

## Commercial Agents: Case and Statute Citator 2024 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.”*

Chambers UK Bar

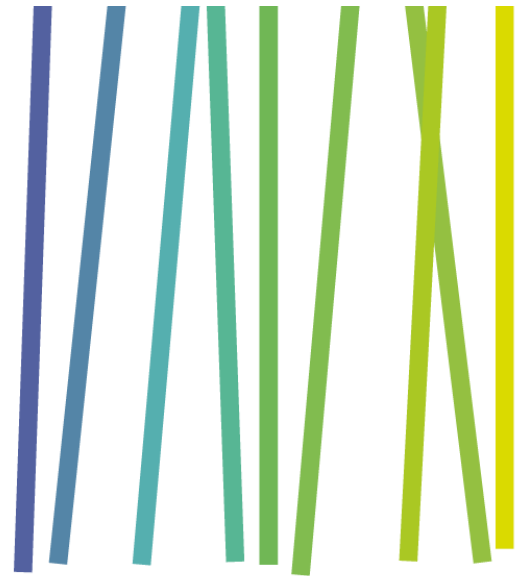
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Andrew is included in the prestigious Chambers 100 marking him out as one of the top 100 barristers in the country and one of the very best in his field. He is also ranked in the first tier of Chambers and Partners and the Legal 500

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### Expertise

- Commercial Dispute Resolution
- Company Law (particularly shareholder disputes)
- Partnership Law
- 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 July 2024.**

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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)*

Until 1 January 2020 and thereafter until the end of the “transition period” (31 December 2021) the Regulations have their constitutional basis in the European Communities Act 1972. Thereafter the Regulations’ constitutional basis will be as “retained EU law” enacted in the form of a UK Statutory Instrument and be enforceable as such until repealed or amended

*Section 2(2) European Communities Act 1972*

*European Union (Withdrawal Agreement) Act 2020*

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 applying to the 28 EU member states, Norway, Ireland and Liechtenstein

*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*

<p>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</p>	<p><i>CILFIT v Ministero Della Sanita</i> [1982] ECR 3415 (Case 283/91)</p> <p><i>Marleasing SA v La Commercial International de Alimentacion SA</i> [1990] ECR I-4135 (Case C-106/89) paras 7-8</p> <p><i>Centosteel Sri Adipol GmbH</i> [2000] ECR I-6007 (Case C-456/89) paras 16-17</p> <p><i>W Nagel (a firm) v Pluczenik</i> [2018] EWCA Civ 2640</p>
<p>The purpose of the Directive is to protect agents 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</i> [2000] CLC 1397</p> <p><i>W Nagel (a firm) v Pluczenik Diamond Co NV</i> [2018] EWCA Civ 2640</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</i> [2004] ECR I-11237 (Case C-284/03)</p> <p><i>Volvo Car Germany GmbH v Autohof Weidensdorf GmbH</i> [201] Bus LR D13 (Case C-203/09)</p> <p><i>W Nagel (a firm) v Pluczenik Diamond Co NV</i> [2018] EWCA Civ 2640</p>
<p><b>Territorial extent of application of the Regulations</b></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] ECR I-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 &amp; 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 [2009] EWHC 2655</i></p>
<p>Laws of other member states may apply in place of the Regulations if parties so agree</p>	<p><i>Commercial Agents (Council Directive) (Amendment) Regulations 1998 (SI 1998/2868 and Explanatory Note)</i>  <i>Regulation 1(3)(a)</i>  <i>Fern Computer Consultancy Ltd v Intergraph Cadworx &amp; Analysis Solutions Inc [2014] EWHC 2908</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>Commercial Agents (Council Directive) (Amendment) Regulations 1998 (SI 1998/2868 and Explanatory Note)</i>  <i>Regulation 1(3)(b)</i>  <i>Fern Computer Consultancy Ltd v Intergraph Cadworx &amp; Analysis Solutions Inc [2014] EWHC 2908</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>The Regulations and the Directive do not apply to protect commercial agents operating outside of EU/EEA 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 (unless the parties specifically agree otherwise)</p>	<p><i>DTI Guidance Notes On the Commercial Agents (Council Directive) Regulations 1993</i>  <i>Agro Foreign Trade &amp; Agency [2017] EUECJ C-507/15</i></p>

