



International Distribution Institute

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**Calculation of an Indemnity Claim according to Clause 89b HGB
(German Commercial Code)**

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Calculation of an Indemnity Claim according to Clause 89b HGB (German Commercial Code)

A. Introduction

The German system of calculation indemnity is the „indemnity system“ stipulated for in article 17 Council Directive on the Coordination of the law of the Member States relating to self-employed commercial agents (86/653/EEC). According to the report on the application of article 17 of Council Directive provided of the Commission of the European Communities as of 23 July 1996, COM (96) 364 final, the indemnity system was modeled on article 89b of the German Commercial Code (HGB) which had provided for the payment of a goodwill indemnity since 1953 and concerning which a large body of case-law has developed regarding its calculation. This case law and practice, according to the Report, should provide valuable assistance to the Courts of other Member States when seeking to interpret the provisions of article 18 (2) of the Directive.

Therefore, the German system of calculating is important also for the European law.



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Calculation of an Indemnity Claim according to Clause 89b HGB (German Commercial Code)

B. Calculation of the indemnity of a commercial agent

1. Basis of the calculation

According to consistent practice of courts the calculation of an indemnity claim is based on the commissions achieved by the commercial agent during the last 12 months of his contract with multiple customers (at least two commercial operations with such customers). Further it is based only on those commissions of the last twelve months achieved with new customers respectively intensified old customers (intensified by 100 %).

However, the commissions of the last year of the contract shall not be decisive in case of **untypical development of turnovers**. In this case the calculation has to be based on previous representative years, if necessary on the annual average of several years. In case of a shorter contract period compensation is based only on those commissions actually achieved by the agent.

These commissions of the last twelve months have to be **multiplied** with the **number of years** which are estimated as time of continuation of the business relationship to the customers or in which the agent could have **drawn advantages** from the customer relations he established. (“estimated years of business”). Normally this will be three to five years.



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B. Calculation of the indemnity of a commercial agent

2. Loss of Customers

Further it has to be taken into consideration that there is a certain **fluctuation** among regular customers and that the company loses some of their regular customers every year. Therefore, the number of lost customers prior to the end of the contract period has to be estimated, whereby not the number of customers but the lost turnover will be decisive.

Based on these data the agent's **loss in commissions** will be calculated. For the first year this will be his **annual commission reduced by the loss of customers**. For the second year after end of contract the loss in commission is based on that of the previous year, but again reduced by the respective loss of customers for this year. Also, the loss on commission for the third and the following years is based on the respective previous year reduced by the loss of customers. This rule is applied as long as the agent could have drawn advantages from the regular customer relations he established. Finally, the losses on commissions of the respective years have to be added. The result is the total of the agent's loss of commission.



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B. Calculation of the indemnity of a commercial agent

2. Loss of Customers

Example:

During the last twelve months of his employment the agent earned a commission of € 50,000.00 by establishing new customer relations. The forecast has to be established for four years, reasonably assuming a loss of customers of 25 %. This results to

Loss of commission for the first year after end of contract: 50.000,00 € ./ 25 % (12.500,00 €) =	37.500,00 €
Loss of commission for the second year after end of contract: 37.500,00 € ./ 25 % (9.375,00 €) =	28.125,00 €
Loss of commission for the third year after end of contract: 28.125,00 € ./ 25 % (7.031,25 €) =	21.093,75 €
Loss of commission for the fourth year after end of contract: 21.093,75 € ./ 25 % (5.273,44 €) =	<u>15.820,31 €</u>

total loss of commission: **102.539,06 €**

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B. Calculation of the indemnity of a commercial agent

3. Discounting Rate

The total loss of commission has to be reduced by a discounting rate. This is justified by the fact that the agent receives with his compensation a payment, which he would have obtained only over a longer period, had he not ended his contract.

However, no general discounting rate can be determined. Jurisdiction has alleged different rates, mainly based on the forecast period from which the loss of commission resulted. In most cases a discounting rate of 10 % can be justified.

Even if the compensation is paid only after a long time (in case of long lasting legal disputes) a discounting has to be effected. However, due and default interest have to be paid on the discounted compensation. Also, a discount rate has to be deducted when the compensation is paid in instalments.

Finally, the discounted loss of commission has to be corrected under equitable principles. The amount resulting herefrom is the gross compensation.



