



International Distribution Institute

Preparing for negotiation of the goodwill indemnity pursuant the “German model”

Bologna, June 2023

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Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)

Article 17

1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, **indemnified in accordance with paragraph 2** or compensated for damage in accordance with paragraph 3.

„indemnified” = German model

„compensated” = French model

Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)

2. (a) The commercial agent shall be entitled to an **indemnity** if and to the extent that:

- he has brought the principal **new customers** or has significantly **increased** the volume of business **with existing** customers and the principal continues to derive **substantial benefits** from the business with such customers, and
- 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.

(b) The amount of the indemnity may 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;

Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)

Article 19

The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.

Judgment of the Court (First Chamber) of 23 March 2006 C-465/04 (Honyvem Informazioni Commerciali Srl v Mariella De Zotti):

(25) (...) Article 19 of the Directive provides for the parties to be able to derogate from the provisions of Article 17 before the contract expires, provided that that derogation is not unfavourable to the commercial agent. It is clear, therefore, that the issue of whether or not that derogation is unfavourable must be determined at the time the parties contemplate it. The latter cannot agree on a derogation if they do not know whether at the end of the contract it will prove to be favourable or detrimental to the commercial agent.

***Judgment of the Court (First Chamber) of 23 March 2006 C-465/04
(Honyvem Informazioni Commerciali Srl v Mariella De Zotti):***

(27) (...) Article 19 of the Directive must be understood as meaning that a derogation from the provisions of Article 17 may be accepted only if, ex ante, there is no possibility that at the end of the contract that derogation will prove to be detrimental to the commercial agent.

(29) The mere fact that that agreement may be favourable to the commercial agent if he is entitled, in accordance with the criteria laid down in Article 17(2) of the Directive, to only a very small indemnity or even to nothing at all, is not sufficient to establish that that agreement does not derogate from the provisions of Articles 17 and 18 of the Directive to the detriment of the commercial agent.

(32) (...) Article 19 of the Directive must be interpreted as meaning that the indemnity for termination of contract which results from the application of Article 17(2) cannot be replaced, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17, 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.

What should be considered by drafting the agreement?

List of existing customers of the agent/principal in the territory as attachment to the agreement? What kind of data of the customers? Pros&Cons?

Other information? Amount of the turnover? Documents confirming the amount?

„Reps & warranties” of the parties? Popularity of the brand?

Marketing/promotion of the brand/products done by the principal?

- Question of „maintaining the situation at the same level”:

- ✓ turnover is the same (or even lower), but there are new clients brought by the agent;
- ✓ turnover is the same (or even lower), the clients are only „existing” ones, but with some of them the turnover is significantly higher;
- ✓ turnover is the same, with the same („existing”) clients, but the situation on the market significantly changed.

What should be considered by drafting the agreement?

Pre-payment of the goodwill indemnity?

Pros & Cons? Risks for the principal? Conditions? Is the Honyvem judgment relevant for the pre-payment?

Under Austrian and German law:

For an effective pre-payment

- the additional commission/fee must only be granted for business with new customers and significantly increased old customers,
- the principal has to prove that without pre-payment the commission rate would have been lower,
- the amount serving as pre-payment must be shown separately in the commission statements and
- the agent is obliged to pay the pre-payment back in case no indemnity is due.

If the pre-payment is invalid, then the total remuneration is relevant when calculating the indemnity.

What should be considered by drafting the agreement?

Under Spanish law

Courts seem to accept this clause.

For an effective pre-payment:

- Courts demand **clarity** in the clause and tend to interpret it restrictively otherwise the pre-payments made could be considered as a part of the general commission.
- the clarity implies that the clause has to take into account **the legal requirements** for the existence of the indemnity (particularly new clients, increase of the turnover and the future benefits for the Principal),
- If the indemnity was not due or the amount paid is higher than the resulting indemnity, the clause could include a refund.

Proposed clause (1):

1. Clientele indemnity

1.1. In the event that the Contract is terminated, and the circumstances set out in Article [...] of the Agency Law occur, the Agent shall be **entitled to a clientele indemnity**. Its amount **shall not exceed** the maximum amount set out in Article [...] of that Law.

1.2. The Parties agree on the **advance payment** of the clientele indemnity by means of a [...]% commission in addition to that provided for in clause [...]. The Agent shall differentiate the amounts on each invoice.

BUT: from the perspective of Austrian/German law,

- the additional commission should be granted only for new customers and significantly increased ones and
- it is not up to the agent to differentiate in his invoices, but up to the principal to do this in his statements he sends to the agent.

Proposed clause (and 2):

1.3. In the event that, taking into account the circumstances at the time of the termination of the Contract, the clientele indemnity due

a. **should be higher** than the amount paid as provided for in this clause, the agent shall be **entitled to the difference**.

b. turns out to be of a **lower amount** than the amount paid with the commissions foreseen in this clause, or the amount paid **exceeds the maximum** calculated according to article [...] of the Law, the agent shall **reimburse the difference**.

c. **is not due**, the agent shall be **obliged to refund** the total amount received from this clause.

List of court cases available (pre-payment issue):

- Judgment of the German *Bundesgerichtshof* dated 13.01.1972, VII ZR 81/70 (NJW 1972, S. 477);
- Judgment of the Austrian *Oberlandesgericht in Linz* (OLG Linz) dated 9.04.2003, 2 R 56/03y;
- Judgment of the Spanish Provincial Courts (*Audiencias Provinciales*):
 - Navarra, November 12, 2004 (EDJ 2004/228820);
 - Madrid, November 22, 2017 (ECLI:ES:APM:2017:15615);
 - Sevilla, January 24, 2019 (ECLI:ES:APSE:2019:106);
 - Valladolid, February 4, 2019 (EDJ 2019/543309);
 - Barcelona, June 28, 2019 (EDJ 2019/634800).



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Thank you!