<b>Definition of a commercial agent</b>	
Statutory definition	<i>Regulation 2(1)</i>
Can expressly incorporate the terms of the Regulations.	<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 &amp; Reynolds on Agency (21st Ed) para 11-01</i>
Commercial agent must be in contractual relations with principal	<i>Barnett Fashion Agency Ltd v Nigel Hall Menswear Ltd</i> [2011] EWHC 978
Labels used by parties in contract are not conclusive, rather, issue is one of substance and not form	<i>Blanc Canet v Europcar France</i> [2005] ECC 34  <i>Mercantile International Group Plc v Chuan Soon Huat</i> [2002] EWCA Civ 288  <i>Umbro International Ltd v Revenue and Custom Commissioners</i> [2009] EWHC 438  <i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564
'Self employed' - does not include employees of the principal	<i>Julian Smith v Reliance Water Controls</i> [2003] EWCA Civ 1153; [2003] Eu LR 874
Commercial agent must provide his activities in an independent manner	<i>Zako SPRL v Sanidel SA (C-452/17)</i> [2019] Bus LR 343; [2019] 1 Lloyds Rep.377
Fact that agent has additional non-agency responsibilities does not prevent the relationship being classified as one of "commercial agency" provided agent's independence is not compromised	<i>Zako SPRL v Sanidel SA (C-452/17)</i> [2019] Bus LR 343; [2019] 1 Lloyds Rep.377
Fact the agent works from same premises as principal does not prevent the relationship being classified as one of "commercial agency" provided agent's independence is not compromised	<i>Zako SPRL v Sanidel SA (C-452/17)</i> [2019] Bus LR 343; [2019] 1 Lloyds Rep.377
'Intermediary' – does not include distributors	<i>AMB Imballaggi Plastici SRL v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249

<p>The structure of the remuneration received is not determinative of whether an arrangement comprises a commercial agency but may be an indicative factor - agent may be paid by commission, by “mark up” or by fixed or variable retainer - but payment by way of “mark up” may be a factor suggesting distributorship rather than agency</p>	<p>Duffen v FRA (unreported) 30 April 1998  <i>AMB Imballaggi Plastici SRL v Pacflex Ltd</i> [1999] 2 All ER (Comm) 249  <i>Mercantile International Group Plc v Chuan Soon Huat</i> [2002] EWCA Civ 288  <i>Sagal v Atelier Bunz GmbH</i> [2009] EWCA Civ 700  <i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564  Regulation 6(3)</p>
<p>Authority to 'negotiate' or 'negotiate and conclude' sales or purchases on behalf of his principal is construed widely (e.g. “deal with manage or conduct” or “promote”) – but 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)  <i>Parks v Esso Petroleum Co Ltd</i> [1999] EWCA Civ 1942 and [1999] CMLR 455 and [2002] Eu LR25  <i>Ferro v Santoro OJ</i> 2002 C323/24  <i>P J Pipe &amp; Valve Co Ltd v Audco India Ltd</i> [2005] EWHC 1904 (cf <i>Kenny v Ireland Roc Ltd</i> 2005 IEHC 241)  <i>Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd</i> [2008] EWHC 767  <i>Accentuate Ltd v Asigra Luc</i> [2009] EWHC 2655  <i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd</i> [2019] EWHC 507  <i>Zak SPRL v Sanidel SA (C-452/17)</i> [2019] Bus LR 343; [2019] 1 Lloyds Rep.377</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 and conclude” sales or purchases on behalf of his principal may nevertheless be a commercial agent but seems that, generally, an “introduction agent” is likely to be included</p>	<p><i>Parks v Esso Petroleum Company Limited (2000) Eu LR 25</i>  <i>P J Pipe &amp; Valve Ltd v Audco India Ltd</i> [2005] EWHC 1904  <i>Kenny v Ireland Roc Ltd</i> 2005 IEHC 241  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd</i> [2019] EWHC 507</p>



