Distribution Law Center
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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 Austrian law ("Austrian 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 Austrian 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 numerous statues. The most important statute, which directly implements the Direction into Austrian law, is the Austrian Commercial Agents Act (*Handelsvertretergesetz*).

b. Link(s) to official publication:

The official publication in the Austrian Official Gazette is accessible via this link in German.

c. Link(s) to English translation:

The official English translation of the Austrian Commercial Agents Act is accessible via this link.

Part 3: Scope

Q2. The Directive (Article 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 Austrian Agency Law the same?

No. The Austrian definition of "Commercial agent" enshrined in Art. 1 Austrian Commercial Agents Act is, in principle, broader than its counterpart in the Directive. Most importantly, the Austrian definition does not refer to the notion of "sale and purchase", but presents the more general language "Vermittlung oder Abschluss von Geschäften". This can be translated into "mediation and conclusion of deals" and refers to all possible kinds of business transactions and legal relationships thereof. Thus, the personal scope of the Austrian Commercial Agents Act is broader than outlined by the Directive.

It should, however, be kept in mind that there are certain limitation in scope, as e.g. transaction regarding real estate or insurances are not covered by the Austrian definition of "Commercial agent" (such transactions are mediated by brokers as defined in the Austrian Broker Act).

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

No.

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

No.

Part 4: Agreementual 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 Austrian Agency Law provide for such obligation?

Yes. Art. 4 Austrian Commercial Agents Act contains such an obligation. It is worth noting that an agency agreement is valid regardless of compliance with Art. 4 Austrian Commercial Agents Act.

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

No.

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 Austrian Agency Law?

Yes. See, Art. 5 Austrian Commercial Agents Act. The obligation to comply with reasonable instructions cannot be found in the explicit text of this provision, but is inferred from the expression of the agent working "for" the entrepreneur.

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

No.

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

Art. 1 para 2 Austrian Commercial Agents Act clarifies that the principal can simultaneously be an agent vis-à-vis another principal. Thus, the law expressly allows agents to appoint sub-agents and qualifies the (main) agent as principal vis-à-vis the sub-agent. Moreover, a principal may conclude commercial agency agreements with both the (main) agent and the sub-agent. Although, the sub-agent only is in a contractual relationship with the entrepreneur in that case, it still is structurally subordinated to the agent. Naturally, the exact legal relationships depend on the specific agreements.

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 Austrian Agency Law?

Yes. See, Art. 6 Austrian Commercial Agents Act.

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

Yes. Contrary to the relevant Article in the Directive, Art. 6 Austrian Commercial Agents Act obliges the principal to immediately (instead of merely within a reasonable period) inform the agent of unexpectedly and significantly lower transaction volumes and acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

B.2 - LEVEL AND CALCULATION BASIS OF REMUNERATION

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

No. The Austrian Agency Law does not restrict the freedom of the parties to fix the level of remuneration of the agent during the ongoing agency agreement.

However, Art. 24 Austrian Commercial Agents Act provides for a special mandatory compensation payment (so-called "*Ausgleichsanspruch*"; see, Art. 24 Austrian Commercial Agents Act). A distributor could – provided that it notifies the principal accordingly within one year after termination of the agreement – be entitled to a compensation fee under the following conditions, if met cumulatively:

- the distributor has acquired new customers or significantly expanded the existing business relationships of the principal;
- it is to be expected that the principal will gain substantial benefits from such business relationships even after termination of the cooperation with the distributor; and
- such compensation fee is equitable considering all the facts of the case at hand, especially the loss of profit suffered by the distributor.

In any way, the distributor will not be entitled to any payment if

- the distributor has terminated or prematurely dissolved the agreement, unless the principal has given the distributor reasons for doing so; or
- the principal has terminated or prematurely dissolved the agreement due to an important reason, based on fault in the behaviour of the distributor; or

- the distributor, with the agreement of the principal, assigns his rights and duties under the agreement to another party.

The maximum financial exposure is the average annual net profit (= "fictive trade margin") of the distributor in the last five years. Within this cap, a calculation method has been developed by case law taking into account reductions in particular for atypical activities, non-regular customers, estimated pulling effect of the principal's brand and estimated customer churn rate after termination.

Further, the distributor may be entitled to the reimbursement of costs pursuant to the mandatory Article 454 Austrian Corporate Act. Provided that, within one year after termination of the agreement, the distributor notifies the principal accordingly, the distributor could be entitled to the reimbursement of costs, if (i) the distributor was obliged in its contractual relationship to make investments due to its membership in the distribution network, and (ii) these investments have not been amortised as of termination or cannot be used for other purposes afterwards. The exceptions provided by Art. 454 Austrian Corporate Act generally correspond to the exceptions provided in Art. 24 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. Art. 10 Austrian Commercial Agents Act and and Art. 354 Austrian Corporate Code provides for this exact regime.

