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# The implementation of the Council Directive 86/653/EEC

on the coordination of the laws of the Member States relating to self-employed commercial agents

– *sphere of application in Denmark, Norway, Sweden and Germany, and other specific issues*

*by Jørgen Lykkegård*

# Agenda

- 1 The scope of the Danish Commercial Agency Act (CA Act) in comparison with the other Nordic countries and Germany – how the rules are applied
  - i. if *employed* commercial agents (commercial travelers)
  - ii. if other kind of intermediates
  - iii. if not goods but services
  - iv. if it is mixed contractual relationships
  - v. if combined services and goods
  - vi. if EEC-principal and non-EEC-agent has made a choice of law within EEC
  
- 2 The Danish rules for compensation for damages, trade clauses
  
- 2 How the actual conditions for goodwill indemnity is practiced in Denmark

## The scope of the Council Directive 86/653/EEC

### *A minimum directive*

Article 1, subsection 2:

*For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.*


Article 2,

1. *This Directive shall **not apply** to:*

- commercial agents whose activities are unpaid,*
- commercial agents when they operate on commodity exchanges or in the commodity market, or*
- the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries.*

2. *Each of the Member States shall have the right to provide that the Directive shall **not apply** to those persons whose activities as commercial agents are considered secondary by the law of that Member State.*

# Characteristics for the Self-employed Commercial Agent

| Act on behalf of?<br><br>Act in the name of? | Principal                           | Intermediate  |
|--|-------------------------------------|---|
| Principal                                    | (Self-employed)<br>Commercial Agent |   |
| Intermediate                                 | Commission Agent                    | Dealer - (Franchisee)<br><br> |

# A minimum directive

- ❑ The national implementation of the directive only has to cover the Self-employed Commercial Agent
- ❑ The interpretation of the directive article 1.1 has been tried by the ECJ regarding a Commission Agent
  - ❑ **Ruling:** *Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that persons who act on behalf of a principal, but in their own name, do not come within the scope of that directive.*



Case  
C-85/03  
"Mavrona"

# A *minimum* directive

- ❑ The national implementation of the directive only has to cover the *Self-employed Commercial Agent*
  - ❑ The national implementation in *Denmark, Norway and Sweden* is according to the wording, but the *employed Commercial Agent* (the Commercial traveller) enjoys some of the same protection as the *self-employed Commercial Agent* does
  - ❑ *Same rules for commission and relationship to a third parties*
  - ❑ Norway: *Right to **goodwill indemnity** if payed (partly) with commission*



*The  
Commercial  
traveller*

# Extension of the scope of the Directive to *other intermediates*

- ❑ It is a *minimum* directive, therefore it is possible to extent the scope either
  - ❑ by agreement
  - ❑ by law
  - ❑ by interpretation (analogy)



analogy

# Extension of the scope of the Directive to other intermediates *by law*

- ❑ In the Nordic countries
  - ❑ Not implemented others
- ❑ In Germany
  - ❑ Implemented service agents in HGB § 84
- ❑ Examples of other EU countries?
  - ❑ Holland, Belgium, Italy, Austria, Portugal, Spain, France have implemented for service agents
  - ❑ Greece, Luxembourg, Great Britain, Northern Ireland and Ireland have not implemented others





# Extension of the scope of the Directive to other intermediates *by analogy* in Denmark

- ❑ In Denmark the courts will accept to use analogy if it is *non mandatory* rules
- ❑ In Denmark the courts have until today rejected an analogy use of mandatory rules (e.g. termination period and goodwill indemnity)
  - ❑ *Service Agents* have been rejected an analogy use
  - ❑ Only *exclusive dealers* have - and only in very rare and special cases - been granted compensation for "*goodwill*"



*Only if very special circumstances*

# Analogy interpretation by the courts in connection with service agents

- ❑ In Denmark the courts have until today rejected an analogy use of mandatory rules (e.g. goodwill indemnity)

*Danish  
case law*

**H-0009-06**

**U2008.246S**

# Analogy interpretation by the courts in connection with exclusive dealers

- ❑ Maybe possible if exclusive dealers

- ❑ *The clientele is build by the exclusive dealer and the clientele has followed the supplier*
- ❑ *The supplier is to blame for the termination*
- ❑ *The contractual relation has not been long enough for the dealer to re-earn his investment*
- ❑ *The dealer is dependent of the supplier when it comes to price determination*