<p>Authority must be 'continuing'</p>	<p><i>Mercantile International Group Plc v Chuan Soon Huat Industrial Group Plc</i> [2002] EWCA Civ 288; [2002] 1 All ER (Comm) 788</p> <p>Opinion of A G Geelhoed and decision of ECJ in <i>Poseidon Chartering BV v Marianne</i> (C-3/04)</p> <p><i>Poseidon Chartering BV v Marianne Zeeschip VOF</i> Case C-3/04</p> <p><i>Marjandi Ltd v Bon Accord Glass Ltd</i> [1998] Scott SC 55 (15 October 2007)</p> <p><i>Claramoda Ltd v Zoomphase Ltd</i> [2009] EWHC 2857</p>
<p>No need for agent to 'negotiate' terms or haggle "price" just to acquire or develop or promote business for principal</p>	<p><i>Parks v Esso Petroleum Company Ltd</i> [1999] EWCA Civ 1942 and, esp, [1999] 1 CMLR 455</p> <p><i>PJ Pipe and Valve Co Ltd v Audico India Ltd</i> [2005] EWHC 1904</p> <p><i>Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd</i> [2008] EWHC 767</p> <p><i>Accentuate Ltd v Aligarh Inc</i> [2009] EWHC 2655</p> <p><i>Invicta UK v International Brands Ltd</i> [2013] EWHC 1564</p> <p><i>Green Deal Marketing Limited v Economy Energy Trading Ltd</i> [2019] EWHC 507</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</i> [2002] Eu LR 25</p> <p><i>Mavrona &amp; Sia OE v Delta Etaireia Symmetochon AE</i> Case C-85/03 OJ 2004 C94/17</p> <p><i>Raoul Sagal v Atelier Bunz EGmbH</i> [2009] EWCA Civ 700</p> <p>And see discussion in this context in <i>Bowstead &amp; Reynolds on Agency</i> (21st ed) para 11-019</p>

<p>'Goods' – may extend beyond what would ordinarily be considered to be goods in this jurisdiction and are not restricted to tangible items</p>	<p><i>Italy v Sacchi (155/73) CTLR 68</i>  <i>Jagerskiold v Gustafasson (C-97/98)9</i>  <i>Brown Boveri v Hauptzollamt (C-79/89/10)</i>  <i>Levob v OV Bank (C-41/04/1</i>  <i>(Pace Airline Services v Aerotrans Luftfahrtagentur GmbH (unreported)</i>  <i>St Albans DC v International Computers Ltd [1996] 4 All ER 481</i>  <i>Tamarind International Ltd v Eastern Gas (Retail) Ltd Times 27 June 2000; [2000] Eur LR 708</i>  <i>Abbey Life v Kok Theam Yeap (C-449/01)</i>  <i>Caprini v CCIAA [2003] EUECJ C-485/01</i>  <i>Monarch Energy Ltd v Powergen Retail Ltd [2006] SLT 743</i>  <i>Crane v Sky In-House Services Ltd [2007] EWHC 66</i>  <i>Devers v Electricity Direct (UK) Ltd LTL 24/8/2009</i>  <i>Accentuate Ltd v Asigra Inc [2009] EWHC 2655</i>  <i>Fern Computer Consultancy Ltd v Intergraph Cadworx &amp; Analysis Solutions Inc [2014] EWHC 2908</i>  <i>Computer Associates (UK) Ltd v Software Incubator Ltd [2018] EWCA Civ 518</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i>  <i>Software Incubator Ltd v Computer Associates (UK) Ltd Decision of the European Court of Justice 16 September 2021 C-410/19</i></p>
<p>“Goods” as defined for the purposes of the Sale of Goods Act 1979 section 61(1) a reasonable guide without necessarily being co-extensive with the meaning in the Directive or the Regulations</p>	<p>See Guidance of DTI (as BEIS was then known</p>
<p>‘Goods’ - include gas and electricity</p>	<p><i>Tamarind International Ltd v Eastern Gas (Retail) Ltd Times 27 June 2000; [2000] Eur LR 708</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>
<p>‘Goods’ - extends to computer software supplied in both a tangible form (e.g. on a disc, dongle or hard drive) and in an intangible form (e.g. electronically via a download)</p>	<p><i>Accentuate Ltd v Aligarh Inc [2009] EWHC 2655</i>  <i>Fern Computer Consultancy Ltd v Intergraph Cadworx &amp; Analysis Solutions Inc [2014] EWHC 2908</i>  <i>Computer Associates (UK) Ltd v Software Incubator Ltd [2018] EWCA Civ 518</i>  <i>Software Incubator Ltd v Computer Associates (UK) Ltd Decision of the European Court of Justice 16 September 2021 C-410/19</i></p>

