MANY COMPANIES USE COMMERCIAL AGENTS TO DISTRIBUTE THEIR GOODS AND SERVICES IN IRELAND. WHEN CONSIDERING TO USE A COMMERCIAL AGENT, ONE HAS TO BE MINDFUL OF THE LEGISLATION APPLYING TO SUCH A RELATIONSHIP. IN IRELAND, THE EUROPEAN COMMUNITIES (COMMERCIAL AGENTS REGULATIONS) 1994 AND 1997 (THE REGULATIONS) APPLY. THEY WERE ENACTED IN ORDER TO TRANSPOSE COUNCIL DIRECTIVE 86/653 EEC (THE DIRECTIVE) INTO IRISH LAW. THE PURPOSE OF THE DIRECTIVE IS TO HARMONISE EUROPEAN UNION (EU) LAW IN RELATION TO COMMERCIAL AGENTS, WITH THE SPECIFIC AIM OF GRANTING GREATER PROTECTION TO COMMERCIAL AGENTS.

PURPOSE OF THIS NOTE

The purpose of this note is to outline:
• the history of commercial agent protection in the EU;
• the key provisions and protections contained in the Regulations;
• the judicial interpretation of these key provisions in this jurisdiction;
• the potential deficiencies in the compensation mechanism contained in the Regulations; and
• the potential ramifications where the defined territory in the commercial agency agreement is not within the EEA.

THE HISTORY OF COMMERCIAL AGENT PROTECTION IN THE EU

Commercial agent legislation has a long tradition in some member states.

Since 1900, Germany’s commercial agency law is codified in section 84-92c HGB (commercial law statute). According to section 89b, on the termination of a commercial agency agreement, a commercial agent can require payment of an indemnity. The maximum indemnity amount is one years’ commission calculated on the average of commission payments within the previous 5 years. The implementation of the Directive has not led to a change in business practice in Germany and only minor changes in German law were required to make Germany fully compliant with the Directive.

Under French law on the termination of a commercial agency, a commercial agent is entitled to two years commission.

Certain other EU member states, notably Ireland and the UK, did not traditionally provide any legal protection for commercial agents.
MANNER OF IMPLEMENTING THE DIRECTIVE

The Directive was transposed into Irish law by the European Communities (Commercial Agents Regulations) 1994 and 1997. The Irish method of transposition in relation to the Directive was simply to replicate, virtually word for word, the provisions of the Directive in the Regulations; accordingly, the same article references used in the Directive are used in the Regulations.

KEY PROVISIONS AND PROTECTIONS CONTAINED IN THE REGULATIONS

1. Definition of a Commercial Agent
Section 2(1) of the Regulations define a commercial agent as follows:-

“a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, hereinafter called ‘the principal,’ or to negotiate and conclude such transactions on behalf and in the name of the principal.”

The scope of activity is restricted to goods. Two classes of activity can be involved:-

- negotiating the sale in relation to goods or purchase; and
- negotiating and concluding the sale or purchase.

While identifying whether an agent concludes a sale or a purchase should be a relatively straight-forward issue to resolve, the meaning of “negotiations” has given rise to uncertainty. The judgment of Clarke J in Kenny v Ireland ROC Limited\(^1\) in the High Court further fleshed out this definition and is a useful indicator of what courts in this jurisdiction will view as constituting a commercial agency relationship.

The High Court held that “authority to negotiate” in the context of Article 2 (1) of the Regulations did not require a process of bargaining in the traditional mould of an invitation to treat, followed by an offer, followed by acceptance etc. Rather, Clarke J was of the opinion that the test for establishing whether a party was a commercial agent of another party, depended on whether that party brought a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of products on behalf of a principal. This skill or consideration must be brought to bear on the sale or purchase. However, the Court recognised that this skill may vary depending on the nature of the goods concerned.

Clarke J distinguished the position in Ireland from that in the UK. The UK legislation excludes persons whose activities as commercial agents are considered secondary. So, in the UK where goods are selected by customers who simply order through the agent, this would constitute secondary activities and the agent would not be able to avail of legislative protection.

