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Q&A on Agency Agreements

Part 1: Introduction

Council Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Directive") harmonizes the laws, regulations and administrative provisions of Member States governing the relations between the parties to commercial agency agreements.

As the Directive constitutes a minimum harmonization, the Member States are free to set higher standards applicable to agency agreements. In addition, on various aspects the Directive leaves room for further elaboration in national law.

In order to facilitate the use of this Q&A, for each relevant issue the position under the Directive is compared with the position under the relevant implementing rules of Belgian law ("Belgian Agency Law"). The starting point is always the minimum harmonisation reflected in the Directive. The Q&A then aims to identify any deviations or additions from the regime reflected in the Directive.

Part 2: Legislative framework

Q1. Which rules constitute the transposition of the Directive into Belgian Agency Law (a)? Where available, please also include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and to the English translation of the regulatory framework (c).

a. Legislative framework:

Commercial agency is regulated by Art. I.II,1° and X.1 to X.25 Belgian Code of Economic Law ("CEL").

b. Link(s) to official publication:

The Dutch and French versions of Art. I.II,1° and X.1 to X.25 CEL are accessible via the Belgian Official Gazette.

c. Link(s) to English translation:

There is no official English translation available.

Part 3: Scope

Q2. The Directive (Art. 1(2)) defines a commercial agent as a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another party (the "principal"), or to negotiate and conclude such transactions on behalf of and in the name of that principal. Is the definition in the Belgian Agency Law the same?

Yes. See, Art. X.1, first paragraph CEL.

Q3. Do other intermediaries fall within the scope of the Belgian Agency Law?

No.

Q4. The Directive (Art. 2(2)) entitles the Member States to exclude from the scope of application parties whose activities as commercial agents are considered secondary in nature. Has Belgium made use of this possibility?

Yes. Commercial agents who do not exercise their activity as intermediary on a regular basis are excluded from Belgian Agency Law (Art. X.1, second paragraph CEL).

Part 4: Contractual phase

A. Form of agency agreements

Q5. The Directive (Art. 13) provides that, as a minimum, each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency agreement including any terms subsequently agreed. Does the Belgian Agency Law provide for such obligation?

Yes. See, Art. X.3 CEL.

Q6. Are there any (other) requirements under the Belgian Agency Law as to the form of the agency agreement in order for it to be valid and enforceable?

Yes. An agency agreement can only be concluded for a fixed term if the agency agreement is executed in writing and the fixed term is put in writing. Otherwise the agreement will be deemed to have an indefinite duration (Art. X.2, second paragraph CEL).

B. Content of agency agreements

B.1 - RIGHTS AND OBLIGATIONS OF PRINCIPAL AND COMMERCIAL AGENT

Q7. The Directive (Art. 3) provides that a commercial agent has the following minimum obligations:

- to look after his principal's interests and to act dutifully and in good faith;

- to make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- to communicate to his principal all the necessary information available to him;
- to comply with reasonable instructions.

Are these minimum obligations provided for in the Belgian Agency Law?

Yes. See, Art. 4 CEL.

Q8. Does the Belgian Agency Law explicitly impose any other obligations on the commercial agent that go beyond the aforesaid minimum?

No.

Q9. Does the Belgian Agency Law provide that a commercial agent may appoint sub-agents?

Yes. See, Art. 5 CEL. A commercial agent may appoint sub-agents paid for by the agent and acting under his responsibility. The commercial agent becomes the sub-agents' principal.

Q10. The Directive (Art. 4) provides that a principal has the following minimum obligations:

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

Are these minimum obligations provided for in the Belgian Agency Law?

Yes. See, Art. X.6 CEL.

Q11. Does the Belgian Agency Law explicitly impose any other obligations on the principal that go beyond the aforesaid minimum?

No.

B.2 - LEVEL AND CALCULATION BASIS OF REMUNERATION

Q12. Are there mandatory rules under the Belgian Agency Law that limit the freedom of the parties to fix the level of the remuneration of the commercial agent?

Yes. Art. X.13, first paragraph CEL provides that the parties fix the level of the commissions freely at the time of entering into the agency agreement.