<p>‘Goods’ - may not extend to financial or insurance products</p>	<p><i>Abbey Life v Kok Theam Yeap (C-449/01)</i> <i>Opinion of AG in Ergo v Barlikova Case C-48/16 (12/1/2017)</i></p>
<p>“Goods” - position in case of mixed supplies (eg contracts for work and materials) is not clear but the court should be cautious in any attempt to split the relationship or define relationship by reference to seeking to allocate some proportion of the agency to qualifying and non qualifying functions of the agent</p>	<p>Regulation 2(3) <i>Marjandi Ltd v Bon Accord Glass Ltd [1998] Scot SC 55 (15 October 2007)</i> <i>W Nagel v Pluczenik Diamond Co NV [2017] EWHC 1750 paras 71 and 72</i></p>
<p>Both individuals, partnerships and companies may be commercial agents</p>	<p><i>AMB Imballaggi Plastici Srl v Pacflex Ltd [1999] 2 All ER (Comm) 249</i> <i>Bell Electric Ltd v Aweco Appliances Systems GmbH [2002] EWHC 872</i></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 [2011] EWHC 2482</i> <i>Computer Associates Ltd v Software Incubator Ltd [2018] EWCA Civ 518</i></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 [2003] EWCA Civ 1238; [2004] 1 Lloyds Rep 693</i></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 [2011] EWHC 978</i></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) [2018] EWCA Civ 2640</i></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 (unreported decision of Norwich County Court see Financial Times 7 July 1998)</i>  <i>AMB Imballaggi v Pacflex Ltd [1999] 2 All ER (Comm) 249 at 254</i>  <i>Tamarind International v Eastern Natural Gas (Retail) Ltd [2000] EULR 708 at para 28</i>  <i>Gailey v Environmental Waste Controls [2003] ScotCS 300</i></p> <p><i>Blanc Canet v Europcar France [2005] ECC 34</i>  <i>MacAdam v Boxpak Ltd 2000 SLT (Sh Ct) 147; [2006] Scot CSIH 9 (16 February 2006)</i>  <i>Michael Edwards v International Connection (UK) Ltd [2006] EWCA Civ 662</i>  <i>Crane v Sky In-House Services Ltd [2007] EWHC 66</i>  <i>Marjandi Ltd v Bon Accord Glass Ltd [1998] Scot SC 55 (15 October 2007)</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>
<p>The Schedule contains a non-exclusive list of pointers, each of which may be of differing weight in different cases. Taken as a whole The Schedule is directed at distinguishing between a relationship where the agent develops goodwill in relation to the market for the particular goods which passes to the principal and circumstances where that is not the case</p>	<p><i>Crane v Sky In-House Services Ltd [2007] EWHC 66</i></p>
<p>The activities of mail order catalogue agents and consumer credit agents are to be regarded as “secondary” unless the contrary is established</p>	<p><i>Para 5 of The Schedule</i></p>
<p>Fact that a person carries out activities for his principal other than his activities as a “commercial agent” does not prevent that person being a “commercial agent” unless, of course, the “commercial agent” activities are properly classified as secondary activities</p>	<p><i>Zak SPRL v Sanidel SA (C-452/17) [2019] Bus LR 343; [2019] 1 Lloyds Rep.377</i></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 [2003] EWCA Civ 1153; [2003] Eu LR 874</i></p>

There is no exclusion from the Regulations of persons appointed as commercial agents on a trial basis or for a probationary period	<i>Conseils et miss en relations (CMR) SARL v Demeures terre et tradition SARL (Case C-645/16) EU:C:2018:262 (19 April 2018)</i>
The Regulations do not apply to officers of companies or associations nor to partners in partnerships or members of limited liability partnerships	
<p><b>Duties of commercial agent imposed by the Regulations</b></p> <p>In performing his activities a commercial agent must 'look after interests of' his principal and 'act dutifully and in good faith'</p>	<p>Regulation 3(1)</p> <p><i>Rossetti Marketing Ltd v Diamond Sofa Co</i> [2011] EWHC 2482 (not appealed in [2012] EWCA Civ 1021)</p>
“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)	<i>Director General of Fair Trading v First National Bank plc</i> [2001] UKHL 52
An agent cannot act for two principals with conflicting interests unless the principals provide fully informed consent	<p><i>Rossetti Marketing Ltd v Diamond Sofa Co Ltd</i> [2012] EWCA Civ 1021</p> <p><i>Computer Associates Ltd v Software Incubator Ltd</i> [2018] EWCA Civ 518</p>
Commercial agent must make 'proper efforts' to negotiate and, where appropriate, conclude the transactions he is instructed to take care of	<i>Regulation 3(2)(a)</i>
Commercial agent must 'communicate all necessary information available to him' to his principal	<i>Regulation 3(2)(b)</i>
Commercial agent must 'comply with reasonable instructions' from his principal	<i>Regulation 3(2)(c)</i>
Duties imposed by Regulation 3 may not be derogated from	<i>Regulation 5(1)</i>

