



Commercial Agents: Case and Statute Citator 2019

compiled by Andrew Marsden, Barrister

"He has great charisma and sets clients at ease, even in very tense circumstances. He is calm, always well prepared, very persuasive and extremely intelligent. He has a very useful knack of coming up with innovative solutions to seemingly intractable problems."

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Expertise

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- Agency (including Commercial Agents)
- Mediation

Introduction

The terms of the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) (as amended) ('the Regulations') implement Council Directive 86/653 [1986] OJ L382/17 ('the Directive'). The Regulations came into force on 1 January 1994 and contain important provisions affecting the relations between commercial agents and their principals. In broad terms, a 'commercial agent' comprises a self-employed intermediary who negotiates or concludes sales or purchases of "goods" on behalf of his principal. The Regulations provide an entitlement to an 'indemnity' or 'compensation' on termination effected by the principal and set out certain duties owed between commercial agents and their principals. They also contain provisions relating to the basis of remuneration of commercial agents, the termination of commercial agencies and the validity of restraint of trade clauses. In other respects, relations between commercial agents and their principals are governed by the common law, equity and, to a more limited extent, other legislation applicable to agents and their principals. For the law relating to agents and their principals generally reference should be made to the standard works such as Bowstead & Reynolds on Agency (21st Ed). This case and statute citator is limited to a consideration of the law peculiar to commercial agents.

This citator reflects the law as at 1 January 2019.

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The Regulations and their coming into force

The Regulations comprise domestic implementation of European Directive

The Council Directive on the Coordination of the Laws of the Member States Relating to Self Employed Commercial Agents Dir 86/653

Section 2(2) European Communities Act 1972

The Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No. 3053)

Commercial Agents (Council Directive) (Amendment) Regulations 1993 (SI 1993 No. 3173)

Commercial Agents (Council Directive) (Amendment) Regulations 1998 (SI 1998 No. 2868)

Came into force 1 January 1994

Regulation 1(1)

Regulations apply to commercial agency contracts made before 1 January 1994 but do not affect rights and liabilities that accrued before then

Regulation 23

Moore v Piretta PTA Ltd [1999] 1 All ER 174

Cureton v Mark Insulations Ltd [2006] EWHC 2279

The European Directive (but not the Regulations) extends to the European Economic Area

The Agreement on the European Economic Area of 1994

Principles of interpretation applicable to the Regulations

Regulations to be interpreted against background of Directive – can look to the French and German law for assistance as to meaning of Directive but implementation of Directive left as a matter for individual member states so that no member state bound to follow practice in any other member state

Moore v Piretta PTA Ltd [1999] 1 All ER 174

Lonsdale v Howard & Hallam [2007] UKHL 32

Invicta UK v International Brands Ltd [2013] EWHC 1564

The courts of the UK are required to interpret the regulations, so far as possible, in light of the wording and purposes of the Directive, in order to achieve the result pursued by the Directive

CILFIT v Ministero Della Sanita [1982] ECR 3415 (Case 283/91)

Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 (Case C-106/89) paras 7-8

Centosteel Sri Adipol GmbH [2000] ECR I-6007 (Case C-456/89) paras 16-17

W Nagel (a firm) v Pluczenik [2018] EWCA Civ 2640

<p>The purpose of the Directive is “to protect Agent by giving them a share of the goodwill which they have generated and from which the principal has benefitted after the agency agreement has been terminated</p>	<p><i>Tamarind International Ltd v Eastern Natural Gas Ltd [2000] CLC 1397</i> <i>W Nagel (a firm) v Pluczenik Diamond Co NV [2018] EWCA Civ 2640</i></p>
<p>Exceptions from the ambit of the Directive and therefore from the ambit of the Regulations should be interpreted strictly</p>	<p><i>Belgium v Tesco Europe SA [2004] ECR I-11237 (Case C-284/03)</i> <i>Volvo Car Germany GmbH v Autohof Weidensdorf GmbH [201] Bus LR D13 (Case C-203/09)</i> <i>W Nagel (a firm) v Pluczenik Diamond Co NV [2018] EWCA Civ 2640</i></p>
<p>Territorial extent of application of the Regulations</p> <p>Regulations apply in relation to activities of commercial agents in Great Britain (i.e. England, Wales and Scotland) -Regulations apply only to activities of a commercial agent in Great Britain unless, perhaps, it is specifically contractually agreed by the parties that the Regulations should apply to activities of the commercial agent outside of Great Britain</p>	<p><i>Regulation 1(2)</i></p>
<p>Regulations apply to activities of commercial agents in Great Britain irrespective of choice of governing law of the contract of agency unless perhaps the governing law selected by the parties is that of another member state of the European Economic Area and the chosen law does not deprive the commercial agent of rights that would have been available under the Regulations</p>	<p><i>Regulation 1(3)(a)</i> <i>Ingmar GB Ltd v Eaton Leonard Technologies Ltd C-381/98 [2000] ECRI-9305; [2001] 1 All ER (Comm) 329</i> <i>Accentuate Ltd v Asigra Inc [2009] EWHC 2655</i> <i>United Antwerp Maritime Agencies (Unamar) NV Navigation Maritime Bulgare (Case C-184/12)</i> <i>Cf Lawlor v Sandvik [2013] EWCA Civ 365</i> <i>Fern Computer Consultancy Ltd v Intergraph Cadworx& Analysis Solutions Inc [2014] EWHC 2908</i></p>