Art. X.13, second paragraph CEL provides that the parties may agree on different amounts depending on the categories of customers visited, the nature of the products distributed or services provided, and the role played by the commercial agent in the realization of the transaction. Art. X.13, third paragraph CEL provides that the parties are also free to agree on a special amount for certain exceptionally important or delicate matters.

According to Art. X.13, seventh paragraph CEL, any unilateral modification of the commission during the term of the agency agreement will be considered to amount to an unlawful termination of the agreement. However, if the agent has tacitly accepted reduced commission levels during a longer period of time, he may be deemed to have consented to such reduced levels.

Art. X.13, last paragraph CEL provides that specific rules apply in the insurance and financial sectors and the sector of the regulated securities market with regard to the level of the agent's commission.

Q13. The Directive (Art. 6(1)) provides that, in the absence of an agreement on the level of the remuneration, the commercial agent is entitled to the remuneration that is customarily allowed in the place where he carries on his activities and, in the absence of such customary practice, to a reasonable remuneration taking into account all the aspects of the transaction. Do these principles also represent the default regime under the Belgian Agency Law?

Yes. See, Art. X.13, fourth paragraph CEL.

Q14. The Directive (Art. 6(2)) provides that any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission. Does this principle also represent the regime under the Belgian Agency Law?

Yes. See, Art. X.7, second paragraph CEL.

Q15. Does the Belgian Agency Law impose any criteria with regard to the type of the agent's remuneration (i.e. fixed amount or commission)?

Yes. According to Art. X.7, first paragraph CEL, the agent's remuneration may consist of a fixed amount, a commission or a combination of a fixed amount and a commission. Art. X.7, third paragraph CEL provides that Art. X.8 to X.14 CEL do not apply if the agent's remuneration does not include a commission. Art. X.15 CEL provides that, if the remuneration consists entirely or partially of a fixed amount, it shall be paid monthly, unless otherwise agreed by the parties.

Q16. Does the Belgian Agency Law impose any criteria with regard to the calculation of the agent's remuneration?

Yes. Art. X.13, fifth paragraph CEL provides that, unless agreed otherwise, the commissions are calculated on the

basis of the price that is invoiced to the customer, without deduction of the additional costs, including the packaging costs, the freight price, the insurance costs, except if they are invoiced separately, and excluding any taxes, customs fees and other levies.

According to Art. X.13, sixth paragraph CEL the loyalty rebates, refunds and discounts that are unilaterally provided to the customer by the principals may not be excluded from the calculation basis of the commission.

Art. X.13, last paragraph CEL provides that specific rules apply in the insurance and financial sectors and the sector of the regulated securities market with regard to calculation methods of the agent's commission.

B.3 - REMUNERATION BY MEANS OF A COMMISSION (DURING)

Q17. According to the Directive (Art. 7(1)) a commercial agent is entitled to a commission during the period covered by the agency agreement:

- where the transaction has been concluded as a result of his action; or
- where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Are both cases reflected in the Belgian Agency Law?

Yes. See, Art. X.8 CEL.

Q18. The Directive (Art. 7(2)) provides for an additional case of entitlement to a commission and has left it to the Member States to choose between two options:

- Option 1: the transaction is entered into with a customer belonging to a specific geographic area or group of customers entrusted to the commercial agent; or
- Option 2: the transaction is entered into with a customer belonging to a specific geographical area or group of customers in respect of which the commercial agent enjoys exclusive rights.

Which option has been retained in the Belgian Agency Law?

Option 2. See, Art. X.8,3° CEL.

B.4 - REMUNERATION BY MEANS OF COMMISSION (AFTER TERMINATION)

Q19. According to the Directive (Art. 8) a commercial agent is entitled to a commission after the agency agreement has terminated if:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and if the transaction was entered into within a reasonable period after that agreement terminated; or

- the order of the third party reached the principal or the commercial agent before the agency terminated and the conditions applicable to entitlement during the term of the agency are met.

Are both cases reflected in the Belgian Agency Law?

Yes. See, Art. X.9 CEL.

Q20. Are there any additional cases provided for in the Belgian Agency Law?