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	<i>Regulation 5(2)</i>
Breach of the duty imposed by Regulation 3 does not automatically give rise to a right to terminate the agency agreement	<i>Crocs Europe BV v Craig Lee Anderson</i> [2012] EWCA Civ 1400
<p><b>Duties of a principal imposed by the Regulations</b></p> <p>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</p>	<p><i>Regulation 4(1)</i></p> <p><i>Corte di cassazione, 18 December 1985, n 6475, Giur.it 1986, I, 1, 1649 note di Loreto</i></p> <p><i>Court d'appel de Rennes, 1 December 1993</i></p> <p><i>Dalloz 1994, informations rapides, 127</i></p>
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	<i>Cooper v Pure Fishing (UK) Ltd</i> [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”	<i>Vick v Vogle-Gapes Ltd</i> [2006] EWHC 1579
Principal must provide commercial agent with necessary documentation relating to the goods in question	<i>Regulation 4(2)(a)</i>
Principal must obtain and provide to commercial agent the information necessary for performance of the agency	<i>Regulation 4(2)(b)</i>
Principal must notify commercial agent within reasonable period of any anticipated significant decline in volume of transactions	<i>Regulation 4(2)(b)</i>

<p>Principal must inform commercial agent within reasonable period of acceptance or refusal to accept any transaction procured by that commercial agent</p>	<p><i>Regulation 4(3)</i></p>
<p>Duties imposed by Regulation 4 may not be derogated from</p>	<p><i>Regulation 5(1)</i></p>
<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><b>Written statement of terms of contract</b></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></p>
<p><b>Enforceability of restrictive covenants in commercial agency agreements</b></p> <p>A restraint of trade clause in a commercial agency agreement is only enforceable if concluded in writing (a written memorandum in this regard is unlikely to be sufficient), if it relates only to the 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> <i>BCM Group Plc v Visualmark Ltd [2006] EWHC 1831</i></p>
<p>Common law restrictions on the effectiveness of terms in restraint of trade also apply and so may render a restrictive covenant of, say, less than 2 years, unenforceable if considered unreasonable in all the circumstances of the case</p>	

<p>Though not expressly stated it seems unlikely that the parties could effectively contract out of Regulation 20</p>	
<p>If the commercial agency is “genuine” then Article 101 of the Treaty on the Functioning of the European Union will not apply but the position is otherwise where the commercial agency is “not genuine” for competition law purposes and no post-termination restrictive covenant will be enforceable in such circumstances</p>	<p><i>Article 5(1)(b) of Regulation 330/2010</i></p>
<p><b>Remuneration of commercial agent</b></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>Whether a transaction has been “concluded as a result of [the commercial agent’s] action” is perhaps likely to be determined by an examination as to whether the commercial agent has been “instrumental” in obtaining the business which in turn is likely to depend on whether the commercial agent has played an active role in obtaining the business even if he was not solely responsible for obtaining that business</p>	<p>See, albeit in different context, <i>Moore v Piretta</i> [1998] CLC 992</p>
<p>Commercial agent may contract out of entitlement to commissions on repeat sales</p>	<p><i>Rigall Arteria Management v Bank Handlowy (Case C-64/21) EU:C:2022:783 (13 October 2022)</i></p> <p><i>Advocate General (AG) Ćapeta opinion delivered 9 June 2022</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></p> <p><i>Kontogeorgas v Kartonpak AE Case C-104/95 [1996] ECR I-6643; [1997] CMLR 1093</i></p> <p><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></p> <p><i>Tigana Ltd v Decoro Ltd [2003] EWHC 23; [2003] Eu LR 189</i></p> <p><i>P J Pipe and Valve Co Ltd v Audco India Ltd [2005] EWHC 1904</i></p> <p><i>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587</i></p> <p><i>Monk v Largo Foods Ltd [2016] EWHC 1837</i></p>
<p>“Reasonable period”</p>	<p><i>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587</i></p>
<p>“Mainly attributable” may have similar meaning to “effective cause”</p>	<p><i>P J Pipe and Valve Co Ltd v Audco India Ltd [2005] EWHC 1904</i></p>