- ❑ *Case H-0092-95*



*Danish  
case law*

**U1988.264S**

U1991.803S

U2000.221H

U2000.567H

U2000.1581H

# Analogy interpretation by the courts in connection with other intermediates

## □ In the other Nordic countries?

- Norwegian case law
  - *Exclusive dealer* selling Tampax could not use the old Commission Act analogous
  - Exclusive dealer could not use the Norwegian CA Act analogous
- Swedish case law
  - *Exclusive dealer* could not use the Swedish CA Act analogous
  - *Service Agent* selling software could use the Swedish CA Act analogous

Nordic  
case law?

|             |
|-------------|
| RT1980.243  |
| HD2013/1887 |
| NJA2007.909 |
| NJA2008.24  |
|             |

# Analogy interpretation by the courts in connection with other intermediates

## ❑ In Germany?

- ❑ Analogy interpretation has been used in Germany to the benefit of the *exclusive dealers* since 1958
- ❑ If *integrated* in the suppliers sales organisation
- ❑ If *obliged to hand over the clientele* to the supplier when the contract is terminated

*German case law*

NJW1959.144

NJW1982.2819

NJW1983.1789

NJW1983.2877

# Analogy interpretation by the courts in connection with other intermediates

- ❑ A number of Legal Writers in the Nordic countries are in favor of a less restricted use of the analogy interpretation of the CA Act in favor of the Exclusive Dealers and Service Agents
  - *The argument against a less restricted use is always that the politicians had the opportunity to implement the rules or at least they could have stated a more liberal opinion on this issue in the motives to the CA Act*

*De lege ferenda*

# Which rules applies if it is a mixed or combined contractual relationship?

- ❑ What happens if the two parties contractual relationship consist of an *agency contract* and a *dealer contract both selling goods or a combined contract selling both goods and services*?
  - Will the two contracts be dealt with individually, or
  - as one combined contractual relationship?
  - In such case what determines which set of rules?



Mixed &  
combined  
contracts

# Which rules applies if it is a mixed contractual relationship?

## □ Danish case law

- The two contracts will be dealt with individually
- In U2000.567/2H the agency contract only amounted to 5 % of the total revenue originating from the mixed contractual relationship

*Danish  
case law*

**H-00092-95**

U2000.567/2H

U2013.532H



# Which rules applies if it is a *combined commercial agency contract* selling both goods and services?

## □ Danish case law – Telia I and II

- The two contracts will be dealt with as *one* combined contractual relationship using the same set of rules
- Depending on if the sale of goods or services is the *dominating element* in the contractual relationship
  - Criterion of *value* or
  - Criterion of *essentiality* ?

*Danish  
case law*

U2008.246S

ØLR-B-1886-14

## Danish case law - Telia II

- ❑ Telia II vs. Telekæden
- ❑ Consists of two matters:
- ❑ 1st matter
  - ❑ Selling cheap phones as dealers and phone subscriptions as service agents
    - ❑ Dealt with as a mixed contract and none of the sales covered by the CA Act
- ❑ 2<sup>nd</sup> matter
  - Telekæden selling both mobiles and subscriptions on credit to customers *as commercial agents*
  - The agency contract was dealt with *as one* combined contractual relationship using the same set of rules
    - Depending on if the sale of goods or services is the *dominating element* in the contractual relationship
    - Criterion of *value* or
    - Criterion of *essentiality*?
      - *The dominating element in the contract was considered to be the subscription*
  - Risk for circumvention?



ØLR-B-1886-14

- **Which rules applies in the other Nordic countries if it is?**
- *a combined commercial agency contract* selling both goods and services?
- a mixed contractual relationship and the commercial agent is selling services when the dealer is selling goods?

# How to derogate from the Directive and national law if not mandatory rules?

- ❑ In Sweden and Norway you can derogate from the CA Act if the opposite is not stipulated in the national law – made mandatory, and then *both by agreement and by common business practice*
- ❑ In Denmark you can derogate from the CA Act if the opposite is not stipulated in the national law – made mandatory, and then *only by agreement*



*Common  
business  
practice*

# The Directive's *Mandatory* Rules

- ❑ As a rule the Directive can be derogated with the exception of:
  - ❑ *The parties rights and obligations towards each other (article 3-4)*
  - ❑ *Partly the Commercial Agent's right to commission (article 10-12)*
  - ❑ *The Commercial Agents right to a written contract (article 13)*
  - ❑ *The right to a minimum length of termination period (article 15)*
  - ❑ *The Commercial Agent's right to goodwill indemnity or/and compensation for damages (article 17-19)*



# The *implementation* of the Directives Mandatory Rules

- ❑ In Norway, Finland and Sweden *all* mandatory rules are initially implemented as international mandatory rules
  - *In Sweden section 3 in Handelsagentlagen has been abrogated in 1998*
- ❑ In Denmark only the rules regarding *termination period* and *goodwill indemnity* are implemented as international mandatory rules which cannot be derogated by an agreement on choice of law
- ❑ EJC – article 17 and 18



Case  
C-381/98  
"Ingmar GB  
Ltd."