Yes. Art. X.9,1° CEL specifies what constitutes a reasonable period: a transaction needs to be entered into within a period of six months after the agreement terminated.

Q21. According to the Directive (Art. 9) a commercial agent is not entitled to the commission, if that commission is payable, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents. Do these principles also represent the regime under the Belgian Agency Law?

Yes. See, Art. X.10 CEL.

Q22. According to the Directive (Art. 10(1)) the commission shall become due as soon as and to the extent that one of the following circumstances obtains:

- the principal has executed the transaction; or
- the principal should, according to his agreement with the third party, have executed the transaction; or
- the third party has executed the transaction.

Are these circumstances reflected in the Belgian Agency Law?

Yes. See, Art. X.11, first paragraph CEL.

Q23. Are there any additional circumstances provided for in the Belgian Agency Law?

No.

Q24. The Directive (Art. 10(2)) provides that the commission shall be due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have. Does the Belgian Agency Law apply the same deadline?

Yes. See, Art. X.11, second paragraph CEL.

Q25. The Directive (Art. 10(3)) provides that the commission needs to be paid no later than on the last day of the month following the quarter in which it became due. Does the Belgian Agency Law apply the same deadline?

Yes. See, Art. X.11, third paragraph CEL.

Q26. The Directive (Art. 10(4)) stipulates that parties cannot by agreement derogate from the principles included

in Art. 10(2) and 10(3) to the detriment of the commercial agent. Does the Belgian Agency Law impose the same restriction on the parties?

Yes. See, Art. X. 11, last paragraph CEL.

Q27. According to the Directive (Art. 11(1)) the right to commission can be extinguished only if and to the extent that:

- it is established that the agreement between the third party and the principal will not be executed; and
- that fact is due to a reason for which the principal is not to blame.

Does the Belgian Agency Law impose these cumulative conditions?

Yes. See, Art. X.12, first paragraph, 1° CEL, which provides that the commission can be extinguished if and insofar as it is established that the third party is not fulfilling its obligations, except when the non-execution is caused by circumstances attributable to the principal.

Q28. Does the Belgian Agency Law allow for other cases where the agent's entitlement to commission is extinguished?

Yes. According to Art. X.12, first paragraph, 2° and 3° CEL parties can also agree that the right to commission shall be extinguished in the following cases: (i) if the execution has become impossible without this being due to the principal; and (ii) if the execution of the transaction cannot reasonably be required of the principal, especially if, due to the third party, there are serious reasons that justify the principal's non-execution.

Q29. According to the Directive (Art. 11(2)) any commission which the commercial agent has already received must be refunded in case the right to it is extinguished. Does the Belgian Agency Law also provide for such an obligation of restitution?

Yes. See, Art. X.12, last paragraph CEL.

Q30. The Directive (Art. 12(1)) provides that the principal must supply his commercial agent with a statement of the commission due. This statement must be supplied no later than the last day of the month following the quarter in which the commission has become due, and shall set out the main components used in calculating the amount of the commission. Do these principles also represent the default regime under the Belgian Agency Law?

Yes. See, Art. X.14, first and second paragraph CEL.

Q31. Does the Belgian Agency Law impose that the parties cannot by agreement derogate from the principles included in Art. 12(1) of the Directive to the detriment of the commercial agent?

Yes. See, Art. X.14, third paragraph CEL.

Q32. Does the Belgian Agency Law impose any additional requirements with regard to the statement of the

commission due?

No.

Q33. The Directive (Art. 12(2)) entitles the commercial agent to demand to be provided with all the information, and in particular an extract from the books, which he needs to check the amount of the commission due to him. Does the Belgian Agency Law grant the commercial agent the same right?

Yes. See, Art. X.14, third paragraph CEL.

Q34. Does the Belgian Agency Law broaden this right to information of the commercial agent?

No.

Q35. Does the Belgian Agency Law impose any criteria with regard to the calculation of the commission?

Yes.

Art. X.13, fifth paragraph CEL provides that, unless agreed otherwise, the commissions are calculated on the basis of the price that is invoiced to the customer, without deduction of the additional costs, including the packaging costs, the freight price, the insurance costs, except if they are invoiced separately, and excluding any taxes, customs fees and other levies.

