultimately for the decision of the court.

If the order was placed with the principal or agent before the termination of the agency contract, but the contract was not concluded until afterwards, then the principal would still be liable to pay commission.

REGULATION 9

(Article 9 of the Directive)

9 (1) A commercial agent shall not be entitled to the commission referred to in Regulation 7 if that commission is payable, by virtue of Regulation 8, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

(2) The principal shall be liable for any sum due under paragraph (1) above to the person entitled to it in accordance with that paragraph, and any sum which the other commercial agent receives to which he is not entitled shall be refunded to the principal.

INTERPRETATION

This Regulation deals with the apportionment of commission between a new agent and his predecessor for the same transaction.

The new agent is not entitled to commission if it is payable to the previous agent unless it is "equitable because of the circumstances" for the commission to be shared between them.

It is the principal's duty to pay commission owing to agents and where commission is paid inadvertently to one agent which was in fact owed to the other, the agent must repay it or the principal reclaim it. In either circumstance the agent entitled to the commission should receive it.

REGULATION 10

(Article 10 of the Directive)

10 (1) Commission shall become due as soon as, and to the extent that, one of the following circumstances occurs:

(a) the principal has executed the transaction; or

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

(c) the third party has executed the transaction.

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

(3) The Commission shall be paid not later than on the last day of the month following the quarter in which it became due, and, for the purposes of these Regulations, unless otherwise agreed between the parties, the first quarter period shall run from the date the agency contract takes effect, and subsequent periods shall run from that date in the third month thereafter or the beginning of the fourth month, whichever is the sooner.

(4) Any agreement to derogate from paragraphs (2) and (3) above to the detriment of the commercial agent shall be void.

INTERPRETATION

This Regulation sets out when the commission to be paid to an agent becomes due and when it should be paid. A transaction may be considered to be "executed" in any of the following circumstances:-

- i. when the principal has accepted or delivered the goods;
- ii. when the principal should have accepted or delivered the goods;
- iii. when the third party accepts or delivers the goods; or
- iv. when the third party pays for the goods.

It is for the two parties to agree within the terms of the contract which of these circumstances will make the commission become due. **Paragraph 2** of the Regulation provides for the latest date that the commission can become due. It is not unusual for goods to be delivered by instalments. If the agency contract does not make specific provision for the matter, the question as to when commission is due would seem to depend upon the precise nature of the sale or purchase transaction. Where each instalment delivery is the subject of a separate contract, it seems likely that a separate commission payment will be due as each separate delivery is made, or should have been made. Where a single contract applies to a number of instalment deliveries, the position is somewhat less clear.

However, in view of the words "to the extent that" in **Regulation 10(1)** the agent may be entitled to the commission which is attributable to each particular instalment delivery.

It should be noted that **paragraph (4)** of Regulation 10 renders void any agreement to derogate to the detriment of the commercial agent from **paragraph (2) and (3)** of the Regulation.

REGULATION 11

(Article 11 of the Directive)

11 (1) The right to commission can be extinguished only if and to the extent that -

(a) it is established that the contract between the third party and the principal will not be executed; and

(b) that fact is due to a reason for which the principal is not to blame.

(2) Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.

(3) Any agreement to derogate from paragraph (1) above to the detriment of the commercial agent shall be void.

INTERPRETATION

The Regulation outlines the circumstances when the agent's right to commission is forfeited. Should a contract not be executed the principal must not be at fault for the entitlement to commission to be extinguished. Any commission already paid by the principal under these circumstances would be refunded.

REGULATION 12

(Article 12 of the Directive)

12 (1) The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has become due, and such statement shall set out the main components used in calculating the amount of commission.

(2) A commercial agent shall be entitled to demand that he be provided with the information (and in particular an extract from the books) which is available to his principal and which he needs in order to check the amount of commission due to him.

(3) Any agreement to derogate from paragraphs (1) and (2) above shall be void.

(4) Nothing in this Regulation shall remove or restrict the effect of, or prevent reliance upon, any enactment or rule of law which recognises the right of an agent to inspect the books of the principal.

