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 Romanian Law ("Romanian 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 Romanian 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 Chapter X of Title IX of Book V of the Romanian Civil Code ("CC"), art. 2072-2095

b. Link(s) to official publication

The Romanian version of the CC is accessible via this link.

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 Romanian Agency Law the same?

Yes. See, Art. 2072 par. (1) and (2) CC.

Q3. Do other intermediaries fall within the scope of Romanian 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 Romania made use of this possibility?

Yes. Art. 2072 par. (2) CC provides that only intermediaries acting on a professional basis qualify as agents, thereby excluding persons whose activities as commercial agents are secondary in nature. According to Art. 3 par. (2) and (3) CC, intermediaries acting on a professional basis are those parties exploiting an undertaking, i.e. the systematic exercising of an organized activity of production, management and transfer of goods or the provision of services.

Moreover, Art. 2073 par. (1) CC expressly excludes from the scope of the law: (1) stock brokers whether acting in respect of stocks, goods or derivatives; (2) insurance brokers and agents; and (3) unremunerated agents. Par. (2) of the same article clarifies that the following are not considered agents in the sense of the Romanian Agency Law: (1) legal or statutory representative organs of legal entities; (2) associates or shareholders legally mandated to represent other associates or shareholders; and (3) parties acting as judicial administrators, liquidators, tutors, guardians, custodian or distraint-administrators for the principal.

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 Romanian Agency Law provide for such obligation?

Yes. See, Art. 2078 par. (2).

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

Yes. Art. 2078 par. (1) CC provides that the agency agreement is to be concluded in writing, notarization being possible but not required. However, the law expressly states that the written form is, unless otherwise provided, only necessary to prove the existence and contents of the agreement (i.e. not for validity). Initially, Romanian courts have held that because only the written form can be used *ad probationem*, conclusion of the agreement in writing is indirectly necessary given that neither the existence nor the contents of the agreement could be proven otherwise.* Subsequently, the courts have allowed proof of the existence and contents of the agency agreement to be made by any means of proof allowed under both the Commercial Code and the Civil Code, including witness statements.**

*Cluj Commercial District Court, decision (commercial) nr. 1043 of 24 February 2011 (reversed by Cluj Court of Appeals, commercial division, decision nr. 260 of 20 December 2011).

**Cluj Court of Appeals, commercial division, decision nr. 260 of 20 December 2011, reversing Cluj Commercial District Court, decision (commercial) nr. 1043 of 24 February 2011; Cluj Commercial District Court, decision nr. 174 of 9 December 2013.

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 Romanian Agency Law?

Yes. See, Art. 2079, par. (1) and (2), letters a) - c) CC.

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

Yes. Art. 2079 par. (2) letters d) - e) CC provide that: (1) the agent must keep separate records for each principal; and (2) the agent must store the goods or samples in a way which makes their identification possible. Art. 2079 par. (4) provides that if it is impossible for the agent to continue the performance of his obligations under the agreement, he must notify the principal of such as soon as possible, under penalty of damages.

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

Yes. Art. 2079 par. (1) CC provides that the agency agreement is to be performed by the agent himself or by his employees. With regards to appointment of sub-agents, art. 2079 par. (3) CC provides that, in respect of total or partial delegation/substitution of the agent, the rules with respect to mandate agreements shall apply. This means that appointment of sub-agents is only possible : (1) if expressly authorized by the principal; or (2) if not expressly authorized, it is notified to the principal as soon as possible, where: (i) it is due to unforeseen events causing an impossibility for the agent to fulfill his obligations; and (ii) it is impossible to notify the principal in advance of such events; and (iii) it can be presumed that the principal would have agreed to the sub-appointment had he known of the events which make it necessary. Where the sub-appointment is authorized by the principal, the agent is only liable for the diligence in choosing the sub-agent and in instructing him. Where the sub-appointment is not authorized, the agent is personally liable for all the sub-agents actions. In either case, the principal can also claim directly against the sub-agent.

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 Romanian Agency Law?

Yes. See, Art. 2080 par. (1), (2) letters a) – c), and par. (3) CC.

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

Yes. Art. 2080 par. (3) CC provides the principal's obligation to pay the agent's remuneration as and when provided by law or the agreement.

B.2 - LEVEL AND CALCULATION BASIS OF REMUNERATION

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

No.

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 Romanian Agency Law?

Yes. See, Art. 2082 par. (3) and (4) CC with mention of the fact that, under Romanian Agency Law, in the absence of an agreement on the level of the remuneration, the remuneration that the commercial agent is entitled to and where reference to determine such is made to remuneration customarily allowed, this can refer not only to the place where he carries on his activities but also to the goods with which the agreement is concerned.