<p>The existence of a clause requiring disputes to be referred to arbitration outside of Great Britain and for the arbitration to be conducted under other governing law will not oust jurisdiction of courts of England and Wales to apply the Regulations</p>	<p><i>Accentuate Ltd v Asigra Inc</i> [2009] EWHC 2655</p>
<p>Laws of other member states may apply in place of the Regulations if parties so agree</p>	<p><i>Regulation 1(3)(a)</i></p>
<p>Laws of England, Wales or Scotland may apply to activities of commercial agents outside of Great Britain if laws of member state in which activities take place so permit and parties so agree</p>	<p><i>Regulation 1(3)(b)</i></p>
<p>The member state with jurisdiction to determine a dispute between a commercial agent and his principal is the member state in which the commercial agency is performed</p>	<p><i>Article 5(1)(b) of the Brussels Regulation (Council Regulation (EC) No 44/2001)</i> <i>Wood Floor Solutions GmbH v Silva Trade SA (C-19/09)</i></p>
<p>EU Directive does not apply to protect commercial agents operating outside of EU even if principal is based in a member state and even if the law of a member state is expressed to govern relations between them</p>	<p><i>Agro Foreign Trade & Agency</i> [2017] EUECJ C-507/15</p>
<p>Definition of a commercial agent</p> <p>Statutory definition</p>	<p><i>Regulation 2(1)</i></p>
<p>Can expressly incorporate the terms of the Regulations.</p>	<p><i>Tamarid International Ltd v Eastern National Gas (Retail) Ltd</i> [2000] Eur LR 708 <i>McQuillan v McCormick</i> [2010] EWHC 1112 <i>Bowstead & Reynolds on Agency (21st Ed) para 11-01</i></p>
<p>Commercial agent must be in contractual relations with principal</p>	<p><i>Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd</i> [2011] EWHC 978</p>

<p>Labels used by parties in contract are not conclusive, rather, issue is one of substance and not form</p>	<p><i>Blanc Canet v Europcar France</i> [2005] ECC 34</p> <p><i>Mercantile International Group Plc v Chuan Soon Huat</i> [2002] EWCA Civ 288</p> <p><i>Umbro International Ltd v Revenue and Custom Commissioners</i> [2009] EWHC 438</p> <p><i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564</p>
<p>'Self employed' - does not include employees of the principal</p>	<p><i>Julian Smith v Reliance Water Controls</i> [2003] EWCA Civ 1153; [2003] Eu LR 874</p>
<p>'Intermediary' – does not include distributors</p>	<p><i>AMB Imballaggi Plastici SRL v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249</p>
<p>The structure of the remuneration received is not determinative of whether an arrangement comprises a commercial agency but may be an indicative factor</p>	<p><i>AMB Imballaggi Plastici SRL v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249</p> <p><i>Mercantile International Group Plc v Chuan Soon Huat</i> [2002] EWCA Civ 288</p> <p><i>Sagal v Atelier Bunz GmbH</i> [2009] EWCA Civ 700</p>
<p>A commercial agent may be remunerated by commissions or by a mark-up on sale price or by salary or retainer</p>	<p><i>Duffen v FRA (unreported)</i> 30 April 1998</p> <p><i>Mercantile International Group Plc v Chuan Soon Huat</i> [2002] EWCA Civ 288</p> <p><i>Invicta Uk v International Brands Ltd</i> [2013] EWHC 1564</p> <p><i>Regulation 6(3)</i></p>
<p>Authority to 'negotiate' or 'negotiate and conclude' sales or purchases on behalf of his principal – does not include a broker acting independently of the parties</p>	<p><i>Marjandi Ltd v Bon Accord Glass Ltd</i> [1998] Scot SC 55 (15 October 2007)</p> <p><i>Parks v Esso Petroleum Co Ltd</i> [1999] EWCA Civ 1942 and [1999] CMLR 455 and [2002] Eu LR25</p> <p><i>Ferro v Santoro OJ</i> 2002 C323/24</p> <p><i>P J Pipe & Valve Co Ltd v Audco India Ltd</i> [2005] EWHC 1904 (cf <i>Kenny v Ireland Roc Ltd</i> 2005 IEHC 241)</p> <p><i>Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd</i> [2008] EWHC 767</p> <p><i>Accentuate Ltd v Asigra Luc</i> [2009] EWHC 2655</p> <p><i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564</p>