According to Art. X.13, sixth paragraph CEL the loyalty rebates, refunds and discounts that are unilaterally provided to the customer by the principles may not be excluded from the calculation basis of the commission.

Q36. Do specific rules and/or restrictions apply to:

- non-solicitation clauses;
- minimum sales quota;
- specific sectors?

Specific rules apply to specific sectors.

Specific rules apply within the insurance and financial sectors and the sector of the regulated securities market. See, Art. 13 and 16, §4 CEL.

B.5 - NON-COMPETE CLAUSE

Q37. The Directive (Art. 20(2)) provides that a non-compete clause shall only be valid if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by the agency agreement.

Does the Belgian Agency Law impose these cumulative criteria?

Yes. See, Art. X.22, §1, 1°-3° CEL.

Q38. Does the Belgian Agency Law impose any additional criteria in order for a non-compete clause to be valid?

No.

Q39. The Directive (Art. 20(3)) provides that a non-compete clause shall be valid for not more than 2 years after termination of the agency agreement. Does the same maximum period apply under the Belgian Agency Law?

Yes. The maximum period for a post-term non-compete clause is six months (Art. X.22, §1, 4° CEL).

Q40. The Directive (Art. 20(4)) provides that national law may impose other restrictions:

- on the validity or enforceability of non-compete clauses, or
- which enable the courts to reduce the obligations on the principal or the commercial agent.

Does the Belgian Agency Law impose any such restrictions?

Yes.

With regard to the first category, the non-compete clause shall have no effect if the agency agreement is terminated by the principal without a cause, or by the commercial agent for cause (Art. X.22, §2 CEL).

With regard to the second category, a non-compete clause creates a rebuttable presumption in favour of the commercial agent that he/she has brought new customers to the principal (Art. X.22, §3 CEL).

Q41. Does the Belgian Agency Law provide any criteria with regard to the calculation method of the indemnification in case of a violation of the non-compete clause?

Yes. According to Art. X.22, §4 CEL, the fixed indemnification in case of a violation of a non-compete clause may not exceed an amount equal to 1 year of indemnification calculated as provided in Art. X.18, fourth paragraph (goodwill indemnity). The principal may claim higher compensation if he/she can prove the existence and extent of the damages incurred.

B.6 - LIABILITY

Q42. Under the Belgian Agency Law, can the parties agree that the commercial agent shall be liable (in whole or in part) for the breach of third party-customers with whom he/she has negotiated and/or concluded an agreement on behalf of the principal, by including a so-called *del credere* clause?

Yes.

Q43. If yes, are such clauses subject to certain rules and/or restrictions?

Yes. A *del credere* clause should comply with the following conditions (Art. X.23 CEL):

- A *del credere* clause should be made in writing.
- A commercial agent is only liable for a third party's solvency, excluding any other violation of its agreementual obligations, unless he/she agreed otherwise in writing.
- A *delcredere* clause should pertain to an agreement in which the commercial agent is personally involved.
- A *del credere* clause ceases to apply if the principal amends any delivery or payment terms in the absence of the commercial agent's consent.
- A commercial agent cannot be liable for an amount higher than the agreed commission, unless the clause relates to a specific agreement or agreements concluded on behalf of the principal. A different regime applies in the insurance and financial sector and in the sector of regulated securities markets.
- If there is an apparent discrepancy between the risk that the commercial agent assumes and the negotiated commission, the courts can reduce the amount for which the commercial agent is liable insofar as such amount exceeds the commission, taking into account all circumstances, in particular the way in which the commercial agent promoted the interests of the principal.

Q44. Are there liability-related clauses that must be mandatorily included in agency agreements?

No.

C. Term and termination

C.1 - TERM

Q45. According to the Directive (Art. 14) an agency agreement for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency agreement for an indefinite period. Does this principle also represent the default regime under the Belgian Agency Law?

Yes. See, Art. X.2, third paragraph CEL.

Q46. Does the Belgian Agency Law contain particular rules and/or restrictions in relation to the term (incl. renewal) of agency agreements?