INTERPRETATION

The Regulation sets out the principal's obligation to provide the agent with a statement of commission due and must set out the main components in

calculating the commission. It also requires the principal to provide the agent with all **necessary** information, including extracts from his (the principal's) books, to check the commission due, should the agent request such information. N.B. the principal is only required to provide relevant extracts and **not** his full books.

REGULATION 16

(Article 16 of the Directive)

16 These Regulations shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract -

(a) because of the failure of one party to carry out all or part of his obligations under that contract; or

(b) where exceptional circumstances arise.

INTERPRETATION

This Regulation preserves the common law and statutory rules of jurisdictions within Great Britain which provide for the immediate termination of an agency contract on the basis of the two matters set out in subparagraphs (a) and (b) of the Regulation. It is thought that the expression "exceptional circumstances" in paragraph (b) would include matters falling within the doctrine of frustration.

REGULATION 17

(Article 17 of the Directive)

17 (1) This Regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.

(2) Except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.

(3) Subject to paragraph (9) below and to Regulation 18, the commercial agent shall be entitled to an indemnity if and to the extent that -

(a) he has brought the principal new customers or has significantly increased the volume of business from existing customers and the principal continues to derive substantial benefits from the business with such customers; and

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

(4) The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question

(5) The granting of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.

(6) Subject to paragraph (9) and Regulation 18, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.

(7) For the purposes of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which -

(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or

(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

(8) Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.

(9) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.

INTERPRETATION

The Regulation deals with entitlement to indemnity/compensation upon termination of the agency contract. It is for the two parties to choose which of these options they would wish to include in their contract with the backstop of compensation should no choice be indicated. There is however, nothing to preclude the two parties from agreeing to use the compensation provisions in some cases and indemnity ones in others when terminating a particular contract. The indemnity/compensation is only payable where the principal will continue to benefit from the business that the agent has brought to the principal.

It should be noted that although having fixed term contracts or giving correct periods of notice (see Regulation 15) could potentially reduce the level of indemnity/compensation it would not necessarily exclude it. The issue of whether compensation is payable on the expiry of a fixed term contract or where the contractual notice period in an indefinite term contract has been given is a matter for the courts to decide.

It is thought that in view of the terms of Regulation 19 it would be possible for the two parties to derogate from this provision **after** the termination of the agency contract.

The word "indemnity" has a rather more limited meaning than that which it normally bears in English law in that it:-

(i) appears to fall short of a complete making good of the loss suffered by the principal; and

(ii) does not necessarily arise in relation to loss caused by the principal.

Its more limited nature may be inferred from **Regulation 17(5)** which contemplates the possibility of the agent wishing to seek damages. The amount of the indemnity is, in any event, limited by **Regulation 17(4)**. The indemnity might appropriately be reviewed as approximating to a form of liquidated damages.

It remains to be seen how courts in Great Britain would assess amounts of compensation/indemnity, and the Department feels unable, at this stage, to offer any guidance as to the approach likely to be adopted.

Article 17.6 of the Directive requires the Commission to submit to the Council, by the end 1994, a report on the implementation of Article 17 (indemnity/compensation) and, if necessary to submit to the Council proposals for amendments.

As to the meaning of "substantial" in **Regulation 17(3)(a)**, it is thought that word would be interpreted as meaning "material" or "not insignificant" having regard to the history of dealings between the principal and the agents and other relevant circumstances.

"Equitable" in **Regulation 17(3)(b)** probably means "just" or "fair" rather than necessarily based on the doctrines or principles of equity - the latter, if they exist at all in the law of every Member State, being bound to vary from State to State.

REGULATION 20

(Article 20 of the Directive)

20 (1) A restraint of trade clause shall be valid only if and to the extent that -

(a) it is concluded in writing; and

(b) it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.

(2) A restraint of trade clause shall be valid for not more than two years after the termination of the agency contract.

(3) Nothing in this Regulation shall effect any enactment or rule of law which imposes other restrictions on the validity or enforceability of restraint of trade clauses or which enables a court to reduce the obligations on the parties resulting from such clauses.