<p>Query whether an agent who is only authorised to introduce customers to his principal and who is not authorised to “negotiate” or “negotiate” or “negotiate and conclude” sales or purchases on behalf of his principal may nevertheless be a commercial agent?</p>	<p><i>Parks v Esso Petroleum Company Limited (2000) Eu LR 25</i> <i>P J Pipe & Valve Ltd v Audco India Ltd [2005] EWHC 1904</i> <i>Kenny v Ireland Roc Ltd 2005 IEHC 241</i></p>
<p>Authority must be 'continuing'</p>	<p><i>Mercantile International Group Plc v Chuan Soon Huat Industrial Group Plc [2002] EWCA Civ 288; [2002] 1 All ER (Comm) 788</i> Opinion of A G Geelhoed and decision of ECJ in <i>Poseidon Chartering BV v Marianne (C-3/04)</i> <i>Zeeschip VOF Case C-3/04</i> <i>Marjandi Ltd v Bon Accord Glass Ltd [1998] Scott SC 55 (15 October 2007)</i> <i>Claramoda Ltd v Zoomphase Ltd [2009] EWHC 2857</i></p>
<p>No need for agent to 'negotiate' terms just to acquire or develop business for principal</p>	<p><i>Invicta UK v International Brands Ltd [2013] EWHC 1564</i></p>
<p>'On behalf of and in the name of that principal' – unlikely to be the case where an agent acts for an undisclosed principal and may not be the case where an agent acts for a disclosed but unnamed principal</p>	<p><i>Parks v Esso Petroleum Co Ltd [2002] Eu LR 25</i> <i>Mavrona & Sia OE v Delta Etaireia Symmetochon AE Case C-85/03 OJ 2004 C94/17</i> <i>Raoul Sagal v Atelier Bunz EGmbH [2009] EWCA Civ 700</i> <i>And see discussion in this context in Bowstead & Reynolds on Agency (21st ed) para 11-019</i></p>

<p>'Goods' – may extend beyond what would ordinarily be considered to be goods in this jurisdiction but seemingly restricted to tangible items</p>	<p><i>Pace Airline Services v Aerotrans Luftfahrtagentur GmbH</i> (unreported)</p> <p><i>St Albans DC v International Computers Ltd</i> [1996] 4 All ER 481</p> <p><i>Tamarind International Ltd v Eastern Gas (Retail) Ltd</i> Times 27 June 2000; [2000] Eur LR 708</p> <p><i>Abbey Life v Kok Theam Yeap</i> (C-449/01)</p> <p><i>Caprini v CCIAA</i> [2003] EUECJ C-485/01</p> <p><i>Monarch Energy Ltd v Powergen Retail Ltd</i> [2006] SLT 743</p> <p><i>Crane v Sky In-House Services Ltd</i> [2007] EWHC 66</p> <p><i>Devers v Electricity Direct (UK) Ltd</i> LTL 24/8/2009</p> <p><i>Accentuate Ltd v Asigra Inc</i> [2009] EWHC 2655</p> <p><i>Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc</i> [2014] EWHC 2908</p> <p><i>Computer Associates Ltd v Software Incubator Ltd</i> [2018] EWCA Civ 518</p>
<p>'Goods' - may extend to computer software supplied in a tangible form (e.g. on a disc, dongle or hard drive) but not if supplied in an intangible form (e.g. electronically via a download)</p>	<p><i>Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc</i> [2014] EWHC 2908</p> <p><i>Computer Associates Ltd v Software Incubator Ltd</i> [2018] EWCA Civ 518</p>
<p>'Goods' – may not extend to sales of contracts for work and materials</p>	<p><i>Marjandi Ltd v Bon Accord Glass Ltd</i> [1998] Scot SC 55 (15 October 2007)</p>
<p>'Goods' - may not extend to financial or insurance products</p>	<p><i>Abbey Life v Kok Theam Yeap</i> (C-449/01)</p> <p><i>Opinion of AG in Ergo v Barlikova</i> Case C-48/16 (12/1/2017)</p>
<p>Both individuals and companies may be commercial agents</p>	<p><i>AMB Imballaggi Plastici Srl v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249</p> <p><i>Bell Electric Ltd v Aweco Appliances Systems GmbH</i> [2002] EWHC 872</p>
<p>Does not include volunteers</p>	<p><i>Regulation 2(2)(a)</i></p>
<p>May act for multiple principals if informed consent given</p>	<p><i>Rosetti Marketing Ltd v Diamond Sofa Company Ltd</i> [2011] EWHC 2482</p> <p><i>Computer Associates Ltd v Software Incubator Ltd</i> [2018] EWCA Civ 518</p>

<p>Does not include sub-agents – sub-agent also not commercial agent of main agent as he does not sell goods of main agent – query whether a sub-agent may be able to 'establish a stake' in rights of main agent as against principal?</p>	<p><i>Light v Ty Europe Ltd</i> [2003] EWCA Civ 1238; [2004] 1 Lloyds Rep 693</p>
<p>Does not include assignees of mere benefit of a commercial agency contract</p>	<p><i>Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd</i> [2011] EWHC 978</p>
<p>The Regulations do not apply to commercial agents who operate on a “commodity exchange” or in a “commodity market”. However, this exception from the operation of the Regulations only applies to commercial agents who operate on a “commodity exchange” or in a “commodity market” and does not apply to a commercial agent otherwise dealing in “commodities”</p>	<p><i>Regulation 2(2)(b)</i> <i>Pluczenik Diamond Co NV v W Nagel (A Firm)</i> [2018] EWCA Civ 2640</p>
<p>Does not include persons whose activities as 'commercial agents' are to be considered 'secondary'</p>	<p><i>Regulation 2(4)</i> <i>The Schedule to the Regulations</i> <i>Hunter v Zenith Windows</i> (unreported decision of Norwich County Court see <i>Financial Times</i> 7 July 1998) <i>AMB Imballaggi v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249 at 254 <i>Tamarind International v Eastern Natural Gas (Retail) Ltd</i> [2000] EULR 708 at para 28 <i>Gailey v Environmental Waste Controls</i> [2003] ScotCS 300 <i>Blanc Ganet v Europcar France</i> [2005] ECC 34 <i>MacAdam v Boxpak Ltd</i> 2000 SLT (Sh Ct) 147; [2006] Scot CSIH 9 (16 February 2006) <i>Michael Edwards v International Connection (UK) Ltd</i> [2006] EWCA Civ 662 <i>Crane v Sky In-House Services Ltd</i> [2007] EWHC 66 <i>Marjandi Ltd v Bon Accord Glass Ltd</i> [1998] Scot SC 55 (15 October 2007)</p>
<p>Status of a person may change over time (i.e. from employee to self-employed commercial agent)</p>	<p><i>Smith v Reliance Water Controls Ltd</i> [2003] EWCA Civ 1153; [2003] Eu LR 874</p>