# Derogation from the Directives *international mandatory rules by choice of law*

□ In the Danish CA Act section 1.4 it is stipulated as a rule that it is possible to derogate from the mandatory rules even if the choice of law is Danish if the Commercial Agent is performing his work in a country outside EU, EFTA or one of the other Nordic countries

- Except if similar rules are implemented in the country where either the Commercial Agent
  - *Is based or*
  - *Perform his work for the principal*

□ *Is it necessary with an explicit rule?*

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Case  
C-507/15  
“Agro”

# What are the consequences of termination ?

## *- it all depends on ...*

- ❑ If the contract is terminated by the principal
  - ❑ Is the agent in major breach of contract ?
  - ❑ Is the termination with or without ordinary notice?
  
- ❑ If the contract is terminated by the agent
  - ❑ Is the principal in major breach of contract?
  - ❑ Is the principal in breach of contract?
  - ❑ If the termination with or without ordinary notice?



*National  
law of  
obligations*



# The Danish rules for compensation for damages

## □ Compensation for damages

### □ Missing notice period

- Loss of commission – basic year
- Duty to limitation of damages

### □ Lost investments

- Consent from the principal?
  - *Implicit or explicit*
- Time for amortization ?



# The Danish rules for compensation for Trade Clauses

## ❑ In Denmark

- to *self employed agents*
- to *employed agents* – the *commercial travellers*

## ❑ In Germany

- to *self employed agents*
- to *employed agents?*

## ❑ In other Nordic countries

- to *self employed agents?*
- to *employed agents?*

*UfR2008.1220H*

*“KE Fibertec  
A/S”*

# Compensation to employed agents in Denmark

| Salary compensation | The employee in new job | Competition clause | Customer clause | Combined clause |
|---------------------|-------------------------|--------------------|-----------------|-----------------|
| 60 percent          | No                      | Up to 12 months    | Up to 12 months | Up to 6 months  |
| 40 percent          | No                      | Up to 6 months     | Up to 6 months  |                 |
| 24 percent          | Yes                     | Up to 12 months    | Up to 12 months | Up to 6 months  |
| 16 percent          | Yes                     | Up to 6 months     | Up to 6 months  |                 |

*Minimum compensation* is 2 months with either 40 or 60 percent of the previous salary even if the employee is in new job

# How the actual conditions for goodwill indemnity is practiced in Denmark

86/653/EEC Article 17

## ☐ The French Model

- Compensation for damages
  - France, partly UK
  - Art. 17, 3

## ☐ The German model

- Goodwill indemnity - HGB § 89b
  - Germany, the Nordic countries, and most EU-member states
  - Art. 17, 2 (b)

## ☐ 5 simple steps to consider if indemnity

- Right to an indemnity?
- Fulfilled 17,2 (a)-conditions?
- Deriving substantial benefits?
- Equitable?
- Above maximum?



*Ausgleichs-  
anspruch*

# The agent has the possible right to goodwill indemnity – step 1

- ❑ If the contract is terminated by the principal
  - ❑ And the agent is not in major breach of contract
  
- ❑ If the contract is terminated by the agent
  - ❑ And the principal is in *major breach* of contract
  - ❑ *With ordinary notice* – and the principal is in *breach* of contract and termination



*Law of  
obligations*

# Is the conditions in 86/653/EEC Article 17, 2, (a) fulfilled – step 2

1. [...]

2.

(a) The commercial **agent shall be entitled to an indemnity if** and to the extent that:

- he has **brought the principal new customers** or **has significantly increased the volume of business with existing customers** and **the principal continues to derive substantial benefits** from the business with such customers, and
- **the payment of this indemnity is equitable having regard to all the circumstances** and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

The commercial agent shall be entitled to an indemnity if and to the extent that:  
**he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers – step 2**

□ *"brought"*

- Small implication necessary

□ *"new customers"*

- Also reactivated customers and if new products

□ *"existing customers"*

- *Presumption* that customers are new

□ *"significantly increased volume"*

- The *net-method* or *gross-method*



# The principal continues to derive substantial benefits – step 3

## □ *”continues to derive”*

- Cumulative condition!
- Presumption that customers continue to come

## □ *”substantial benefits”*

- Quantification of benefits
- *The quantification will depend on an estimate of the future development and the state of the agency on the day of termination*
- *The Danish white paper for the CAA says that the benefits can vary from a few months to several years lost commission*
- *The white paper also says it is possible to see how it actually developed if the matter has to be decided in court a few years later*