Query whether derogation is permitted from the provisions of Regulations 7 and 8	<i>Ingmar GB Ltd v Eaton Leonard Ltd</i> [2001] EWHC 3; [2001] Eur LR 755 at para 3
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	<i>Regulation 9</i>
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	<i>Regulation 10(1)</i> <i>Regulation 10(2)</i>
“To the extent that” suggests that where contract envisages payment by instalments then commission might be payable pro rata	<i>Regulation 10(1)</i>
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	<i>Regulation 10(3)</i>
No derogation from Regulations 10(2) and 10(3)	<i>Regulation 10(4)</i>
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>
Whether a commercial agent with exclusivity in a particular area or group of customers is entitled to commissions on sales effected in that area by the principal will depend on proper interpretation of the commercial agency agreement	<i>Duffel v FRABO SpA (No 1) [1999] ECC 58</i>
<b>Termination of a commercial agency</b>	
Minimum periods of notice for agency contracts for indefinite periods	<i>Regulation 15</i>
In calculating periods of notice term of commercial agency prior to commencement of Regulations to be taken into account	<i>Moore v Piretta PTA Ltd [1998] CLC 992</i>
Notice must expire at end of calendar month	<i>Regulation 15(4)</i>
Parties cannot agree on shorter periods but can agree longer periods of notice	<i>Regulation 15(2)</i>
Damages will be awarded in respect of the relevant required notice period	<i>Alan Ramsay Sales &amp; 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>It is likely that a commercial agent would be considered a supplier of its services to his principal and so would be unable to terminate the commercial agency by reason of the principal's insolvency</p>	<p>Corporate Insolvency and Governance Act 2020</p>
<p><b>'Indemnity' and 'Compensation'</b></p> <p>Statutory entitlement</p>	<p><i>Regulation 17</i></p>
<p>'Indemnity' or 'compensation' payable to commercial agent 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 irrespective of whether or not the principal is in breach of contract in any respect</p>	<p><i>Moore v Piretta PTA Ltd [1999] 1 All ER 174</i>  <i>Whitehead v Jenks &amp; Cattell Engineering Ltd [1999] Eu LR 827</i>  <i>Frape v Emreco International Ltd [2002] SLT 371</i>  <i>Light v Ty Europe Ltd [2003] EWCA 1238</i>  <i>Tigana Ltd v Decoro Ltd [2003] EWHC 23</i>  <i>Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA 375</i>  <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 Piretta 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>  <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 at common law under Regulation 16 (e.g. following a repudiatory breach by the agent)</p>	<p><i>Regulation 18(a)</i>  <i>Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA 375</i>  <i>Crane v Sky in Home Ltd [2007] EWHC 66</i>  <i>Nigel Fryer Joinery Services Ltd v Ian Frith Hardware Ltd [2008] EWHC 767</i>  <i>Devere Group Ltd v Pearce [2011] EWHC 1240</i>  <i>Crocs Europe BV v Anderson [2012] EWCA Civ 1400</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>
<p>A breach of the duties imposed by Regulation 3(1) to look after the interests of the principal and to act dutifully and in good faith towards the principal does not automatically involve a repudiatory breach of the commercial agency agreement. Rather, whether such a breach will involve a repudiatory breach will depend on an objective assessment of the facts and a determination of whether the breach is sufficiently serious to entitle the principal to treat the contract as terminated</p>	<p><i>Crocs Europe BV v Anderson [2012] EWCA Civ 1400</i></p>
<p>The exceptions to entitlement to “compensation” or “indemnity” are to be construed strictly or narrowly</p>	<p><i>Belgium v Temco Europe SA (Case C-284/03 [2004] ECR I-11237</i>  <i>Volvo Car Germany GmbH v Autohof Weidensdorf GmbH (Case C-203/09) [2012] Bus LR D13</i>  <i>W Nagel v Pluczenik Diamond Company NV [2018] EWCA Civ 2640</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>
<p>Regulation 18 can only apply to exclude right to “indemnity” or “compensation” if the principal; actually terminates the commercial agency contract by reason of a repudiatory breach. So, for example, Regulation 18 will not apply if the principal simply lets the commercial agency expire.</p>	<p><i>Cooper and others v Pure Fishing (UK) Ltd [2004] EWCA 375</i></p>
<p>The entitlement to “compensation” or “indemnity” will only be excluded by the operation of section 18(a) if the agency agreement is terminated (a) “because” (in a causal sense) of default attributable to the agent and (b) if that default would justify immediate termination</p>	<p><i>Crane v Sky In Home Service Ltd [2007] EWHC 66</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</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</i> (C-203/09)</p> <p>cf <i>Rossetti Marketing Ltd v Diamond Sofa Company Ltd</i> [2002] EWCA Civ 1021</p> <p><i>Crane v Sky In Home Service Ltd</i> [2007] EWHC 66</p> <p><i>Green Deal Marketing Limited v Economy Energy Trading Ltd</i> [2019] EWHC 507</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</i> [2012] EWCA Civ 1400</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</i> [2008] EWHC 767</p> <p><i>Rossetti Marketing Ltd v Diamond Sofa Co Ltd</i> [2012] EWCA Civ 1021</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</i> [2018] EWCA Civ 518</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</i> [2008] EWHC 767</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), or in light of irremediably, persistent or recurring breaches not amounting to repudiatory breaches or in respect of no repudiatory but remediable breaches that are not actually remedied</p>	<p><i>Laboratoires Arkopharma SA v Gravier</i> [2003] ECC 33</p> <p><i>Crane v Sky in Home Ltd</i> [2007] EWHC 66</p>
<p>Agent may not be entitled to 'indemnity' or 'compensation' in circumstances where his principal reduces the subject matter of the agency or the extent of the agent's territory but does not 'terminate' agency</p>	<p><i>Scottish Power Energy Retail Ltd v Taskforce Contracts Ltd</i> [2008] ScotCS CSOH 110</p> <p><i>Tony Vick v Vogle-Gapes Ltd</i> [2006] EWHC 1579</p>

