



## Litigation Briefing 3

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### The Commercial Agents Regulations 1993 – a brief comment

Since their introduction into English law by the Commercial Agents (Council Directive) Regulations 1993 (“the Regulations”), made to give effect to Council Directive 86/653/EEC of 18th December 1986 (“the Directive”), the Regulations have been a fertile breeding ground for litigation between principals and commercial agents.

The high water mark is the case of *Lonsdale* decided in the House of Lords and reported at [2007] UK HL32. Lord Hoffman gave the main judgment and set out clearly the facts and the legal issues arising. He recorded that although the Directive was intended to “coordinate” the laws of Member States of the EU, Article 17 of the Directive in fact allowed Member States to choose different ways in which a commercial agent was to be compensated on termination of the agency. The agent was entitled to either an indemnity (by Article 17(2)) or compensation (by Article 17 (3)).

To make matters a recipe for confusion, the indemnity claim is derived from German law (Section 89b of the *Handelsgesetzbuch*) but the compensation claim is derived from French law (Article 12 of the *Loi no 91-593 du 25 juin 1991*). Curiously perhaps, when bringing the Directive into English law, the UK did not choose one or other of the indemnity and compensation routes.

Instead it chose both on the basis that the parties to a commercial agency could choose to agree that the agent would be entitled to an indemnity on termination but, in the absence of agreement, the agent would be entitled to compensation.

The *Lonsdale* decision answered the primary question: How is the compensation to be calculated? The Directive says that the agent is entitled to be compensated for the damage he suffers as a result of the termination of his relations with the principal. Since the compensation concept derives from French law, Lord Hoffman looked to French law to answer the primary question. Under French law the agent is entitled to be compensated for the deprivation of the benefit of the agency relationship. In other words, “What was the value (at the time of termination) of the income stream which the agency would have generated?”

In France, it seems that the usual practice is to value agencies at twice the average annual gross commission of the previous three years. Lord Hoffman pointed out that it appeared that commercial agencies in France were more often changing hands than in the UK and that, often, the price paid was twice the annual gross commission. Indeed, some French principals before granting a commercial agency will demand from the agent payment of an estimated twice gross commission since they know that they would have to pay this sum (or something like it) to the agent on termination.

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Lord Hoffman rejected the suggestion that this approach should be adopted in England. He agreed with the “clarity and commonsense” of the judge at first instance in the Oxford County Court and accepted that where a commercial agency was producing a modest and falling income, a much lesser sum should be paid.

It is interesting to compare the Lonsdale judgment with a recent decision of the first chamber of the European Court of Justice. In the ECJ, the case of *Semen v. Deutsche Tamoil GmbH* (case C-348/07) was heard on 18<sup>th</sup> September 2008, 19<sup>th</sup> November 2008 and 26<sup>th</sup> March 2009. The claimant operated a petrol station in Germany as agent of the well known oil company Tamoil. As mentioned above, German law provides that terminated agents are to receive an “indemnity”. The Tamoil case was concerned with (1) whether the German method of calculating the indemnity contradicted the requirements of the Directive, and (2) what if the principal was part of a group of companies? The Tamoil case touched on the point mentioned by Lord Hoffman in the Lonsdale case i.e. it is difficult to see how continuing different practices in different EU countries are compatible with the notion of “harmonisation of Member State practices”.

Under German law, the indemnity payable to an agent is subject to a cap on the basis of what the court considers to be “equitable”. Any award in favour of the agent over and above the amount of commission lost by the agent would not be equitable. Also, in Germany Article 17 provides for a protected minimum level for commercial agents. Should there be a maximum?



The ECJ appears to have decided that the Directive means that it is not possible to limit automatically the indemnity to which a commercial agent is entitled to the amount of commission lost. In short, there is no limitation on the level of indemnity equal to the level of lost commissions.

It seems clear that the agent should not “profit” from the termination of the agency. By the German system, the indemnity is calculated on the basis of the commission earned by the agent during the final 12 months of the duration of the contractual relationship. This contrasts with the French method explained above. But suppose the price of the product rises sharply shortly before or after termination of the contract: what if the agent has funded a major marketing campaign shortly before termination? The Advocate General’s opinion suggested there should be an adjustment to reflect the “reality of future gains and losses”. He suggested also that it was for the national court to decide whether its approach to the definition of “lost commissions” was sufficiently flexible. Neither of the suggestions by the AG appeared to find much favour with the court.

The second question for determination by the ECJ was this: where the principal was the member of a group of companies, were benefits derived by other members of the group to be taken into account when calculating the indemnity to which the terminated commercial agent was entitled? The court held that the calculation of the advantages gained by the principal (from the agency) was not required to take account of other companies with the same owner in the group unless the contractual duties of the agent also consisted of a duty to create or develop the commercial relationships undertaken by third parties with other companies in the same group.

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