Yes. According to Art. X.2, first paragraph CEL, an agency agreement may have a fixed or indefinite term. An agency agreement has an indefinite term if there is no written agreement, or, in case there is a written agreement, when the parties have not agreed on the duration. A fixed term agency agreement which is prolonged for one or more successive terms is considered to have an indefinite term as from its effective date, which means that the termination and compensation regime for agreements having an indefinite term must be complied with.

C.2 - TERMATION BY NOTICE

Q47. According to the Directive (Art. 15(1)) an agency agreement that is concluded for an indefinite period may by either party be terminated by notice. Does this principle also represent the regime under the Belgian Agency Law?

Yes. See, Art. X.16, §1, first paragraph CEL. This also applies to agency agreements having a fixed term and including the possibility to terminate by notice.

Q48. According to the Directive (Art. 15(2)) the notice period is 1 month for the first year, 2 months for the second year commenced, and 3 months for the third year commenced and subsequent years. Do these notice periods also represent the regime under the Belgian Agency Law?

Yes. See, Art. 16, §1, second paragraph CEL.

Q49. According to the Directive (Art. 15(3)) the notice period for the fourth, fifth and sixth year and subsequent years may be respectively 4, 5 and 6 months. Do these notice periods also represent the regime under the Belgian Agency Law?

Yes. See, Art. 16, §1, second paragraph CEL.

Q50. If yes, can the parties agree to a shorter notice period?

No. See, Art. X.16, §1, second paragraph CEL.

Q51. According to the Belgian Agency Law, if no notice period has been agreed, is there a notice period that always applies irrespective of the duration of the agency agreement?

No.

Q52. According to the Directive (Art. 15(4)), if a principal and commercial agent agree on longer notice periods than those laid down in Art. 15(2) and (3) of the Directive, the notice period to be respected by the principal must not be shorter than that to be observed by the commercial agent. Does the same default regime apply under the Belgian Agency Law?

Yes. See, Art. X.16, §1, third paragraph CEL.

Q53. According to the Directive (Art. 15(5)), unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month. Does the same default regime apply under the Belgian Agency Law?

Yes. See, Art. 16, §2 CEL.

Q54. Does the Belgian Agency Law provide how the termination notice must be notified to the other party?

Yes. According to Art. X.16, §2 CEL, the termination must be notified by means of (i) a document indicating the

beginning and the duration of the notice period and delivered with written acknowledgement of receipt by the party to whom it is addressed, (ii) a registered letter having effect on the third business day after shipment date, or (iii) a bailiff's writ.

Q55. According to the Directive (Art. 15(6)), the answers to questions 47 to 53 also apply to agency agreements having a fixed term if they are converted to agency agreements having an indefinite term due to the continuation of the agreement beyond the fixed term, provided that the earlier fixed period must be taken into account in the calculation of the notice period. Does the same default regime apply to agency agreements having a fixed term under the Belgian Agency Law?

Yes. See, Art. X.2, 2nd paragraph CEL jo. Art. X.16, §1 and §2 CEL.

C.3 - TERMINATION FOR CAUSE

Q56. According to the Directive (Art. 16) an agency agreement may immediately be terminated:

- because of the failure of one party to carry out all or part of his obligations; or
- where exceptional circumstances arise.

Are both termination grounds reflected in the Belgian Agency Law?

Yes. See, Art. X.17, first paragraph CEL. Belgian Agency Law is somewhat more stringent in that it requires that a) a serious breach is established and b) that the exceptional circumstances render any further cooperation between the principal and the agent impossible. Also, the terminating party must terminate the agency agreement within 7 business days as from the day such party became aware of the serious breach or the exceptional circumstances. Furthermore, the only serious breaches or exceptional circumstances on which the terminating party can rely to justify such termination are those that have been communicated to the other party (by registered letter or bailiff's writ) within 7 business days following the termination of the agency agreement (Art. X.17, second paragraph CEL).

Q57. Are there additional termination grounds provided in the Belgian Agency Law?

No.

Q58. Does the Belgian Agency Law provide that the parties may not derogate from the regime on termination for cause to the detriment of the commercial agent before the agency agreement is terminated?

Yes. See, Art. X.17, third paragraph CEL.