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 Romanian Agency Law?

Yes. See, Art. 2082 par. (2) CC.

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

No. Although Art. 2082 par. (2) CC seems to suggest that the remuneration of the agent may only be fixed or variable (i.e., commission), par. (5) refers to the agent's remuneration being in whole or in part in the form of a commission, thus indicating that a remuneration combining fixed and variable components is also possible.

Q16. Does the Romanian 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 Romanian Agency Law?

Yes. See, Art. 2083 letters a), b) CC.

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 Romanian Agency Law?

Option 2. See, Art. 2083 letter c) CC.

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 Romanian Agency Law?

Yes. See, Art. 2084 par. (1) CC.

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

Yes. See, Art. 2084 par. (2) CC.

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 Romanian Agency Law?

Yes. Art. 2085 par. (1) CC expressly makes reference to the right to commission being born when (however not to the extent that) one of these conditions is met.

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

No. Art. 2085 par. (1) CC provides that, unless otherwise agreed by the parties, the agents right to receive a commission is born either (i) when the principal executes his part of the transaction, or (ii) he should have, according to his agreement with the third party, or (iii) when the third party has executed his part of the transaction. Therefore, under Romanian Agency Law, it is irrelevant, for the agent's right to a commission being born, whether, after the principal has executed his part of the transaction (even if before the moment when, according to the principal's agreement with the third party, the principal should have executed his part of the transaction), the third party does indeed execute his part of the transaction or the moment is reached when, according to the agreement between the principal and the third party, the third party should have executed his part of the transaction. As, under Romanian Agency Law, the three conditions are alternative, and, under Art. 10 (2) of the Directive, the premise is that the principal has executed his part of the transaction, the agent's right to a commission under Romanian Agency Law will always be born as soon as the premise in Art. 10 (2) of the Directive is realized, irrespective of the subsequent behavior of the third party.

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 Romanian Agency Law apply the same deadline?

Yes. See, Art. 2085 par. (2) CC.

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 Romanian Agency Law impose the same restriction on the parties?

Yes. See, Art. 2094 CC.

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 Romanian Agency Law impose these cumulative conditions?

No. Art. 2086 par. (2) CC provides that the agent's right to commission is extinguished or reduced proportionally with the degree of non-execution where the contract between the third party and the principal is not executed due to a fault by the agent. Therefore, in all cases where the contract between the third party and the principal is not executed due to a fault which is not attributable to the agent, the agent's commission is due (art. 2086 par. (1) CC).

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

Yes. Art. 2086 par. (3) CC provides that in case of partial execution of the transaction by the third party, the agent is only entitled to a commission reduced proportionally with the degree of non-execution, irrespective of any fault of the agent.

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

Yes. See, Art. 2086 par. (4) CC.

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 Romanian Agency Law?

No. Art. 2087 par. (1) CC provides that the principal must, at the end of each quarter, send to the agent copies of the invoices issued to third parties, including a description of the calculation of the commission. However, Art. 2087 par. (2) CC indicates that only upon request of the agent must the principal also promptly communicate the information necessary for the calculation of the commission, including relevant excerpts of its accounting records.

Q31. Does Romanian 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. 2087 par. (3) CC.

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

Yes. See, Art. 2087 par. (2) CC.

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

No.

Q35. Does Romanian 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?

No.

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 Romanian Agency Law impose these cumulative criteria?

Yes. See, Art. 2075 par. (2) and (3) CC.

Q38. Does Romanian 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 Romanian Agency Law?

Yes. See, Art. 2075 par. (4) CC.

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 Romanian Agency Law impose any such restrictions?

Yes, both. Art. 2093 par. (1) CC provides that non-compete clauses are not enforceable when, in the absence of

exceptional reasons (which make continued collaboration impossible) in case of termination without notice: (1) the principal unilaterally terminates the agreement without respecting the legal or contractual notice period, without serious reason for not respecting the notice period and without informing the agent of this reason; or (2) the agency agreement is terminated due to a fault by the principal. Art. 2093 par. (2) CC provides that upon request of the agent the court may, while taking into account the legitimate interest of the principal, set aside or limit the non-compete clause when its effects on the agent are serious and obviously inequitable.

Q41. Does Romanian 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 Romanian 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. Romanian Agency Law does not specifically provide for such a possibility. However, reference can be made to Art. 2052 par. (2) CC concerning commission agreements, including an express obligation of the commissioner to guarantee the execution of the agreement by the third party. This is a general provision of law that also (in theory) applies to agency agreements according to Art. 2095 par. (1).