2. Commission on Post Termination Transactions
Article 8 of the Directive and the Regulation provides the following:-

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\(^1\) Kenny v Ireland ROC Limited, [2005] IEHC 241.
“A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated:

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

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

Unfortunately, this Article can be described as vague at best. The Directive offers no guidance on what constitutes a “reasonable period,” and inadequate guidance as to the basis upon which this post termination commission should be calculated. There are no reported Irish decisions on calculating post termination commission.

3. Minimum Notice Period under Irish Law

Article 15 of the Directive and the Regulations provide the mandatory minimum period of notice of termination which the principal must provide to the commercial agent:

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<tr>
<th>Duration of Agreement</th>
<th>Mandatory Minimum Period of Notice</th>
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<tr>
<td>1 Year</td>
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<td>3 Years</td>
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4. Compensation on Termination

Article 17(1) of the Directive and the Regulations provides that:

“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.”

Due to an oversight by the Irish parliamentary draftsman, the Article merely repeats the command to EU Member States from the Directive, namely that member states shall take measures necessary to ensure that the commercial agent will be entitled to compensation in respect of damage suffered, or an indemnity against damage suffered instead of actually enacting what was commanded. In doing so, the 1994 Regulations failed to specify that any remedy would be available to a commercial agent on the termination of a commercial agency.

Section 2 of S.I No. 31/1997-European Communities (Commercial Agents) Regulations 1997, rectifies the situation without repealing the defective wording by providing the following:

“It is hereby confirmed that, pursuant to Regulations 3 of the European Communities (Commercial Agents) Regulations, 1994, a commercial agent shall, after termination of the agency agreement, be entitled to be compensated for damage in accordance with Article 17(3) of the Directive subject, insofar as they are relevant to such compensation, to the provisions of that Article and of Articles 18, 19, and 20 of the Directive.”
Accordingly, on termination of a commercial agency agreement, a commercial agent will be entitled to damages as a result of termination in accordance with Article 17(3) of the Directive, but not given an indemnity.

Article 17(3) provides the following:

“Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent’s activities,

- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal’s advice.”

The Regulations offer no guidance on the appropriate method of calculating compensation. There have been no reported Irish decisions on the subject of compensation for commercial agents earning commission. In the absence of any legal precedents as to how compensation should be calculated, an Irish court could refer for guidance to the decisions of the Courts of other jurisdictions such as those of the UK.

In 2007, the UK Supreme Court (previously called the House of Lords) held that under the UK legislation transposing the Directive, the correct quantum of compensation is the value of the agency at the termination date of the agency contract if it were to be purchased by a third party purchaser for value, having regard to activities which may take place in the future.

The value of an agency is generally dependant on both:

- the period of notice at which the principal can terminate the agreement; and
- the nature of the market in which the agency is sold.

It is likely that should the matter of the assessment of compensation for the termination of commercial agency come before an Irish Court, it would use the market value rather than any other method such as the method employed in Germany or France.

**DEFINED TERRITORY**

The Directive and the Regulations are silent on the issue of territorial application; this means that it is possible that the Regulations only apply to commercial agency activity which are granted within the EEA. The European Court of Justice (the ECJ) has expressly stated, in Ingmar GN Ltd-v-Eaton Leonard Technologies Inc, that where the commercial agency activities occur within a Member State, the provisions of the Directive will apply regardless of any attempt to exclude them by contract.

**FUTURE DEVELOPMENTS**

It is clear that the intentions of the EU to harmonise the law in relation to commercial agents has not been a complete success.
The EU Commission is currently examining the application of commercial agency law in the EU and in due course, further developments in commercial agency law may be expected.

DISCLAIMER
This note is a general discussion of the law relating to agency in Ireland and does not purport to be a comprehensive examination of the law/legal advice. Before taking any action, full professional advice should be obtained.

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