Duties of commercial agent imposed by the Regulations

In performing his activities a commercial agent must 'look after interests of' his principal and 'act dutifully and in good faith'

Regulation 3(1)
Rossetti Marketing Ltd v Diamond Sofa Co [2011] EWHC 2482

"Good faith" in the context of the Regulations probably has the same meaning as under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)

Director General of Fair Trading v First National Bank plc [2001] UKHL 52

An agent cannot act for two principals with conflicting interests unless the principals provide fully informed consent

Rossetti Marketing Ltd v Diamond Sofa Co Ltd [2012] EWCA Civ 1021
Computer Associates Ltd v Software Incubator Ltd [2018] EWCA Civ 518

Commercial agent must make 'proper efforts' to negotiate and, where appropriate, conclude the transactions he is instructed to take care of

Regulation 3(2)(a)

Commercial agent must 'communicate all necessary information available to him' to his principal

Regulation 3(2)(b)

Commercial agent must 'comply with reasonable instructions' from his principal

Regulation 3(2)(c)

Duties imposed by Regulation 3 may not be derogated from

Regulation 5(1)

Consequence of breach of duties imposed by Regulation 3 governed by law of the contract – in England and Wales may include damages, injunctions, entitlement to terminate, etc

Regulation 5(2)

Breach of the duty imposed by Regulation 3 does not automatically give rise to a right to terminate the agency agreement

Crocs Europe BV v Craig Lee Anderson [2012] EWCA Civ 1400

Duties of a principal imposed by the Regulations

Principal must act 'dutifully and in good faith' in his relations with his commercial agent – query whether principal can use others to solicit orders from customers in a territory for which the agent is solely responsible or whether, as a matter of course, the principal can refuse to conclude contracts negotiated by the commercial agent

Regulation 4(1)
Corte di cassazione, 18 December 1985, n 6475, Giur.it 1986, I, 1, 1649 note di Loreto
Court d'appel de Rennes, 1 December 1993
Dalloz 1994, informations rapides, 127

Conduct of the principal designed to engineer a position where the commercial agent would find it impossible to continue to act will involve a breach of duty of good faith owed by the principal to the commercial agent

Cooper v Pure Fishing (UK) Ltd [2004] EWCA Civ 375

The duty of good faith requires that a principal “shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust”

Vick v Vogle-Gapes Ltd [2006] EWHC 1579

Principal must provide commercial agent with necessary documentation relating to the goods in question

Regulation 4(2)(a)

Principal must obtain and provide to commercial agent the information necessary for performance of the agency

Regulation 4(2)(b)

Principal must notify commercial agent within reasonable period of any anticipated significant decline in volume of transactions

Regulation 4(2)(b)

Principal must inform commercial agent within reasonable period of acceptance or refusal to accept any transaction procured by that commercial agent

Regulation 4(3)

Duties imposed by Regulation 4 may not be derogated from

Regulation 5(1)

<p>Consequence of breach of duties imposed by Regulation 4 governed by law of the contract – in England and Wales may include damages, injunctions, entitlement to terminate, etc</p>	<p><i>Regulation 5(2)</i></p>
<p>Written statement of terms of contract</p> <p>Both principal and commercial agent are entitled to a signed written document setting out terms of the agency - save as regards restraint of trade clauses there is no requirement that an enforceable commercial agency agreement must be in writing</p>	<p><i>Regulation 13</i> <i>Regulation 22</i></p>
<p>Remuneration of commercial agent</p> <p>In absence of agreed rates of remuneration commercial agent entitled to 'the remuneration that commercial agents appointed for the goods forming the subject of his agency are customarily allowed in the place where he carries on his activities' or if no such customary practice 'reasonable remuneration'</p>	<p><i>Regulation 6(1)</i></p>
<p>Regulations 7-12 only apply if the commercial agent is remunerated wholly or partly through "commission"</p>	<p><i>Regulation 6(3)</i></p>
<p>Definition of 'commission'</p>	<p><i>Regulation 2(1)</i> <i>Mercantile International Group plc v Chuan Soon Huat Industrial Group plc [2001] CLC 1222</i></p>
<p>Commercial agent entitled to commission (as opposed to any other form of remuneration) on 'commercial transaction concluded during the period covered by the agency contract – (a) where the transaction has been concluded as a result of his action; or (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind</p>	<p><i>Regulation 7(1)</i></p>