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

Yes. Art. 2052 par. (2) CC provides that the assuming such obligation is subject to a special „for guarantee" or „for credit" commission or any other such commission as agreed by the parties or, absent such agreement, by the court, taking into account the context and the value of the guaranteed obligation.

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 Romanian Agency Law?

Yes. See, Art. 2088 CC.

Q46. Does Romanian 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 Romanian Agency Law?

Yes. See, Art. 2089 par. (1) CC.

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 Romanian Agency Law?

No. Art. 2089 par. (3) and (4) CC provide that the notice period is 1 month for the first year and an additional month for each subsequent year commenced, with a maximum of 6 months. This means that only for the seventh year commenced there would not be an additional month of notice period added.

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 Romanian Agency Law?

Yes. See, Art. 2089 par. (4) CC.

Q50. Can the parties agree to a shorter notice period?

No.

Q51. According to Romanian 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 Romanian Agency Law?

Yes. See, Art. 2089 par. (5) CC.

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 Romanian Agency Law?

Yes. See, Art. 2089 par. (6) CC.

Q54. Does Romanian 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 Romanian Agency Law?

Yes. See, Art. 2089 par. (7) CC.

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 Romanian Agency Law?

No. Art. 2090 CC provides only for immediate termination where exceptional circumstances arise that make collaboration between the principal and agent impossible. These circumstances must not fall under force majeure or unforeseeable circumstances and all damages incurred by the other party need to be covered. In such a case termination is effective as from the moment the written notification of termination is received.

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

No.

Q58. Does Romanian 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. Art. 2094 CC does not include Art. 2090 CC as one of the provisions from which the parties may not derogate to the detriment of the agent.

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

Yes. Romanian Agency Law does not make any specific reference to such possibility, which has led some authors to assume that the general provisions on termination for cause (art. 1521 CC) would apply. This would seem even more the case given that the mention of Art. 2090 CC was apparently intently left out of the enumeration of provisions which cannot be derogated from to the detriment of the agent, thus apparently allowing additional causes for termination be included in the agreement.

However, upon adopting the Romanian Agency Law, the legislator has also abrogated the former Law no. 509/2002 concerning permanent commercial agents, which specifically provided, in Art. 21 par. (1), for termination of the agency agreement for serious breach of contract. Specific renunciation to such express provision in the new Romanian Agency Law could suggest that the intention was not to allow termination for cause in any other situation than as provided under Art. 2090 CC.

Termination for cause can operate only for a significant breach of the obligations or, in the case of continuing contracts, for repeated less significant breaches. Termination for cause operates by written notification of the defaulting party when said party is by law in default or when that party did not fulfill his obligation in the term indicated in the notification. The termination notification must also be issued within the statute of limitations for the corresponding claim.

Q60. Is prior judicial intervention required in order for the termination of the agreement to take effect?

No. Under general civil law, termination for cause can take effect without judicial intervention where parties have agreed to such.

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

Yes. First of all, according to art. 2090 par. (1) CC termination must be due to circumstances which are „exceptional", which suggests that such were not foreseeable upon entering the agreement. Secondly, these circumstances need to be such so as to make collaboration between the principal and the agent impossible. Thirdly, the circumstances must not qualify as force majeure or unforeseeable circumstances. Moreover, in case such termination without notice operates, all damages incurred by the other party need to be covered. Finally, termination in such case operates from the moment the written notification of termination is received.

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 Romanian Agency Law provide for this criterion?

Yes. See, Art. 2091 par. (1) letter a) CC.

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 Romanian Agency Law provide for this criterion?

Yes. See, Art. 2091 par. (1) letter b) CC.

Q64. Is under Romanian 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. Art. 2091 par. (1) letter b) CC provides that the limitation of the professional activity of the commercial agent due to a non-compete clause in the agency agreement is a factor that needs to be taken into account when evaluating whether the general condition, of the indemnification being equitable, is met. There is no specific provision to the effect that the existence of the non-compete clause would allow for a legal presumption of equitability of the indemnification. Courts have, however, considered that the mere existence of the non-compete clause makes the indemnification equitable.

