



Positive appointment Agency Agreements in Ireland

Agency agreements can be beneficial for companies who wish to have a presence in the Irish market without committing themselves fully. When a company decides to appoint an agent, it is important to consider all potential implications of such an arrangement, as there can be significant cost implications on termination of a commercial agency.

This article explores:

- the benefits of appointing a commercial agent
- some of the characteristics of a commercial agency so that a company can identify whether an existing/future arrangement is in fact a commercial agency, and
- the consequences of termination of a commercial agency.

Why appoint an Agent?

Appointing an Agent can save the company the expense of hiring and managing employees and renting premises. As a result, overheads are generally kept to a minimum.

The Company can also use the agency as a 'trial run' for their products before deciding whether to fully commit themselves in the Irish market.

Does a commercial agency exist?

The legislation at national and European level dictates what a commercial agency actually consists of. Commercial agencies in Ireland are governed by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the "**Directive**") which is implemented in Irish law by the European Communities (Commercial Agents) Regulations 1994 and 1997 (the "**Regulations**").

The Regulations define a 'commercial agent' broadly as a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "**Principal**") or to negotiate and conclude such transactions on behalf of and in the name of the Principal.

The definition does not extend to:

- a) an officer of a company empowered to enter into commitments binding on a company or association;
- b) a partner lawfully authorised to enter into commitments binding on his partners;
- c) a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy;
- d) commercial agents whose activities are unpaid;
- e) commercial agents where they operate on commodity exchanges or in the commodity market;
- f) a consumer credit Agent or a mail order catalogue Agent whose activities are considered secondary; or
- g) an Agent selling services (the Directive applies to goods only).

An Agency agreement should be evidenced in writing. The Directive provides that each party shall be entitled to receive from the other party, on request, a signed written document setting out the terms of the agency agreement.

Obligations on the Agent and Principal

Article 3 of the Directive imposes a general obligation on an Agent to look after their Principal's interests and act dutifully and in good faith. The Agent must also:

- make proper efforts to negotiate and, where appropriate, conclude the transactions that they are instructed to take care of;
- communicate to their Principal all the necessary information available to them; and
- comply with reasonable instructions given by the Principal.

Obligations are also imposed on the Principal when dealing with their Agent. Again, this includes the general obligation to act dutifully and in good faith. Additional obligations imposed on the Principal include the duty to:

- provide the Agent with the necessary documentation relating to the goods concerned
- obtain for their commercial Agent the information necessary for the performance of the agency agreement, and in particular, notify the Agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the Agent could normally have expected, and
- inform the Agent within a reasonable period of their acceptance, refusal, and of any non-execution of a commercial transaction which the commercial Agent has procured for the Principal.

Remuneration/commission

Article 7 of the Directive provides for remuneration of the Agent by commission on commercial transactions concluded during the period covered by the agency agreement where:

- a) the transaction has been concluded as a result of the Agent's action; or
- b) the transaction is concluded with a third party whom the Agent has previously acquired as a customer for transactions of the same kind.

An Agent's entitlement to commission also arises where the Agent is entrusted with or has an exclusive right over a specific geographical area or group of customers.

An Agent's entitlement to commission does not automatically end on termination of the agreement. An Agent can also be entitled to commission on commercial transactions concluded after the agency agreement has terminated where the transaction is mainly attributable to the Agent's efforts during the period covered by the agency agreement and if the transaction was entered into within a reasonable period after the agreement terminated (Article 8).

Termination

Where an agency agreement is for a fixed period which continues to be performed by both parties after the expiration of the fixed term, it shall be deemed to be converted into an agency agreement for an indefinite period.

The notice periods required for a valid termination varies and depends on the length of the agreement in place. If the agreement is in its:

- First year – one month's notice is required;
- Second year – two months' notice is required; or
- Third and subsequent years – three months' notice is required.

These notice periods are mandatory minimum periods and cannot be derogated from, however the parties may opt to agree longer notice periods in the relevant agency agreement.

Compensation

Under Article 17 of the Directive, the Agent shall be entitled to compensation upon the termination of the commercial agency. "Termination" in this context extends to capture the expiration of the agreement in the normal course, even when there has not been an "active" termination as a result of a breach by one of the parties.

This compensation right will apply even where a written agency agreement is silent on the point. The parties are not permitted to waive the application of this provision during the term of the agency.

There are, however, certain prescribed exceptions to the application of this compensation entitlement. For example, compensation will not arise where the agreement was terminated because of default on the part of the Agent or where the Agent unjustifiably terminated the agreement.

The rationale behind this compensation right is to ensure the Agent is adequately remunerated for their part in the creation of the goodwill of the Principal's business given that the Agent may have brought the Principal new customers or significantly increased the volume of business with existing customers and the Principal continues to benefit from the business with the customers.

An Agent must notify the Principal of their intention to pursue their entitlement to compensation within one year of termination.

The level of compensation payable to the Agent upon termination of the agency agreement is complex and there is currently no guidance from the Irish courts on the level of compensation payable to an Agent upon termination.

The matter has, however, been examined in other European jurisdictions. For example, the English courts have held that the basis for calculating compensation due to an Agent on termination is calculated by reference to the loss of the value of the agency. This is the amount a purchaser may reasonably be expected to pay for the agency as of the date of termination. While not binding in this jurisdiction, the position of the English courts may be considered persuasive by the Irish courts if they are ever asked to rule on the application of the provisions of the Directive relating to compensation.

What if I do not want an Agency arrangement?

Where a commercial agency exists, the obligations under the Directive and the Regulations apply. It is generally not possible to contract out of the application of the Directive where a commercial agency is created.

Alternatives to an agency arrangement are distribution agreements and employee/employer relationships. However, these alternatives carry their own specific limitations under competition and employment legislation.

Conclusion

Agency agreements have their benefits in that they can reduce expenditure by the company in a particular market. However, once an agency relationship exists, both parties become bound by the robust provisions set out in the Directive and the Regulations. Parties intending to enter into agency arrangements should be mindful of the potentially significant financial consequences on termination of any such arrangement.

For further information on commercial agency agreements, please contact your usual Eversheds Sutherland contact or our Commercial Contracts team:



Marie McGinley

Partner, Head of IP, Technology & DP

T: +353 1 6441 457

M: +353 86 1706507

mariemcginley@eversheds-sutherland.ie



Peter O'Neill

Senior Associate, Corporate & Commercial

T: +353 1 6644 943

M: +353 86 1849138

peteroneill@eversheds-sutherland.ie

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[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

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