<p>Commercial agent entitled to commission (as opposed to any other form of remuneration) on 'commercial transactions concluded during the period covered by the agency contract where he has an exclusive right to a specified geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group'</p>	<p><i>Regulation 7(2)</i> <i>Kontogeorgas v Kartonpak AE Case C-104/95 [1996] ECR 1-6643; [1997] CMLR 1093</i> <i>Moore v Piretta PTA Ltd [1999] 1 All ER 174</i></p>
<p>Commercial agent entitled to commission (as opposed to any other form of remuneration) on 'commercial transactions concluded after the agency contract has terminated if – (a) the transaction is mainly attributable to his 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) – the order of the third party reached the principal or the commercial agent before the agency contract terminated'</p>	<p><i>Regulation 8</i> <i>Tigana Ltd v Decoro Ltd [2003] EWHC 23; [2003] Eu LR 189</i> <i>P J Pipe and Valve Co Ltd v Audco India Ltd [2005] EWHC 1904</i> <i>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587</i> <i>Monk v Largo Foods Ltd [2016] EWHC 1837</i></p>
<p>Query whether derogation is permitted from the provisions of Regulations 7 and 8</p>	<p><i>Ingmar GB Ltd v Eaton Leonard Ltd [2001] EWHC 3; [2001] Eur LR 755 at para 3</i></p>
<p>Regulation 8 to take precedence over Regulation 7 unless, in the circumstances, it is fair to share commission payable as between old commercial agent and new commercial agent</p>	<p><i>Regulation 9</i></p>
<p>Commissions (as opposed to any other form of remuneration) fall due at latest when transaction has been or should have been executed by principal or when third party has or should have executed the transaction</p>	<p><i>Regulation 10(1)</i> <i>Regulation 10(2)</i></p>
<p>Commissions (as opposed to any other form of remuneration) to be paid no later than last day of month following quarter in which fell due</p>	<p><i>Regulation 10(3)</i></p>
<p>No derogation from Regulations 10(2) and 10(3)</p>	<p><i>Regulation 10(4)</i></p>

Principal can only seek to extinguish (or partially extinguish) commercial agent's right to commission (as opposed to any other form of remuneration) if contract with third party will not be executed and the reason for its non-execution does not lie with the principal	<i>Regulation 11(1)</i> <i>Opinion of AG in Ergo v Barlikova Case C-48/16 (12/1/2017)</i>
Commissions (as opposed to any other form of remuneration) received by agent where right to that commission is properly extinguished must be refunded by commercial agent to principal	<i>Regulation 11(2)</i>
No derogation from Regulation 11(1) to detriment of commercial agent	<i>Regulation 11(3)</i>
Principal to supply commission (as opposed to any other form of remuneration) statements no later than end of month following a quarter in which commission becomes due setting out main components used in calculating commission payable and all information necessary to check the amount of commission due	<i>Regulation 12</i>
Termination of a commercial agency	
Minimum periods of notice for agency contracts for indefinite periods	<i>Regulation 15</i>
Damages will be awarded in respect of the relevant required notice period	<i>Alan Ramsay Sales & Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486</i>
But minimum periods of notice not to affect rule of law which permits immediate termination because of breach or in exceptional circumstances	<i>Regulation 16</i>
Where agency continues after fixed term expires it becomes an agency for an indefinite period	<i>Regulation 14</i>
Where an agent ceases to sell but continues to engage in commercial activity the agency may not terminate until the commercial activity ceases	<i>Claramoda Ltd v Zoomphase Ltd [2009] EWHC 2857</i>

<p>'Indemnity and 'compensation'</p> <p>Statutory entitlement</p>	<p><i>Regulation 17</i></p>
<p>'Indemnity' or 'compensation' payable on a termination by notice by principal, on expiry of a fixed term appointment (but query if new fixed term appointment is offered) and on termination as a result of death</p>	<p><i>Moore v Piretta PTA Ltd [1999] 1 All ER 174</i></p> <p><i>Whitehead v Jenks & Cattell Engineering Ltd [1999] Eu LR 827</i></p> <p><i>Frape v Emreco International Ltd [2002] SLT 371</i></p> <p><i>Light v Ty Europe Ltd [2003] EWCA 1238</i></p> <p><i>Tigana Ltd v Decoro Ltd [2003] EWHC 23</i></p> <p><i>Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA 375</i></p> <p><i>Regulation 17(8)</i></p>
<p>Where fixed term commercial agency contract expires but the commercial agent is actually renewed no right to “compensation” or “indemnity” arises</p>	<p><i>Moore v Biretta PTA Ltd [1998] CLC 992</i></p>
<p>Right to “indemnity” or “compensation” arises when principal terminates commercial agency even during the currency of a trial period</p>	<p><i>Conseils et mise en relations (CMR) SARL v Demeures terre et tradition SARL (Case C-645/16) EU:C:2018:262 (19 April 2018)</i></p>
<p>Right to 'indemnity' or 'compensation' also appears to exist where commercial agent terminates agency on grounds of age, infirmity or illness in consequence of which he cannot reasonably be required to continue his activities (e.g. where terminates on agent reaching recognised retirement age)</p>	<p><i>Regulation 18(b)(iii)</i></p> <p><i>Abbott v Condici Ltd [2005] 2 Lloyds Rep 450</i></p>
<p>Agent not entitled to 'indemnity' or 'compensation' if agency is validly terminated because of agent's default justifying immediate termination (i.e. following a repudiatory breach by the agent)</p>	<p><i>Regulation 18(a)</i></p> <p><i>Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA 375</i></p> <p><i>Crane v Sky in Home Ltd [2007] EWHC 66</i></p> <p><i>Nigel Fryer Joinery Services Ltd v Ian Frith Hardware Ltd [2008] EWHC 767</i></p> <p><i>Devere Group Ltd v Pearce [2011] EWHC 1240</i></p> <p><i>Crocs Europe BV v Anderson [2012] EWCA Civ 1400</i></p>