Q59. Is it possible to terminate the agency agreement based on certain grounds for termination (breach or other) included in the agency agreement?

Yes. There are different points of view in Belgian legal doctrine with regard to the question whether an agency

agreement may be terminated for cause by means of a condition subsequent and express termination clauses included in agency agreements.

Some authors state that such conditions and clauses are by definition void (as the conditions of Art. X.17 CEL are strictly regulated), whereas others state that these are legal. Hence, express termination clauses and conditions subsequent (e.g. change of control clauses) resulting in the immediate termination of an agency agreement, although the conditions of Art. X.17 CEL are not complied with (e.g. there are no exceptional circumstances), bear the risk to be void. They must in any event be open to a posteriori judicial intervention to control their validity and compliance with the (substantial and formal) conditions provided in Art. X.17 CEL. If void, the sanction is equal to an indemnification in lieu of the applicable notice period.

Q60. If yes, is prior judicial intervention required in order for the termination of the agreement to take effect?

No.

Q61. Are there any other particular rules and/or restrictions as regards the termination of the agency agreement (e.g. trial period, etc.)?

Yes.

According to Art. X.16, §3 CEL, in the absence of a notice period, or exceptional circumstances that render any professional cooperation between the principal and the agent definitively impossible, the party terminating the agency agreement shall be required to pay the other party an indemnification in lieu of such notice. The indemnification shall be calculated on the basis of the monthly average of the commissions earned during the 12 months preceding the termination of the agency agreement, or, as the case may be, during the months preceding the termination of the agency agreement.

According to Art. X.16, §4-5 CEL, specific termination rules apply in the financial sector and in the event that a joint consultative body has been established.

C.4 - INDEMNIFICATION

Q62. The Directive (Art. 17(2)(a)) provides that the commercial agent is entitled to an indemnification 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. Does the Belgian Agency Law provide for this criterion?

Yes. See, Art. X.18, first paragraph CEL.

Q63. The Directive (Art. 17(2)(a)) also provides that the commercial agent is entitled to an indemnification if and to the extent that the payment of this indemnification is equitable having regard to all circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Does

the Belgian Agency Law provide for this criterion?

No. This equitability criterion is not provided for under Belgian Agency Law, but Belgian case law implements the Court of Justice jurisprudence (Quenon K; see, answer to question 65).

Q64. Is under the Belgian Agency Law the application of a non-compete clause a circumstance on the basis of which the commercial agent is presumed to be entitled to an indemnification (cfr. Art. 17(2)(a), second indent of the Directive)?

Yes. See, Art. X.18, second paragraph CEL.

Q65. Other than the criteria set forth in Art. 17(2)(a) of the Directive, are there any specific rules or precedents derived from the Belgian case law on the basis of which the indemnification is calculated?

Yes.

According to Art. X.18, third paragraph CEL, the amount of the indemnification is calculated on the basis of the business volume realized, as well as the introduction of customers.

There is no fixed calculation method. Belgian case law implements the Court of Justice jurisprudence (Quenon K), which breaks down the calculation of the indemnification into three stages: (i) the quantification of the benefits accruing to the principal as a result of the volume of the business with customers brought by the commercial agent, taking into account criteria including the duration of the agreementual relations and the evolution of the customers brought or elaborated on by the commercial agent to the benefit of the principal; (ii) checking whether the amount established on the basis of the above-mentioned criteria is equitable, having regard to all the circumstances of the case and, in particular, to the commission lost by the commercial agent; and (iii) the application of the upper limit of one year (as provided in Art. X.18, third paragraph CEL).

According to Belgian case law the calculation of the indemnification is based on the commercial agent's gross remuneration, excluding VAT and the reimbursement of costs (if any).

Q66. The Directive (Art. 17(2)(b)) provides that the amount of the indemnification may not exceed a figure equivalent to an indemnification for 1 year calculated from the commercial agent's average annual remuneration over the preceding 5 years, and if the agreement goes back less than 5 years the indemnification shall be calculated on the average for the period in question. Does the same regime apply under the Belgian Agency Law?

Yes. See, Art. X.18, third paragraph CEL.

