

**2013 IDI Annual conference, workshop 1, Saturday 15 June 2013.**

**Panel: The amount of goodwill indemnity generally granted to commercial agents in some European countries: an overview.**

**ITALY**

In Italy the EC Directive 86/653 has been implemented by amending Articles 1742 *et seq.* of the Italian civil code.

Article 1751 c.c. implemented Article 17.2 of the European Directive.

- 1) How do your national Courts normally appreciate the main criteria provided by the EC Directive, i.e. the increase of the clientele and/or of the business with the existing customers?

The agent has the burden of proof concerning the existence of those two main conditions, in order to be granted the goodwill indemnity.

- a) Do they normally make an in depth evaluation of the number of customers brought by the agent, in comparison with the number of customers that the principal had at the beginning of the contractual relationship?

Being an evaluation on the merits of the dispute, lower Courts (and not the Supreme Court) are competent to make such evaluation and they follow different approaches, also depending on the evidence presented by the agents, in each specific Court proceeding.

Sometimes Italian Courts do not make an in depth evaluation of the increase of the principal's customers.

In most cases, however, Courts are very severe in considering the fulfilment by the agent of its burden of proof concerning this aspect; for instance, in a recent decision issued by the Tribunal of Milan<sup>1</sup> the Court stated that the provision by the agent of a list of customers and the fact that some of those customers were indicated in the orders received by the principal was not a sufficient element of proof.

In another case, the Tribunal of Turin granted the goodwill indemnity to the agent in its maximum amount, simply ascertaining that the principal did not have any customer in the agent's area before the contract<sup>2</sup>.

- b) What about the increase in the turnover of existing customers?

Again, in some cases Italian Courts simply look at the general increase of the principal's turnover and conclude that such condition is met. In other cases, they

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<sup>1</sup> Trib. Milano, 12/4/2011.

<sup>2</sup> Trib. Torino n. 448 of 27/3/2009.

verify specifically the increase/decrease of the turnover with each specific customer, in order to check whether the increase is substantial, or not.

- c) Pros and cons for the principal of including, as an annex to the contract, a list of the existing customers.

Of course, on the one hand such an annex will help the agent in fulfilling its burden of proof and it will be favourable to him, especially in cases where the agent has brought new customers and/or substantially increased the turnover with the principal's existing customer.

However, in case of less successful agents, the principal will have an important evidence to oppose to the agent's possible claim of the maximum amount of the indemnity.

From a practical point of view, by choosing this solution the principal will have a document assessing the situation of its customers at the beginning of the relationship, attached to the contract and, therefore, ready to be used in the Court proceeding, instead of having to find other evidence proving that he was selling its products (or services) to those customers before the commencement of the agency contract (e.g. invoices maybe referred to 10/20 years before the Court proceeding).

- d) Would it be useful, from the principal's perspective, to provide documents in the Court proceeding (e.g. letters sent to the agent), proving that – during the contractual relationship – some of the customers have been reported to the agent by the principal?

Certainly it would be useful.

- 2) How your national courts normally appreciate the other criteria provided by the EC Directive, i.e. the substantial benefits for the principal from business with those customers after the end of the contract?
  - a) How can the agent fulfil his burden of proof, considering that – after the end of the relationship – he does not normally have access to any information concerning the relationships between the principal and the customers he brought to him?
  - b) Would the agent's right to indemnity be limited in its amount, if – following the end of the agency contract – the principal loses its customers for reasons which do not stem from the agent?
  - c) What is the period of time taken into consideration by your national Courts, in order to evaluate if and to what extent the principal continues to derive substantial benefits from the business with customers brought by the agent?

This is a very difficult (nearly impossible) burden of proof for the agent.

Italian Courts used to be very severe in evaluating this aspect, which presented for the agent all the above mentioned problems: in most cases, the agent was not able to provide the Court with sufficient evidence; and even where he could - e.g. when

the Court condemned the principal to exhibit his financial books referred to the period following the end of the agency contract - it then appeared that the principal had lost many customers for any possible reason (not attributable to the agent) and that outcome played anyway to the detriment of the agent.

Recently some Courts started evaluating this condition differently, by considering the condition met, when the agent is able to provide evidence of the customers left to the principal at the end of the contract<sup>3</sup>.

- 3) How is the third criterion provided by the EC Directive (i.e. the indemnity being equitable, in regards to all the circumstances and in particular the commissions lost by the agent on the business with such customers), taken into account in respect to the other above mentioned criteria?

This criterion is taken into consideration by Italian Courts, provided that the other two requirements are met and proved by the agent<sup>4</sup>. The “equity” requirement is often used by Courts to reduce the amount of indemnity from the maximum amount fixed by Article 1751 c.c. to the amount provided by the Italia Economic Collective Agreements (see further question 4).