INTERPRETATION

A "restraint of trade clause" is any agreement which restricts the business activities of a commercial agent following termination of the agency contract (see the definition in **Regulation 2**).

The restraint of trade provisions only extend to the kind of goods that were covered in his contract. It is thought that the provisions would not extend to goods of a similar nature aimed at different types of purchasers.

THE SCHEDULE

1. The activities of a person as a commercial agent are to be considered secondary where it may reasonably be taken that the primary purpose of the arrangement with his principal is other than set out in paragraph 2 below.

2. An arrangement falls within this paragraph if -

(a) the business of the principal is the sale, or as the case may be purchase, of goods of a particular kind; and

(b) the goods concerned are such that -

(i) transactions are normally individually negotiated and concluded on a commercial basis, and

(ii) procuring a transaction on one occasion is likely to lead to further transactions in those goods with that customer on future occasions, or to transactions in those goods with other customers in the same geographical area or among the same group of customers, and

that accordingly it is in the commercial interests of the principal in developing the market in those goods to appoint a representative to such customers with a view to the representative devoting effort, skill and expenditure from its own resources to that end.

3. The following are indications that an arrangement falls within paragraph 2 above, and the absence of any of them is an indication to the contrary -

(a) the principal is the manufacturer, importer or distributor of the goods;

(b) the goods are specifically identified with the principal in the market in question rather than, or to a greater extent than, with any other person;

(c) the agent devotes substantially the whole of his time to representative activities (whether for one principal or a number of principals whose interests are not conflicting);

(d) the goods are not normally available in the market in question other than by means of the agent;

(e) the arrangement is described as one of commercial agency.

4. The following are indications that an arrangement does not fall within paragraph 2 above -

(a) promotional material is supplied direct to potential customers;

(b) persons are granted agencies without reference to existing agents in a particular area or in relation to a particular group;

(c) customers normally select the goods for themselves and merely place their orders through the agent.

5. The activities of the following categories of persons are presumed, unless the contrary is established, not to fall within paragraph 2 above -

Mail order catalogue agents for consumer goods.

Consumer credit agents.

INTERPRETATION

The Schedule sets out the criteria for determining the persons whose activities as commercial agents are considered secondary under UK law and are excluded from the provisions of the Regulations by virtue of **Regulation 2(3)**.

The first test is to determine whether or not a contract comes under the provisions of the Regulations. The determining factor is whether the agent is required to keep, as his own property, a considerable stock of the product.

The comparison to be made is between the agent's activities as a commercial agent and his other activities and not the relationship with the principal.

It is not possible to say which of the provisions in **paragraphs 3 and 4** take priority and this will have to be determined on a case by case basis taking into account the exact nature of the agency contract.

PART II

Answers to specific questions raised during the consultation exercise

Q. Can The Principle of Set-Off Continue to Apply?

A. The Regulations do not mention set-off. It is thought that set-off will remain available to the principal, his agent and third parties in accordance with the rules of common law.

Q. If a principal employs an agent to act for him in a number of different member states, could there be one agency contract governing the relationship?

A. This would be possible subject to the comments made (see **Regulation 1**) concerning the applicability of English law to contracts outside the UK.

Q. Regulation 17(8) expressly allows indemnity or compensation where the agency contract is terminated as a result of the commercial agent's death. Is the position the same if the commercial agent (being a company) goes into liquidation?

A. Where the principal or agent is a company, at common law the actual authority of the principal or agent will be determined by its winding up or dissolution. It should be noted that where the authority is irrevocable it will not be determined by such events.

Q. Can an age limit be fixed for a commercial agent?

A. It is thought it can. Fixed contracts are permitted and if, for example, a 40 year old agent is appointed "until he is 60" this is equivalent to a fixed contract for 20 years or until death.