<p>Query whether a principal who has terminated a commercial agency can rely upon grounds justifying immediate termination if he was not aware of those grounds and so did not actually rely on those grounds for termination at the time</p>	<p><i>Volvo Car Germany GmbH v Autohof Leidensdorf GmbH (C-203/09)</i> <i>cf Rossetti Marketing Ltd v Diamond Sofa Company Ltd [2002] EWCA Civ 1021</i></p>
<p>Not all breaches of fiduciary duties (including breaches of duties imposed by Regulation 3) entitle the other party to immediately terminate the commercial agency. Rather, it depends on how serious the breach is</p>	<p><i>Crocs Europe BV v Craig Lee Anderson [2012] EWCA Civ 1400</i></p>
<p>Unauthorised acting for competitor is likely to justify immediate termination</p>	<p><i>Nigel Fryer Joinery Services Ltd v Ian Frith Hardware Ltd [2008] EWHC 767</i> <i>Rossetti Marketing Ltd v Diamond Sofa Co Ltd [2012] EWCA Civ 1021</i></p>
<p>Undertaking other non competitive agencies or other competitive agencies with the consent of the principal is unlikely to involve the commercial agent in any breach of duty unless the commercial agency agreement specifically forbids the same or requires the commercial agent to provide its services exclusively to its principal</p>	<p><i>Computer Associates Ltd v Software Incubator Ltd [2018] EWCA Civ 518</i></p>
<p>Failure to submit regular reports when required to do so may involve repudiatory breach justifying immediate termination</p>	<p><i>Nigel Fryer Joinery Services Ltd v Ian Frith Hardware Ltd [2008] EWHC 767</i></p>
<p>Unlikely that entitlement to 'compensation' could be avoided by inclusion of contractual provisions that entitle principal to immediately terminate upon the occurrence of specified events (e.g. failure to meet sales targets)</p>	<p><i>Laboratoires Arkopharma SA v Gravier [2003] ECC 33</i> <i>Crane v Sky in Home Ltd [2007] EWHC 66</i></p>
<p>Agent may not be entitled to 'indemnity' or 'compensation' in circumstances where his principal reduces the extent of the agent's territory but does not 'terminate' agency</p>	<p><i>Scottish Power Energy Retail Ltd v Taskforce Contracts Ltd [2008] ScotCS CSOH 110</i> <i>Tony Vick v Vogle-Gapes Ltd [2006] EWHC 1579</i></p>

<p>Agent not entitled to 'indemnity' or 'compensation' if he terminates the agency unless circumstances amount to a constructive dismissal or agent reasonably terminates because of age, infirmity or illness</p>	<p><i>Regulation 18(b)</i> <i>Page v Combined Shipping and Trading Co Ltd [1997] 3 All ER 656</i> <i>Alan Ramsay Sales & Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486</i></p>
<p>Agent not entitled to 'indemnity' or 'compensation' where his agency is terminated by reason of his assignment of his agency</p>	<p><i>Regulation 18(c)</i> <i>King v Tunnock [2000] IRLR 569</i> <i>Rossetti Marketing Ltd v Diamond Sofa Company Ltd [2002] EWCA Civ 1021</i></p>
<p>Unless agency contract specifically provides for an 'indemnity' the agent's entitlement is to 'compensation'</p>	<p><i>Regulation 17(2)</i> <i>Hardie Polymers Ltd v Polymetland [2002] SCLR 64</i> <i>Brand Studio Ltd v St John Knits Inc [2015] EWHC 3143</i></p>
<p>Agency contract may specify different entitlements to 'indemnity' or 'compensation' in different situations or on happening of different events</p>	<p><i>Charles Shearman v Hunter Boot Ltd [2014] EWHC 47</i> <i>Brand Studio Ltd v St John Knits Inc [2015] EWHC 3143</i></p>
<p>Right to 'indemnity' or 'compensation' lost unless notice given within one year of termination of intention to pursue</p>	<p><i>Regulation 17(9)</i></p>
<p>The relevant 'termination' date may extend beyond the date the agent ceases to sell the principal's goods</p>	<p><i>Claramoda Ltd v Zoomphase Ltd [2009] EWHC 2857</i></p>
<p>Limitation period of 6 years for claims to "indemnity" or "compensation"</p>	<p><i>Section 9 Limitation Act 1980</i> <i>McGee on Limitation Periods (7th Ed) para 2-003</i> <i>Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908</i></p>
<p>No formal requirements for notice of intention to pursue. Just has to convey requisite intent</p>	<p><i>Hacket v Advanced Medical Computer Systems Ltd [1999] CLC 160</i></p>