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 Austria Agency Law?

Yes. The term "commission" (*Provision*) is not defined explicitly by law. Thus, there are numerous types of commission, ranging from the ordinary agency commission to e.g. management or *del credere* commissions. However, both settled case law as well as virtually undisputed legal literature define the term "commission" identical to Art. 6 of the Directive and consider the different commissions as mere variants thereof.

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

No.

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

No.

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 Austrian Agency Law?

Yes. See Art. 8 para 2 and 3 Austrian Commercial Agents Act.

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 retailed in the Austrian Agency Law?

Option 2. (see, Art. 8 para 4 Austrian Commercial Agents Act).

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 Austrian Agency Law?

Yes. See, Art. 11 para 1 Austrian Commercial Agents Act.

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

No.

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 Austrian Agency Law?

Yes. See, Art. 11 para 2 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See Art. 9 para 1 Austrian Commercial Agents Act.

Q23. Are there any additional circumstances provided for in the Austrian 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 AustrianAgency Law apply the same deadline?

Yes. See, Art. 9 para 2 Austrian Commercial Agents Act.

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 Austrian Agency Law apply the same deadline?

Yes. See, Art. 14 para 1 in conjunction with Art. 15 Austrian Commercial Agents Act. Moreover, Art. 14 Austrian Commercial Agents Act mandates that, should the agency agreement be terminated before that deadline, the commission needs to be paid no later than on the last day of the month following the termination of the agreement.

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 Austrian Agency Law impose the same restriction on the parties?

Yes. According to Art. 27 Austrian Commercial Agents Act, Art. 14 and Art. 15 Austrian Commercial Agents Act are of mandatory nature (i.e. deviations are only possible in favour of the agent).

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 Austrian Agency Law impose these cumulative conditions?

Yes. See, Art. 9 para 3 Austrian Commercial Agents Act. In case of default of payment of the third party, the law requires the principal to prove that it has taken all reasonable steps to induce the third party to pay.

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

No.

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 Austrian Agency Law also provide for such an obligation of restitution?

Yes. Although the Austrian Commercial Agents Act is silent on this matter, such refund may be obtained according to general principles of civil law as enshrined in the Austrian General Civil Code.

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 Austrian Agency Law?

Yes. See Art.14 Austrian Commercial Agents Act.

Q31. Does the Austrian 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. According to Art. 27 Austrian Commercial Agents Act, Art. 14 Austrian Commercial Agents Act is of mandatory nature (i.e. deviations are only possible in favour of the agent).

Q32. Does the Austrian 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 Austrian Agency Law grant the commercial agent the same right?

Yes. See, Art. 16 para 1 Austrian Commercial Agents Act.

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

No.

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

No.

Q36. Do specific rules and/or restrictions apply to

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

Yes. Specific rules apply within the insurance sector. See, Art. 26a et seq. Austrian Commercial Agents Act.

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 Austrian Agency Law impose these cumulative criteria?

No. The Austrian Commercial Agents Act does not contain such criteria (i.e. in theory, a non-compete obligation may also be imposed without a written agreement).

Nevertheless, the Austrian Agency Law imposes an even stricter prohibition of non-compete clauses after the agency agreement has ended (n.b. Art. 20 of the Directive refers only to post-contractual non-compete clauses). According to Art. 25 Austrian Commercial Agents Act, all provisions restricting the agent's commercial activities after the agency agreement has ended are null and void.

Q38. Does the Austrian 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 Austrian Agency Law?

No. The statutory prohibition is not limited in time. Although Art. 20 para 4 of the Directive does allows for national deviations, Austrian scholars doubt the EU-conformity of this unlimited prohibition

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 Austrian Agency Law impose any such restrictions?

Yes, see Q37. The Austrian provisions on post-contractual non-compete obligations provides for a stricter regime than the Directive.

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

No.

B.6 - LIABILITY

Q42. Under the Austrian 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. According to Austrian case law, *del credere* provisions can be relevant when determining the extent to which the agent is integrated into the distribution system of the principal. This is vital for assessing possible cartel relationships between the agent and 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 Austrian Agency Law?

Yes. See, Art. 20 Austrian Commercial Agents Act.

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

No.

C.2 - TERMINATION 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 Austrian Agency Law?

Yes. See, Art. 21 para 1 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See, Art. 21 para 1 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See, Art. 21 para 1 Austrian Commercial Agents Act.

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

Yes. Pursuant to Art. 21 para 2 Austrian Commercial Agents Act, the parties must not agree on shorter notice periods, whereas Art. 21 para 3 allows for longer notice periods provided the agent is not subject to a longer notice period than the principal.