Q. To what extent can the regulations be derogated from?

A. There are three different types of Regulations within the Regulations: those which cannot be derogated from; those which cannot be derogated from to the detriment of the agent; and those which make no mention of derogation. It can be argued that where regulations mean there to be no derogation, they say so. It can also be said that if nothing is said it is to be inferred that it can be derogated from. If this is so then, for example, the agency contract could express the agent's entitlement to commission as arising where the transaction is "wholly" as a result of his action.

The Department's conclusion on this, although not a firm one, is that the terms of the agency contract can vary the events upon which the agent becomes entitled to commission, although they could not do so to an extent that it excludes the right altogether since this would conflict with **Regulation 11(1)**.

Q. Are sub-agency agreements covered by the regulations?

A. Whilst the position is not clear, the Regulations are, in principle, capable of covering sub-agency agreements.

Q. Is it possible to include a liquidated damages provision within the contract?

A. Liquidated damages is a provision within a contract where one party agrees to pay to the other a specified sum of money in the event of a breach of contract. Such clauses may be permissible provided that they represent a genuine pre-estimate of damage.

Although one object of the clause will be to limit the principal's liability, it may not be a pure limitation clause in that it forms a compromise between the parties and is intended to be enforceable whether the actual loss is greater or less than the sum agreed. Nevertheless, as against the principal, such provisions risk attack by the agent as void by virtue of Regulation 19.

Q. Are the regulations retrospective?

A. Only in the sense that they apply to all contracts as from 1 January 1994 and it is inevitable that in some respects account will have to be taken of what occurred before 1994. The Regulations do not, however, apply so as to affect the rights and liabilities of either the principal or agent if they have accrued before 1994.

Q. Do the regulations apply to agents who sell Christmas hampers?

A. It is believed that the activities of such agents would be likely to be held as secondary, thus rendering the agents (by virtue of **Regulation 2(4)**) outside the scope of the Regulations.

ANNEX

Examples on the application of Regulation 1

1. Principal in Great Britain, agent's activities in France (EU Member State)

The Regulations do **not** apply, since the agent's activities are in France and therefore are not in Great Britain (see **Regulation 1(2)**). However, if the parties choose English law to govern the contract between them, it is suggested that the contract could provide for the provisions of the Regulations to apply to the relations between them as though the agent's activities were in Great Britain. Although the agent is in France, if the parties choose English law to govern the agency contract, the provisions of French law implementing the Directive would not apply (unless those provisions are held to be "mandatory rules" (see Article 3 of the Rome Convention on the law applicable to contractual obligations)).

2. Principal in Great Britain, agent's activities in Australia (non-EU Member State)

The Regulations do not apply, given that the agent's activities are in Australia and therefore not in Great Britain. However, again, it is thought that, as in the first example above, the parties could specifically adopt the provisions of the Regulations by contractual provision to that effect. Any "mandatory rules" of the relevant Australian State(s) would need to be considered in case they were capable of over-riding any provisions of the contract.

3. Principal in France, agent's activities in Great Britain

In the absence of an express choice of French law, the Regulations would apply, given that the agent's activities are in Great Britain. If the parties choose French law, the Regulations would not apply (see **Regulation 1(3)**), and the agent would have the protection of the Directive as implemented in French law.

4. Principal in USA, agent's activities in Great Britain

If the law of a part of Great Britain is chosen by the parties to govern the agency contract, it is concluded that the Regulations will apply.

However, if the law of a State of the US is chosen, no doubt an exclusive jurisdiction clause in favour of the courts of that State would also be included in the agency contract, on the basis of which a court in Great Britain may well decline jurisdiction.

In the absence of such a clause, or if a court in Great Britain nevertheless accepts jurisdiction, the court may take the view (perhaps after making an Article 177 reference to the European Court) that the Regulations constitute mandatory rules of the law of a part of Great Britain and that the Regulations should, accordingly, apply, the intention of the Directive being to afford certain protections to commercial agents operating within the European Union (but possibly only where the principal is also established within the European Union (see the recitals to the Directive referred to in the notes under the heading "**Preamble to the Directive**")). Thus an agent in such circumstances would be unwise to assume that, despite operating in Great Britain, the Regulations would apply.

End