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

Yes. There is precedent to the effect that, even where the agency agreement was terminated prior to the expiry of one year, indemnification to the agent was set equivalent to 12 times the average remuneration he has received for each month the agency agreement was in effect.*

With respect to the test applied by the Romanian courts in consideration of Art. 17(2)(a) Directive (both by reference to Art. 22 Law no. 509/2002 and by reference to Art. 2091 Romanian Agency Law), the courts seem to prefer a step-by-step analysis of the conditions provided by the statute, as follows:

1. has the agent brought the principal new customers or has he significantly increased the volume of business with existing customers – courts note that the conditions are alternative, not cumulative, i.e. it is sufficient that the agent brought new customers or has significantly increased the volume of business with existing customers;
2. the principal continues to derive benefits from the business with such customers – courts have verified if, taking into account the duration for the execution of the transactions intermediated by the agent, such would be likely to still produce effects after the termination of the agency agreement;
3. these benefits are substantial – courts have analysed this by reference to the value of the commission received by the agent during the performance of the agency agreement, the principal's market share, the number of clients the agent has procured for the principal and other relevant financial indicators;
4. that the indemnification be equitable – courts have noted that the equitable character of the indemnification needs to be assessed on a case-by-case basis, taking into account all circumstances, the two indicated by the legal text being just two examples of such which need not, obviously, be cumulatively met. Commission lost by the agent was weighed by the Romanian courts taking into account the commission received during the

contractual period and the average duration of such agreements in the specific business sector. In respect of the existence of a non-compete clause, the courts have held that the mere fact that such clause exists and is likely to be applied in the sense of restraining the commercial agent's commercial activity for a period of time (courts have considered even a 1 year non-compete after a 5 year-long agency agreement was considered as restrictive enough to cause the indemnification to be equitable), is sufficient to consider the indemnification of the commercial agent as equitable.**

*See Bucharest Tribunal, 6th civil division, decision no. 4706 of 7 June 2013

**See Bucharest Tribunal, 6th civil division, decision no. 5288 of 2 July 2013

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 Romanian Agency Law?

Yes. See, Art. 2091 par. (2) CC.

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 Romanian Agency Law?

Yes. See, Art. 2092.

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 Romanian Agency Law?

Yes. Art. 2091 par. (5) CC provides that the right to indemnification is extinguished if neither the agent nor his successor notifies (mise en demeurre) the principal of his right to indemnification within 1 year following the termination of the agency agreement. A claim for compensation for damage would fall under the general statute of limitations for claims for monetary damage which is of 3 years.

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 Romanian Agency Law?

Yes. See, Art. 2091 par. (3) CC.

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 Romanian Agency Law?

No. There is no specific mention in the Romanian Agency Law, however the default regime under general law applies (Art. 1322 CC).

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 Romanian Agency Law take the same circumstances into account?

No. Although not specifically provided under Romanian Agency Law, these circumstances can fall under the general rule of the complete recovery of damages incurred as a result of an illicit act. According to Art. 1385 CC, damages include losses actually suffered, missed benefits, expenses made to avoid or limit damages incurred. Damages can also be awarded for a future loss, if its occurrence is certain. Where the illicit act has caused a loss of chance to gain an advantage or to avoid a loss, reparation can be granted proportionally to the possibility of that chance materializing.

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 Romanina Agency Law?

Yes. See, Art. 2091 par. (4) CC.

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 Romanian Agency Law impose the same restriction on the parties?

Yes. See, Art. 2094 CC.

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

Yes. Parties are, in principle, free to determine the scope of their claims in court and the court vested with the claim is bound by the procedural principle of availability, whereby the court can only rule on what the parties have indicated in their claims and defenses. Thus, in theory, an agent can choose to solely ask the court to rule on either indemnification or compensation or both.

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

Yes. Art. 2091 par. (5) CC provides that the right to indemnification is extinguished if neither the agent nor his successor notifies (mise en demeurre) the principal of his right to indemnification within 1 year following the termination of the agency agreement. A claim for compensation for damage would fall under the general statute of limitations for claims for monetary damage which is of 3 years.

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 Romanian 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?

Yes. Romanian courts have held that disputes concerning the validity and enforceability of provisions in agency agreements which are governed by norms of ordre public (e.g. provisions which were entered into without regard to the limits specifically provided by law and which could not be derogated from) are not subject to arbitration.*

*Bucharest Court of Appeals, 6th civil division, decision nr. 41 of 5 March 2009.

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

No. Romanian Agency Law does not provide for such specific statute of limitations, the general statute of limitations being applicable.

Part 6: Additional comments

Art. 2077 par. (1) CC provides that the agent can receive complaints regarding the goods sold, or services provided by the principal, and in such a case is obliged to inform the principal of such in a prompt manner. Art. 2077 par. (2) provides that the agent can take security on behalf, and in the interest of the principal and all other measures necessary to conserve his rights. Art. 2076 CC provides that the agent cannot make sales on credit, nor apply discounts or postponements to debts owed to the principal.