<p>No derogation from right to 'indemnity' or 'compensation' (but appears may agree to waive right to 'indemnity' or 'compensation' after termination of agency as part of post termination settlement)</p>	<p><i>Regulation 19</i></p> <p><i>Opinion of AG Leger in Ingmar GB Ltd v Eaton Leonard Technology Ltd Case C-381/98 [2000] ECR I-9305; [2001] 1 All ER (Comm) 329</i></p> <p><i>Honyvem v De Zotti (C-465/04)</i></p> <p><i>Alex Berry v (1) Laytons and (2) BG Jones [2009] EWHC 1591</i></p>
<p>No limitation of entitlement to lesser of 'compensation' or 'indemnity'</p>	<p><i>Charles Shearman v Hunter Boot Ltd [2014] EWHC 47</i></p> <p><i>Brand Studio Ltd v St John Knits Inc [2015] EWHC 3143</i></p>
<p>Unenforceable attempt to limit entitlement to lesser of 'indemnity' or 'compensation' may be capable of severance from contract but that severance may leave the commercial agent only entitled to "indemnity"</p>	<p><i>Brand Studio Ltd v St John Knits Inc [2015] EWHC 3143</i></p>
<p>For jurisdictional purposes a claim to an 'indemnity' or to 'compensation' is to be treated as a contractual claim</p>	<p><i>Arcado v Haviland SA Case C-9/87 [1988] ECR 1539</i></p>
<p>Principles applicable in calculating the level of 'compensation' payable – agent to be compensated for 'the damage he suffers as a result of the termination of his relations with his principal' – agent to be compensated for the loss of the benefit of the 'right to future commissions which proper performance of the agency contract would have procured him' – that loss to be calculated as 'the amount the agent could reasonably expect to receive for the right to stand in his shoes, continue to perform the duties of the agency and receive the commission which he would have received'</p>	<p><i>Regulation 17(6)</i></p> <p><i>Regulation 17(7)</i></p> <p><i>Lonsdale v Howard & Hallam Ltd [2007] UKHL 32 (overruling in this respect the approaches taken in, amongst other cases, Douglas King v T Tunnock Ltd [2000] SLT 744; Barrett McKenzie v Escada (UK) Ltd [2001] ECC 50; Ingmar GB Ltd v Eaton Leonard Inc [2001] EWHC 3 and Tigana v Decoro [2003] EWHC 23)</i></p> <p><i>McQuillan v McCormick [2010] EWHC 1112</i></p> <p><i>Alan Ramsey Sales and Marketing Limited v Typhoo Tea Limited [2016] EWHC 486 (Comm)</i></p>
<p>In assessing the value of the commercial agency it is to be assumed that the agency is to continue</p>	<p><i>Page v Combined Shipping & Trading [1997] 3 AER 656</i></p> <p><i>Lonsdale v Howard & Hallam Ltd [2007] UKHL 32</i></p> <p><i>Alan Ramsay Sales & Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486 (Comm)</i></p>

The following are relevant in determining what an agent might receive in the open market for his agency:

1. the prospects for the agency as they existed at the date of termination
2. future earnings to be discounted at an appropriate rate
3. whether his agency would be assignable in the future
4. the costs that the agent would have to incur to earn the commissions from that agency – including notional salary for agent (often identified by reference to an appropriate proportion of the salary for a “sales manager” as referred to in the Annual Survey of Hours and Earnings)
5. the actual performance of the principal's business after the termination of the agency
6. the agent's ability to take his customers elsewhere

Lonsdale v Howard & Hallam [2007] UKHL 32

McQuillan v McCormick [2010] EWHC 1112

Alan Ramsay Sales & Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486 (Comm)

Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587

Generally, the value of a commercial agency will be identified by applying an appropriate multiplier to the anticipated annual profits of the commercial agency. The appropriate multiplier may be based on the average price/earnings ratio of the FTSE index for the “Consumer Goods and Consumer Services” sector, discounted, where appropriate, by about 40% to reflect a lack of marketability and discounted further, where appropriate, by about 30% to reflect the size and scale of the commercial agency

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It may also be appropriate to apply a further discount of about 20% where the hypothetical purchaser is likely to be an individual or small business with a conservative and cautious outlook and modest means

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Where the commercial agent has conducted multiple agencies it will be necessary to identify the future variable costs associated with the running of the terminated commercial agency in order to ascertain its future likely profitability. Those costs may, where appropriate, be broadly identified by comparing the variable costs incurred prior to and after the termination of the commercial agency

