

EUGENE COLLINS

Corporate Department

Agency Termination

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If you are a supplier, agent or distributor, read on and know your legal status

We summarise the relevant issues to consider in asking, “who is a commercial agent?” and some points on compensation payable.

As the terms “agent” and “distributor” are often used interchangeably in the commercial world, we must consider whether the so-called agent or distributor is a “commercial agent” within the meaning of the EU Commercial Agents Regulations 1993 and 1997 (the “Regulations”). This would entitle the agent to claim compensation on the termination or expiry of the contract.

Who is a commercial agent?

It is important to note that the main difference between an agent and a distributor is that an agent acts on behalf of the principal and the contract is between the principal and the end customer. However, a distributor buys good on its own account from the supplier and then resells the goods to the end customers. On the termination of a true distribution arrangement, the distributor’s legal entitlement to compensation, on termination or expiry of the arrangement, is simply as the contract specifies. It is the agent that falls within the scope of the Regulations and is entitled to a compensation pay out.

Turning now to the definition of “commercial agent” – it consists of four tests:

A commercial agent is:

- a self-employed intermediary
- who has continuing authority to negotiate
- the sale or purchase of goods on behalf of the principal or
- to negotiate and conclude such transactions on behalf of, and in the name, of that principal.

The following points should be noted with regard to the above definition:

- the term “self-employed intermediary” has been held to include an individual, a partnership or a company;
- the courts have interpreted the term “negotiate” widely to include effecting introductions and, in addition, it does not require “what may be termed active negotiation or bargain by bid and counter bid”. Instead, one of the tests is whether the person, who may be said to be negotiating, has to “deal with, manage or conduct” the sale or purchase concerned and, in doing so, it is necessary for the agent to bring some skill or consideration to the activity;
- the Regulations apply to goods, not services.

Compensation on termination

Where the Regulations apply, on termination or expiry of the agency arrangement, the agent has an entitlement to seek compensation. However, this right to claim compensation is lost if the agent hasn't notified the principal of his intention to seek compensation within one year following termination of the agency arrangement.

How do the parties calculate compensation?

As the Irish courts have not yet considered the point, there are two possible approaches which the Irish courts may decide to follow:

- 1 To follow the French approach (on which the compensation system was based) where the amount of compensation should be equal to the sum of two years gross commission calculated on the basis of the average commission earned during the three years preceding the termination of the agency or;
- 2 In contrast, the English courts have more recently ruled that the proper basis for calculating the compensation due to an agent on termination of an agency relationship governed by the Regulations is by reference to the loss of the value of the agency. The value of the agency is the amount that a hypothetical purchaser might reasonably be willing to pay for the agency as at the date of termination.

In addition to enhanced rights of a commercial agent on termination of an agency arrangement there are also additional rights and duties which arise during the duration of an agreement under the Regulations. It is imperative that all parties are aware of their status under law and this becomes particularly heightened on termination of the arrangement.

For further information on this topic please contact: Laura McLoughlin, Associate, Corporate, E: lmcloughlin@efc.ie