

## What to do when it all goes wrong

— guidance for principals facing  
claims under the Commercial  
Agents Regulations 1993

*The Commercial Agents (Council Directive) Regulations 1993 (as amended) regulates the relationship between principals and commercial agents. The Regulations come from the 1986 European Directive on Self-Employed Agents, and have been implemented as local legislation in all countries within the European Union.*

### What does it matter if the Regulations apply to your business?

As a principal, you need to be careful when the Regulations apply.

The major effects will be felt when the agreement comes to an end. In most cases, you will be required to pay the agent commissions on sales made after the agreement has ended (post-termination commission) as well as compensation for the termination of the agreement.

### Do the Regulations apply to your business?

The Regulations will usually apply if you have engaged a commercial agent whose activities are carried out within Great Britain (that is, England, Scotland and Wales).

Each country within the European Union has its own version of the Regulations.

### So, is your agent a "commercial agent"?

A "commercial agent" is defined in the Regulations as:

*a self-employed intermediary who has continuing authority to:*

- (a) *negotiate* the sale or purchase of *goods* on behalf of another person (the "principal");  
or
- (b) *negotiate and conclude* the sale or purchase of *goods* on behalf of and in the name of that principal.

Note that a partner cannot be the *commercial agent* for his partnership, and neither can an officer of a company be the *commercial agent* of the company.

**If the agreement has ended, what claims might the agent be able to bring?**

A commercial agent may have the following claims:

1. **Notice compensation** - if you have not given sufficient notice under the agreement and the Regulations, then you will need to pay compensation for the commissions which the agent would have earned if you had given full notice.
2. **Pre-termination commission** - this is a claim for all the commissions due up to the date of termination.
3. **Post-termination commission** - this is for:
  - a. "pipeline" commission on transactions which had started but not completed by the date of termination; and
  - b. commissions on sales entered into within a "reasonable" period after termination where the transaction was mainly attributable to the agent's efforts during the agency.
4. **Termination compensation or indemnity** - this is usually the biggest claim under the Regulations, and is designed to compensate the agent for the loss of the agency.

It is generally payable if the agreement is terminated by you as the principal, or where a fixed-term agreement comes to an end.

5. **Breach of contract** - if you have breached any of the terms of the agreement, you may be liable for the losses which you have caused to the agent.
6. **Back commission** - commission will be payable by the principal irrespective of the principal not having been paid by the customer if such non payment is for a reason for which the principal is to blame.

Yes.

**Compensation** is calculated on a slightly different basis to indemnity, and currently can result in paying up to two years' gross commissions to an agent for the termination of the agreement.

**Indemnity**, however, is capped at one year's gross commissions.

**Is there a difference between "compensation" and "indemnity"?**

### Is compensation always payable to an agent?

### Can we try to argue that the agent is not a "commercial agent" under the Regulations?

All agency agreements in the UK (under the Regulations and the equivalent in Northern Ireland) include compensation unless the parties have specifically chosen indemnity in the agreement itself.

*(For the purposes of this booklet, we will refer to both compensation and indemnity as "compensation".)*

No.

Compensation will not be payable where:

1. The *agent has terminated* the agreement, *except* where either:
  - a. the termination is justified by circumstances attributable to the principal (usually because of the principal's breach); or
  - b. because the agent cannot reasonably carry on the agency because of age, infirmity or illness.
2. You (as principal) terminate the agreement because of the agent has failed to carry out all or part of its obligations under the agreement and that such default is attributable to the agent.
3. If the agent (with your agreement) assigns the agency to another party.

There are a number of arguments you might be able to make. These include:

1. If you do not sell "goods" through the agent, but "services" instead, then the Regulations will not apply.
2. If the person/company you have engaged does not have "continuing authority" to negotiate on your behalf, then they will not be commercial agents.
3. You may try to claim that the agent is not actually "negotiating" any sale at all. This can be a difficult argument to make, and the Courts have made it clear that an agent does not need to "negotiate" in the traditional sense: merely presenting goods for sale will be sufficient in most cases.

### What other ways could I argue that the Regulations don't apply?

If within in your relationship with the agent, the "commercial agency" activities are not the primary purpose of the arrangement, then such activities will be considered "secondary" and the Regulations will not apply to the arrangement. This means that when the commercial agency part of the arrangement comes to an end, the agent will not be able to make the claims for compensation and post-termination commission under the Regulations.

An example might be where your relationship with the agent is primarily that of a distributor, and the agency activities are something less than (say) 50%.

### What can I do to minimise my exposure under the Regulations?

The following are suggestions to reduce your liability under the Regulations:

#### 1. Try to extend fixed-term agreements

The aim here is to turn these agreements into "evergreen" contracts (that is, of indefinite duration). That way, you can still terminate the agreement, but you have more control over the circumstances in which compensation will be payable.

#### 2. Terminate for breach - not simply on notice

If you can show that the reason you are terminating is because of the *agent's breach* (for example: seriously poor performance or breach of duties) and that you would have been *justified in terminating without notice* (whether you do or not), then you will have a much better chance of ending the relationship without having to pay any compensation.

#### 3. Don't breach the agreement yourself

Remember, if your agent terminates the agreement because of your breach, you may still be liable to pay compensation under the Regulations.

#### 4. Keep good records and notes

The better the records and notes you keep of your own good behaviour and the agent's bad behaviour, the better you will be prepared to argue your case later.

#### 5. Get good legal advice

The sooner you understand how the Regulations work for your agency, the easier it will be to minimise your exposure to your agents.



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