<p>Agent not entitled to 'indemnity' or 'compensation' if he terminates the agency unless circumstances amount to a constructive dismissal, unless the termination is justified by circumstances attributable to the principal or the 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 &amp; Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</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>“Assignment of his agency” to be given a purposive interpretation for these purposes</p>	<p><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 Polymerland [2002] SCLR 64</i>  <i>Brand Studio Ltd v St John Knits Inc [2015] EWHC 3143</i></p>
<p>Whether the contract provides for payment of “‘indemnity’ rather than ‘compensation’ is a matter of contractual interpretation</p>	<p><i>Hardie Polymers Ltd v Polymerland [2002] SCLR 64</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 &amp; 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 that principal and agent may agree to waive right to 'indemnity' or 'compensation' but only after termination of the commercial agency as part of a post termination settlement)</p>	<p><i>Regulation 19</i>  <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>  <i>Honyvem v De Zotti (C-465/04)</i>  <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>  <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>The correct approach to quantifying compensation was that agents were regarded as having a share in the goodwill in the principal's business which it helped to create</p>	<p><i>Lonsdale v Howard &amp; Hallam Ltd [2007] UKHL 32</i>  <i>Green Deal Mark in eting Limited v Economy Energy Trading Ltd [2019] EWHC 507</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>  <i>Regulation 17(7)</i>  <i>Lonsdale v Howard &amp; 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>  <i>McQuillan v McCormick [2010] EWHC 1112</i>  <i>Alan Ramsey Sales and Marketing Limited v Typhoo Tea Limited [2016] EWHC 486 (Comm)</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</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 &amp; Trading [1997] 3 AER 656</i>  <i>Lonsdale v Howard &amp; Hallam Ltd [2007] UKHL 32</i>  <i>Alan Ramsay Sales &amp; Marketing Ltd v Typhoon Tea Ltd [2016] EWHC 486 (Comm)</i>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>
<p>But it is necessary to take account of the fact that the agency might actually terminate at some point in the future even though it should not be assumed that the principal will immediately take steps to terminate the successor agency</p>	<p><i>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1578</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 (ie. is the market for the principal's goods expanding or declining)
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 (e.g. to a competing principal) or to compete with the hypothetical purchaser of his business

*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

*Green Deal Marketing Limited v Economy Energy Trading Ltd* [2019] EWHC 507

Generally, the value of a commercial agency will be identified in light of expert evidence by applying an appropriate multiplier to the anticipated annual profits of the commercial agency. (On the facts of a particular case, the appropriate multiplier may, for example, 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)

*Alan Ramsay Sales and Marketing Limited v Typhoo Tea Limited* [2016] EWHC 486 (Comm)