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<p>Account also have to be taken of the overheads/fixed costs incurred in connection with the running of the commercial agency. In doing so the court should not necessarily assume that the notional purchaser will be a start up operation but may assume that the notional purchaser will be an already established business incurring overheads/fixed costs already. However, even in such a case the court should still deduct an appropriate element of overheads/fixed costs in identifying likely future profitability of the commercial agency</p>	<p><i>Alan Ramsay Sales and Marketing Limited v Typhoo Tea Limited</i> [2016] EWHC 486 (Comm)</p>
<p>Whether a claim under Regulation 8 will affect the extent of any “compensation” payable under Regulation 17 will depend on whether the existence of that claim would influence what a hypothetical purchaser might pay for the agency will depend on the facts</p>	<p><i>Software Incubator Ltd v Computer Associates Ltd</i> [2016] EWHC 1587 <i>Monk v Largo Foods Ltd</i> [2016] EWHC 1837</p>
<p>Extent of 'compensation' and, possibly, 'indemnity' likely to be determined in accordance with expert evidence</p>	<p><i>Lonsdale v Howard & Hallam Ltd</i> [2007] UKHL 32 <i>McQuillan v McCormick</i> [2010] EWHC 1112</p>
<p>Risk that commercial agency might be terminated as a result of the principal's loss of its distributorship of the products the subject of the agency is to be taken into account</p>	<p><i>McQuillan v McCormick</i> [2010] EWHC 1112</p>
<p>A commercial agency may actually not have any value in a particular case</p>	<p><i>Warren v Drukkerij Flach B.V.</i> [2014] EWCA Civ 993</p>
<p>Unclear whether principles of mitigation have any place when assessing 'compensation' payable</p>	<p><i>Tigana Ltd v Decoro Ltd</i> [2003] EWHC 23 <i>Lonsdale v Howard & Hallam Ltd</i> [2007] UKHL 32</p>
<p>Extent to which benefits are conferred on principal by activities of agent and agent's inability to amortise expenses are relevant to assessment of damages suffered by agent but unclear how they are to be taken account of</p>	<p><i>Regulation 17(7)(a)</i> <i>Regulation 17(7)(b)</i> <i>Duffen v Frabo SpA</i> [2000] 1 Lloyds Rep 180 <i>See also judgment of Moore-Bick LJ in Court of Appeal in Lonsdale v Howard & Hallam Ltd</i> [2006] EWCA 63; [2006] 1 WLR 1281 at para 29</p>

<p>No attempt to harmonise the levels of compensation payable within the EU – methods of assessing compensation payable in one member state may be different from those in another – compensation payable in other member states no guide to what is payable in Great Britain</p>	<p><i>Honeyvem Informazioni Commerciali Srl v Mariella de Zotti</i> Case C465-04 [2006] ECRI-02789</p> <p><i>Lonsdale v Howard & Hallam Ltd</i> [2007] UKHL 32</p>
<p>Principles applicable in calculating the amount of an 'indemnity' payable</p>	<p><i>Regulation 17(3)</i></p> <p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p> <p><i>Hardie Polymers Ltd v Polymerland Ltd</i> [2001] Scot CS243</p> <p>And see generally <i>Bowstead & Reynolds on Agency</i> (20th Ed) para 11-042</p>
<p>Calculating the amount of an 'indemnity' payable is a three-stage process, namely: (1) assess value of additional and continuing new business the agent has brought the principal; (2) assess what is 'equitable' having regard to all factors including the commission 'lost' by the agent; and (3) apply the statutory cap</p>	<p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p> <p><i>Re Sales of Spectacle Frames</i> [2017] ECC 19</p>
<p>Extent of 'indemnity' dependent upon extent to which the commercial agent has brought the principal new customers or increased the volume of business with existing customers and the extent to which the principal continues to derive substantial benefits from such customers (i.e. if no continuing benefit, no indemnity)</p>	<p><i>Regulation 17(3)(a)</i></p> <p><i>Re Sales of Spectacle Frames</i> [2017] ECC 19</p>
<p>Benefits to other group companies not to be taken into account</p>	<p><i>Semen v Deutsche Tamoil GmbH</i> [2009] 1 Lloyd's Rep 653</p>
<p>Extent of the 'indemnity' limited to that which is 'equitable having regard to all the circumstances' (i.e. extent of indemnity may be reduced if agent in breach of agency agreement or obligation)</p>	<p><i>Regulation 17(3)(b)</i></p> <p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p>
<p>Deductions to be made for likely expenses to be incurred in earning commission</p>	<p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p>
<p>Discount to reflect early receipt of indemnity</p>	<p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p>

Amount of 'indemnity' subject to cap equal to average annual remuneration calculated over last five years	<i>Regulation 17(4)</i>
Query whether cap is calculated by reference to gross remuneration or after deducting likely expenses incurred in earning remuneration	<i>Moore v Piretta PTA Ltd [1999] 1 All ER 174</i>
'Commissions lost' not to be regarded as a cap on extent of indemnity	<i>Semen v Deutsche Tamal GmbH [2009] 1 Lloyd's Rep 653</i>
Seems that principles of mitigation may not have relevance when assessing the extent of any 'indemnity' payable	<i>Moore v Piretta PTA Ltd [1999] 1 All ER 174 (but compare Regulation 17(3)(b))</i>
Right to and extent of any 'indemnity' and, perhaps, 'compensation' should not affect right to or extent of any damages payable in respect of any breaches of contract (e.g. failure to give required notice period)	<i>Regulation 17(5)</i> <i>(cf para 86 of Davis J in Tigana Ltd v Decoro Ltd [2003] EWHC 23)</i> <i>McQuillan v McCormick [2010] EWHC 1112</i> <i>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587</i>
<p>Enforceability of restrictive covenants in commercial agency agreements</p> <p>A restraint of trade clause in a commercial agency agreement is only enforceable if concluded in writing, if it relates to a geographical area or group of customers entrusted to the commercial agent and if it does not have a duration longer than two years after termination</p>	<p><i>Regulation 20</i></p> <p><i>BCM Group Plc v Visualmark Ltd [2006] EWHC 1831</i></p>