Art. 27 Austrian Commercial Agents Act, however, only qualifies Art. 21 para 1 and para 3 Austrian Commercial Agents Act as mandatory. Thus, most Austrian legal scholars agree that Art. 21 para 2 can be deviated from (i.e. shorter notice periods may be agreed upon) as long as this is done in favour of the agent.

Q51. According to the Austrian 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 Austrian Agency Law?

Yes. See, Art. 21 para 3 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See, Art. 21 para 4 Austrian Commercial Agents Act.

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

No.

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 Austrian Agency Law?

Yes.

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 Austrian Agency Law?

Yes.

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

Yes. Art. 22 para 2 Austrian Commercial Agents Act contains a non-exhaustive list of grounds for the principal to immediately terminate the agency agreement, namely

- If the agent becomes incapable of performing their duties;
- If the agent makes himself guilty of an act that appears to make him unworthy of the confidence of the principal, especially (i) when they accepts an unlawful reward, (ii) if they transmit orders to the principal that have not been issued, or (iii) if they otherwise lead the principal in error in significant business affairs;
- If the agent for a considerable time fails or refuses to operate for the principal, or if the agent violates other essential contractual provisions;
- If the agent is guilty of acts of violence or significant defamation vis-à-vis the principal; or
- If insolvency proceedings are opened over the assets of the agent.

Art. 22 para 3 Austrian Commercial Agents Act provides a non-exhaustive list of grounds for the agent to

immediately terminate the agency agreement namely:

- If the agent becomes incapable of performing their duties, or
- If the principal (i) unduly diminishes or denies the commission for the agent or violates other essential contractual provisions; (iii) is guilty of acts of violence or significant defamation against the agent; or (iv) no longer engages in commercial activities in the business sector, in which the agent primarily operates.

Q58. Does the Austrian 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?

No. The Austrian Commercial Agents Act does not contain any explicit provisions regarding the legal nature of its termination provisions. Therefore, the parties can only further specify their rights of termination on material grounds within the boundaries of the general principles of civil law (i.e. no derogation from Art. 22 Austrian Commercial Agents Act is possible).

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

Yes. See, Q58. The parties can agree on a list of material breaches leading to an extraordinary termination beforehand (n.b. the statutory list of material grounds contained in Art. 22 Austrian Commercial Agents Act remains valid irrespective of the specifics contained in the agency agreement).

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.)?

No.

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 Austrian Agency Law provide for this criterion?

Yes. See, See, Q12. This is provided for in Art. 24 Austrian Commercial Agents Act.

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 Austrian Agency Law provide for this criterion?

Yes. See, Q12. This is provided for in Art. 24 Austrian Commercial Agents Act.

Q64. Is under the Austrian 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)?

No. As post-contractual non-compete clauses are invalid under Austrian Commercial Agents Act (see, Q37), such clauses are irrelevant with regard to balancing any indemnification.

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 Austrian case law on the basis of which the indemnification is calculated?

Yes. See, Q12.

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 Austrian Agency Law?

Yes. See, Q12. This is provided for in Art. 24 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See, Q12. This is provided for in Art. 24 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See, Q12. This is provided for in Art. 24 Austrian Commercial Agents Act.

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 Austrian Agency Law?

Yes. See Art. 23 Austrian Commercial Agents Act.

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?

No.

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 Austrian Agency Law?

No. In case of wrongful and at least negligent termination by the principal, the agent is entitled to compensation for related damages (see, Art. 23 Austrian Commercial Agents Act). For the so-called "*Investitionskostenersatz*", see the explanations to Art. 454 Austrian Corporate Code under Q12.

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 Austrian Agency Law take the same circumstances into account?

Yes.

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 Austrian Agency Law?

No. Death terminates the agreement insofar as the commercial agent is a natural person. There is no specific provision that would state an entitlement to compensation for damages resulting from the death of the agent. However such entitlement can (under certain circumstances) arise from general civil law.

Further, Art. 24 para 2 Austrian Commercial Agents Act clarifies that the special compensation payment (*Ausgleichsanspruch*) remains valid even if the agency agreement has ended because of the death of the agent.

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 Austrian Agency Law impose the same restriction on the parties?

Yes. See, Art. 27 para 1 Austrian Commercial Agents Act.

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

No.

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

Yes. Both the special compensation payment (Art. 24 Austrian Commercial Agents Act) and the investment-compensation (Art. 454 Austrian Corporate Code) must be claimed within one year after terminating the agency agreement. For damages resulting from wrongful negligent termination of the agency agreement, the ordinary terms for tort law apply (3 years after gaining knowledge of the damages and the damaging party; see Art. 1489 Austrian General Civil Law Code).

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 Austrian Agency Law?

No.

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 Austrian Agency Law provide for a statute of limitations that is applicable to claims regarding the performance of agency agreements?

No.