# ”Substantial benefits” – the German Prognosis Method – step 3

- Introduced to the other EU-member states in COM (96) 364 –*Report on the application of article 17 of council directive on the co-ordination of the laws of the member states relating to self-employed commercial agents (86/653/EEC)*
  - *“The indemnity system was modelled on Article 89b of the German Commercial Code which had provided for the payment of a goodwill indemnity since 1953 and concerning which a large body of case-law has developed regarding its calculation. This case-law and practice should provide invaluable assistance to the Courts of other Member States when seeking to interpret the provisions of Article 17(2) of the Directive.”*




# The description of the Prognosis Method - step 3

- ❑ Quantifying the extent that the agent has brought the principal either
  - new customers or
  - Intensified existing customers
- ❑ Calculating the agents commission deriving from these customers within the last 12 months before termination
  - The basic year
- ❑ Predict the likely length of time the business with the new and intensified customers will last.
  - Lifespan
- ❑ Rate of migration
- ❑ Discount



# The German Prognostic Model has not been accepted in Denmark – step 3

- ❑ That is despite to the fact that the Danish white paper *says that the benefits can vary from a few months to several years lost commission*
- ❑ *Despite to the COM (96) 364*
- ❑ Since UfR2002.33H – the Danish practice seems to have been a *”standardized normal indemnity”* equivalent to the commission in the *basic year (= last 12 months before termination)*



UfR2002.33H  
*”the chocolate agent”*

# Is the indemnity *equitable* – step 4

- ❑ the payment of this indemnity is equitable having regard to all the circumstances
  - ❑ in particular, the commission lost by the commercial agent on the business transacted with such customers.
- ❑ Com (96) 364
  - ❑ The figure is rarely adjusted for reasons of equity in practice. The following factors are taken into account:



# The following factors are taken into account according to COM (96) 364: step 4

- Whether the agent is retained by other principals;
  - The fault of the agent;
  - The level of remuneration of the agent. For example, did the principal recently reduce the rate of commission e.g.
    - because he felt that agent's earnings were becoming too high or
    - pay to the agent a large amount of commission on contracts with customers which the agent did not introduce or had little to do with?
    - Also, did the agent receive special compensation for keeping a consignment inventory, special bonuses for new clients, del credere commission, any special allowance for trade fairs or extra payments for sub-agents?
    - Did he incur costs regarding loss of sub-agents?
  - Decrease in turnover of the principal;
  - Extent of the advantage to the principal;
  - Payment of pension contributions by the principal;
  - The existence of restraint of trade clauses. Clearly, a principal will be required to pay a higher indemnity for this.
-

# The Danish practice – “*equitable under consideration of all circumstances*” – step 4

- The agents loss of commission
- Trade clauses
- Duration of the contract
- The reason for termination
- Favorable remuneration
- The level of the principals sales support
- Decrease in turnover of the principal
- Whether the agent has other principals
- The use of sub-agents
- The character of the clientele
- Etc. etc.

# Is the Prognosis Method in Germany the same as described in the COM (96) 364?

- ❑ German practice
  - ❑ The benefit was limited to the most inferior amount of either
    - ❑ The agents loss of commission,
    - ❑ The principals loss of benefit or
    - ❑ The equity figure
  
- ❑ **According to ECJ it is not possible to limit the indemnity to the most inferior of the 3 figures as a rule**
  - ❑ Individual judgement in each case

C-348/07  
"Deutsche  
Tamoil  
GmbH"

# 86/653/ECC article 17, 2, (b) – - step 5

- The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;
- Includes also remuneration for *existing customers*





# COM (96) 364 – step 3 to 5

Commission on new customers and/or intensified customers over last 12 months of agency 50.000 ECU

Anticipated duration of benefits is 3 years with 20% migration rate

|         |                   |                   |
|---------|-------------------|-------------------|
| Year 1: | 50,000 - 10,000 = | 40.000 ECU        |
| Year 2: | 40,000 - 8,000 =  | 32.000 ECU        |
| Year 3: | 32,000 - 6,400 =  | <u>25,600 ECU</u> |

Total lost commission = 97,600 ECU

Correction to present value say 10 %.

This figure being equal to the actual

Indemnity = 87,840 ECU

This figure might be adjusted for reasons of equity

A final correction must be made should the amount exceed the maximum under Article 17(2)(b) of the Directive

= 50,000 ECU

**tvc.**

**Thank you for your attention**

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