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B. Calculation of the indemnity of a commercial agent

4. Calculation of maximum amount

According to clause 89b para 2 HGB the compensation must not exceed an annual commission based on the average of the previous five years or other annual payments during the agent's employment. This maximum amount shall limit the gross compensation determined according to clause 89b para 1 HGB. Consequently, the maximum amount only gains importance if it is less than the gross compensation and thus limits its amount. The maximum amount must not be reduced on the basis of equitable principles. Equitable principles are only to be applied in the frame of the calculation of the gross compensation.



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Calculation of an Indemnity Claim according to Clause 89b HGB (German Commercial Code)

C. Calculation of the indemnity of a distributor

1. Basis of the calculation: gross margin

According to consistent practice of courts the calculation of a compensatory claim is based on the gross margin achieved by the distributor during the last 12 months of his contract. Further it is based only on those margin of the last twelve months achieved with new customers respectively intensified old multiple customers.

However, this gross margin has to be reduced to the typical margin of a sales/commercial agent. This is because only sales agents receives a compensation/indemnity claim. I do not know the exact commission which would be paid to a sales agent. However, I presume that it will be between 5 and 10 % of the turnover.



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Calculation of an Indemnity Claim according to Clause 89b HGB (German Commercial Code)

C. Calculation of the indemnity of a distributor

1. Basis of the calculation: gross margin

However, the gross margin of the last year reduced to the amount of the typical commission of a commercial agent of the contract shall not be decisive in case of untypical development of turnovers. In this case the calculation has to be based on previous representative years, if necessary on the annual average of several years. In case of a shorter contract period compensation is based only on such gross margin actually achieved by the distributor.

This gross margin of the last twelve months have to be multiplied with the number of years which are estimated as time of continuation of the business relationship to the customers or in which the distributor could have drawn advantages from the customer relations he established. (“estimated years of business”). Normally this will be three to five years.



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C. Calculation of the indemnity of a distributor

2. Loss of Customers

Further it has to be taken into consideration that there is a certain fluctuation among regular customers and that the company loses some of their regular customers every year. Therefore, the number of lost customers prior to the end of the contract period has to be estimated, whereby not the number of customers but the lost turnover will be decisive.

Based on these data the distributor's loss in gross margin will be calculated. For the first year this will be his annual gross margin reduced by the loss of customers. For the second year after end of contract the loss in gross margin is based on that of the previous year, but again reduced by the respective loss of customers for this year. Also, the loss on gross margin for the third and the following years is based on the respective previous year reduced by the loss of customers. This rule is applied as long as the distributor could have drawn advantages from the regular customer relations he established. Finally, the losses on gross margin of the respective years have to be added. The result is the total of the distributor's loss of gross margin.

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C. Calculation of the indemnity of a distributor

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Example:

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Loss of gross margin for the fourth year after end of contract: 21.093,75 € ./ 25 % (5.273,44 €) =	€ <u>15.820,31</u>
<i>total loss of gross margin:</i>	<u>€ 102.539,06</u>

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C. Calculation of the indemnity of a distributor

3. Discounting Rate

The total loss of gross margin has to be reduced by a discounting rate. This is justified by the fact that the distributor receives with his compensation a payment, which he would have obtained only over a longer period, had he not ended his contract.

However, no general discounting rate can be determined. Jurisdiction has alleged different rates, mainly based on the forecast period from which the loss of gross margin resulted. In most cases a discounting rate of 10 % can be justified.

Even if the compensation is paid only after a long time (in case of long lasting legal disputes) a discounting has to be effected. However, due and default interest have to be paid on the discounted compensation. Also, a discount rate has to be deducted when the compensation is paid in instalments.

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C. Calculation of the indemnity of a distributor

4. Calculation of maximum amount

According to clause 89b sec. 2 HGB by analogy the compensation must not exceed an annual gross margin based on the average of the previous five years or other annual payments during the distributor's employment. This maximum amount shall limit the gross compensation determined according to clause 89b sec. 1 HGB. Consequently, the maximum amount only gains importance if it is less than the gross compensation and thus limits its amount. The maximum amount must not be reduced on the basis of equitable principles. Equitable principles are only to be applied in the frame of the calculation of the gross compensation.



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