- 4) Are there other circumstances taken into consideration by your national Courts in order to grant the goodwill indemnity to commercial agents, besides the once mentioned above? (e.g. the simple increase of the turnover; in Italy, the Collective Agreements)

In Italy, besides the indemnity provided by the Directive (namely, the “German system”), implemented in Article 1751 c.c., the Economic Collective Agreements (AEC) provide for a different method of calculation of the goodwill indemnity. Particularly, the AEC indemnity is calculated as a percentage on all the commissions earned by the agent during the whole duration of the contract: in most cases (save the case of a long lasting contract) such calculation leads to an amount which is much lower than the maximum amount provided by Article 1751 c.c.

The European Court of Justice, in the Honyvem case (C-465/04 of March 23, 2006) stated that the goodwill indemnity cannot be replaced by an indemnity determined in accordance with criteria other than those prescribed by Article 17 of the European directive, unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from the application of Article 17. The Court also specified that, to that aim, the two methods should be compared in abstract, *ex ante*.

Thus, considering that the collective agreements cannot guarantee in all cases an indemnity equal or greater than the amount which results from the application of Article 17 of the directive (implemented by Article 1751 c.c.), the European Court substantially declared the calculation system provided by Collective Agreements contrary to Article 17 of the EC directive.

Notwithstanding that, the Supreme Court has now confirmed in several judgments that lower Courts first of all shall verify if the conditions provided by Article 1751 c.c.

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<sup>3</sup> Trib. Pistoia, 21/12/2010; Trib. Mantova, 24/5/2011, n. 102.

<sup>4</sup> Cass. 16/5/2012, n. 7644.

are met; provided that they are met, lower Courts shall evaluate whether the amount arising out of the application of the Collective Agreements is "equal" or not, considering all the circumstances of the case. Should it appear that such amount is not "equal", Courts can grant higher amount of commissions, within the limit of the maximum amount indicated by Article 1751 c.c.<sup>5</sup>.

Even if in some cases Italian Courts just looked at the general increase of the principal's turnover, in order to grant the goodwill indemnity to the agent, normally, the simple increase of the turnover is not sufficient for the agent to fulfil its burden of prove, but can be taken into consideration together with other element of prove provided by the agent<sup>6</sup>.

5) What are the circumstances eventually considered by your national Courts, in order to limit or exclude the agent's right to goodwill indemnity? (e.g. the promotional efforts made by the principal in the agent's country; well known trademark in the agent's country; etc.)

Italian Courts, when evaluating the "equity" criterion, often reduce the amount of indemnity from the maximum amount claimed by the agent on the basis of several circumstances of the cases, including the possible renown of the products in the market; on the expenses borne by the principal in advertisement; etc.

In a recent case<sup>7</sup>, the Tribunal of Bologna limited the amount of indemnity due to the agent to 45% of the maximum amount provided by Art. 1751 c.c., stating that – being the parties in the field of telecommunications where customers are "sensitized" by the advertisements and promotional activities of the telecommunications' companies, the increase of the customers made by the agent was mostly due to the promotional efforts made by the principal.

6) What are the tools normally used by your national Courts, in order to calculate the goodwill indemnity? (e.g. an expertise made on the financial books of the principal: what are the main problems arising out of such an expertise in your experience?)

Notwithstanding the fact that Article 1748 c.c. expressly provides for the agent's right to a copy of an abstract of the financial books of the principal, in order to verify the amount of the commissions paid to him during the contractual relationship, Italian Courts often decide that such exhibition order cannot replace the agent's burden of proof and therefore do not accept the agent's request of exhibition<sup>8</sup>.

This is however not always the case: sometimes Courts order the principal to present his financial books and appoint an expert for examining those documents. This solution normally implies high costs and further delays in the Court proceeding and not always the expert is able to make an exact evaluation and calculation.

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<sup>5</sup> See Cass., 19-2-2008, n. 4056; Cass. 13-8-2008, n. 21574; Cass., 1-6-2009, n. 12724; Cass. 23-6-2010, n. 15203; Cass. 15-3-2012, n. 4149; Cass. 25-5-2012, n. 8295.

<sup>6</sup> See Cass. 17-5-2012, n. 7754.

<sup>7</sup> Trib. Bologna, 14-2-2012.

<sup>8</sup> See, for instance, Cass. 20-7-2012, n. 12692.

7) What is the average amount of indemnity normally granted to commercial agents, compared with the maximum amount of one year's commissions, provided in the EC Directive?

As explained above, the recent tendency of the Supreme Court is to depart from the amount calculated on the basis of the Collective Agreements, which is in most cases much lower than the maximum amount provided for by Article 1751 c.c. Provided that the agent has fulfilled his burden of proof concerning the conditions set forth in Article 1751 c.c., Courts often come to the conclusion that the amount arising out from the method of calculation of the Collective Agreement is "equal", considering the specific circumstances of the case.

Of course it is not possible to give an exact indication, but it seems that – by following the abovementioned approach – Courts grant around 50%, 60% of the maximum amount provided for in Article 1751 c.c. (as well as in Article 17.2 of the EC Directive).

In some cases, however 80% or 100% of the maximum amount is recognized to agents by Italian Courts.

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