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

*Alan Ramsay Sales and Marketing Limited v Typhoo Tea Limited* [2016] EWHC 486 (Comm)

<p>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</p>	<p><i>Alan Ramsay Sales and Marketing Limited v Typhoo Tea Limited</i> [2016] EWHC 486 (Comm)</p>
<p>Account also has 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 &amp; 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>The absence of any written agreement governing the commercial agency is unlikely to have significant bearing on its value and the extent of “compensation” or “indemnity” payable</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 &amp; Hallam Ltd</i> [2007] UKHL 32 <i>Software Incubator Ltd v Computer Associates Ltd</i> [2016] EWHC 1578</p>

<p>Minor breaches of contract by the commercial agent should generally not reduce the hypothetical value of the commercial agency and the extent of “compensation” payable. Rather the assessment should be made on the assumption that the commercial agency will be performed properly in the future</p>	<p>Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1578</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 [2000] 1 Lloyds Rep 180</i>  <i>See also judgment of Moore-Bick LJ in Court of Appeal in Lonsdale v Howard &amp; Hallam Ltd [2006] EWCA 63; [2006] 1 WLR 1281 at para 29</i></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  <i>Lonsdale v Howard &amp; Hallam Ltd [2007] UKHL 32</i></p>
<p>Principles applicable in calculating the amount of an 'indemnity' payable</p>	<p><i>Regulation 17(3)</i>  <i>Moore v Piretta PTA Ltd [1999] 1 All ER 174</i>  <i>Hardie Polymers Ltd v Polymerland Ltd [2001] Scot CS243</i>  <i>And see generally Bowstead &amp; Reynolds on Agency (20th Ed) para 11-042</i>  <i>See also Commission Article 17 report on indemnity</i>  <i>QT v O2 Czech Republic (Case c 574/21) EU:2023:233</i></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 [1999] 1 All ER 174</i>  <i>Re Sales of Spectacle Frames [2017] ECC 19</i></p>
<p>The amount of any indemnity payable should take account of commissions that might be lost by the agent on possible business transacted by the principal after termination with new customers the agent brought to the principal or with customers with whom the agent significantly increased the volume of business done by the principal</p>	<p><i>QT v O2 Czech Republic (Case c 574/21) EU:2023:233</i></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 or secured new 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>  <i>King v Tunnock</i> 2000 SC 424  <i>Lonsdale v Howard &amp; Hallam Ltd</i> [2007] UKHL 32  <i>Marchon Germany GmbH v Yvonne Karaszkiwicz</i> Case C 315, 7 April 2016  <i>Re Sales of Spectacle Frames</i> [2017] ECC 19  <i>QT v O2 Czech Republic (Case c 574/21)</i> EU:2023:233</p>
<p>Whether the principal continues to derive "substantial" benefits is, perhaps, likely to be interpreted as requiring simply material benefits as opposed to trivial benefits</p>	<p>See Christou on International Agency, Distribution and Licensing Agreements (6th Ed) para 3-205</p>
<p>Benefits to other group companies not to be taken into account</p>	<p><i>Turgay Semen v Deutsche Tamoil GmbH</i> [2009] 1 Lloyd's Rep 653</p>
<p>A sub agent of the commercial agent may be entitled to share in any indemnity paid by the principal to the commercial agent</p>	<p><i>NY v Herios (Case C 593/21)</i> EU:C:2022:784 (13 October 2022)</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>  <i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174  <i>Honyvem v De Zotti, Case C-465/04</i></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>
<p>Amount of 'indemnity' subject to cap equal to average annual remuneration calculated over last five years</p>	<p><i>Regulation 17(4)</i></p>
<p>Query whether cap is calculated by reference to gross remuneration or after deducting likely expenses incurred in earning remuneration</p>	<p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174</p>

<p>'Commissions lost' not to be regarded as a cap on extent of indemnity</p>	<p><i>Semen v Deutsche Tamal GmbH</i> [2009] 1 Lloyd's Rep 653</p>
<p>Seems that principles of mitigation may not have relevance when assessing the extent of any 'indemnity' payable</p>	<p><i>Moore v Piretta PTA Ltd</i> [1999] 1 All ER 174 (but compare Regulation 17(3)(b))</p>
<p>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) but court will seek to avoid any element of double recovery</p>	<p><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>  <i>Green Deal Marketing Limited v Economy Energy Trading Ltd [2019] EWHC 507</i></p>