Q67. According to the Directive (Art. 18), indemnification or compensation for damage is not payable where

- the principal has terminated the agency agreement because of default attributable to the commercial agent which would justify immediate termination of the agency agreement;

- the commercial agent has terminated the agency agreement, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he/she cannot reasonably be required to continue his/her activities; and/or
- with the agreement of the principal, the commercial agent assigns his rights and obligations under the agency agreement to another parties.

Do these principles also represent the default regime under the Belgian Agency Law?

Yes. See, Art. X.18, fifth paragraph CEL. With regard to possibility a), Belgian Agency Law refers to “serious breach”.

Q68. According to the Directive (Art. 17(5)), a commercial agent may lose his/her entitlement to the indemnification or compensation for damage if within 1 year following termination of the agency agreement he/she has not notified the principal of his/her intention to pursue the entitlement. Does this principle also represent the default regime under the Belgian Agency Law?

Yes. See, Art. X.18, last paragraph CEL.

C.5 - ADDITIONAL COMPENSATION

Q69. The Directive (Art. 17(2)(c)) provides that the commercial agent, in addition to the indemnification, is entitled to seek damages for breach of agreement, failing to respect the notice period, etc. Does the same regime apply under the Belgian Agency Law?

Yes. See, Art. X.19 CEL.

Q70. If yes, do specific rules and/or restrictions apply to the damage that can be compensated in addition to the indemnification under Art. 17(2) of the Directive?

Yes. According to Art. X.19 CEL, if a commercial agent is entitled to an indemnification, which does not fully compensate the actual damage incurred, he/she may obtain additional compensation equal to the difference between the amount of the actual damage incurred and the indemnification. The commercial agent must prove the damage actually incurred.

Q71. The Directive (Art. 17(3)) provides that the commercial agent is entitled to compensation for damage suffered as a result of the termination of the agency agreement. Does the same default regime apply under the Belgian Agency Law?

No. Belgium has opted for the solution included in Art. 17 (2) of the Directive.

Q72. According to the Directive (Art. 17(3)) such damages shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency agreement would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities; and/or
- which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency agreement on the principal's advice.

Does the Belgian Agency Law take the same circumstances into account?

No.

Q73. Are there any other specific rules or precedents, than the criteria set forth in Art. 17(3) of the Directive, derived from case law on the basis of which the compensation is calculated?

No.

Q74. The Directive (Art. 17(4)) provides that a commercial agent is entitled to indemnification or compensation for damage where the agency agreement is terminated as a result of the commercial agent’s death. Is this default entitlement available under the Belgian Agency Law?

Yes. See, Art. X.20 CEL.

Q75. The Directive (Art. 19) stipulates that the parties may not derogate from Art. 17 and 18 to the detriment of the commercial agent before the agency expires. Does the Belgian Agency Law impose the same restriction on the parties?

Yes. See, Art. X.21 CEL.

Q76. Are the parties under the Belgian Agency Law free to opt for either indemnification or compensation?

No.

Q77. Must the commercial agent under the Belgian Agency Law claim the indemnification or compensation within a certain period of time after termination of the agency agreement?

Yes. According to Art. X.18 CEL, a commercial agent loses his right to indemnification if he has not notified the principal that he intends to assert his rights within 1 year after the termination of the agency agreement.

Q78. Are there other specific rules with respect to compensation or indemnification following the termination of the agency agreement?

No.

Part 5: Dispute resolution

Q79. Do any specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction under the Belgian Agency Law?

Yes. According to Art. X.25 CEL, without prejudice to the application of international agreements and other provisions in the agency agreement, any activity of a commercial agent having its main place of business in Belgium is subject to Belgian law and falls within the jurisdiction of the Belgian courts.

Q80. Can the parties opt for arbitration?

Yes.

Q81. If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in agency agreements?

No.

Q82. Does the Belgian Agency Law provide for a statute of limitations that is applicable to claims regarding the performance of agency agreements?

Yes. According to Art. X.24 CEL, the statute of limitations pertaining to claims regarding the performance of agency agreements is equal to 1 year after the termination of the agreement, or 5 years after the event giving rise to the claim without this period being longer than 1 year after the end of the agreement.