

# Agency Q&A: Ireland

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This Q&A provides country-specific commentary on *Practice note, Agency: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

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## Definition and authority

1. How is the relationship between agent and principal defined under national law?

The term "agent" is used broadly to describe many different types of role. A person may be called an agent, but might not, for example, have the authority to bind the principal and not be considered an agent in law. Conversely, a person may be considered an agent in law even where they are not called an "agent". The main determinative factor in considering whether a person is an agent in law is whether the agent has the ability to alter the legal relations of their principal with third parties.

The primary source for the definition of the relationship between an agent and a principal is the contractual agreement between the parties.

Where a relationship is one of agency, the relationship between the agent and the principal is considered to be a fiduciary relationship under Irish law; as such, an agent owes many duties to the principal (see [Question 10](#) for more detailed discussion).

An agent also has the basic rights to remuneration, a lien and an indemnity under the common law.

There are various different types of agent under Irish law, including:

- *Del credere* agents.
- Mercantile agents.
- Factors.
- Those acting on behalf of companies, such as officers or directors.
- Partners in a partnership arrangement.

- Commercial agents.

There is a specific definition of a commercial agent in Irish legislation, contained in the European Communities (Commercial Agents) Regulations 1994 and 1997 (the Commercial Agents Regulations), which transpose the Commercial Agents Directive (86/653/EEC) into national law. A commercial agent is a "self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person" or "to negotiate and conclude such transactions on behalf of and in the name of that principal".

To consider the application of the Commercial Agents Directive through the Commercial Agents Regulations in Ireland, it is useful to separate out the three main elements of this definition further:

- **"Self-employed intermediary"**. The term self-employed in this context is taken to include companies as well as individuals, in accordance with EU law. In the Irish case of *Cooney & Co v Murphy Brewery Sales Ltd*, Costello P stated that he had "no doubt" that the plaintiffs, two companies, would be regarded as commercial agents within the meaning of the Directive (*unreported, High Court, Costello P, 30 July 1997*). Therefore, a "self-employed intermediary" may include an individual sole trader, a partnership or registered company.
- **"Goods"**. The definition under the Commercial Agents Regulations specifically excludes those agents that promote or sell services.
- **"Negotiate"**. The term "negotiate" in the context of commercial agency has been interpreted widely by the Irish courts. In the case of *Kenny v Ireland ROC Limited*, Clarke J found that "active negotiation" or bargaining does not need to take place for the Commercial Agents Regulations to apply; rather, the test that should be applied in considering where a commercial agent has negotiated a sale was whether "having regard to the manner in which the sale of goods is carried out, it is necessary for the agent to bring a material level of skill to the activity" (*[2005] IEHC 24*).

The following are specifically excluded from the scope of the Commercial Agents Directive and the Commercial Agents Regulations:

- An officer or director of a company, who has the authority to bind the company.
- A partner, who has the authority to bind their partner(s).
- A receiver, receiver and manager, a liquidator or an examiner, or a trustee in bankruptcy.
- A commercial agent whose activities are unpaid.
- A commercial agent operating on commodity exchanges or in the commodity market.
- A consumer credit agent or a mail order catalogue agent for consumer goods, whose activities are considered to be secondary (there is a rebuttable presumption that these activities are secondary). (Article 2(2) of the Commercial Agents Directive allows EU member states to exclude from the application of the Directive the activities of commercial agents that are considered to be secondary under national law; these are the only activities that Ireland opted to exclude as secondary.)

2. What authority under national law does an agent have to bind the principal by its acts? How far can an agent bind its principal to third parties, when it does not have express authority from the principal to do so?

The manner in which the agent is conferred with authority to bind the principal, and what type of authority is conferred on them, depends on many factors, including what type of agency it is and the terms of the agency agreement between the parties.

Broadly, there are a number of main types of authority by which the agent may bind the principal at common law:

- **Actual authority.** An agent has actual authority where its actions are authorised by its principal either expressly or impliedly.
- **Apparent or ostensible authority.** This arises where an agent is represented to a third party as having actual authority, even where it does not actually have this authority; in this case, it may bind its principal. Three conditions must be met for the principal to be bound by the agent acting on apparent authority:
  - there must be a representation that the agent has the authority which is wider than their actual authority;
  - the representation comes from a person who has authority to make the representation such as the principal themselves; and
  - the third party commits itself on the basis of this representation.
- **Usual and customary authority.** An agent has usual authority where they have authority that a person in their position usually has, such as authority implied from a particular trade custom.
- **Ratification.** This is authority that is conferred on the actions of an agent after the fact, where the agent did not have authority at the time to bind the principal, but the principal then ratifies and adopts the actions and so is bound by them from that point.
- **Authority of necessity.** This is authority that the agent does not usually hold, but where an emergency situation arises, particularly where the property of the principal is at risk, the agent may be authorised to take urgent action where it cannot obtain express authority from the principal.

## Regulation and legal formalities

3. Are agencies specifically regulated by national law? Is any legislation pending, which is likely to affect agency arrangements? Are there any formalities that a principal must comply with when appointing an agent, for example, any registration or disclosure requirements?

The Commercial Agents Regulations specify that a commercial agency contract will not be valid unless it is evidenced in writing.

There are no specific formalities required for any other type of agency agreement, other than those mandatory for an enforceable contract (that is, that where no consideration is being given, the contract should be executed as a deed).

No further legislation is pending in Ireland that is likely to affect agency arrangements.

## Competition law

4. Are there any national laws or regulations that would affect the following business practices:

- Grant of exclusive territory?
- Tied selling?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Refusal to deal?
- Imposition of minimum and maximum prices?
- Imposition of minimum sales targets?

Section 4 of the Competition Act 2002 (Competition Act) prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in trade in goods or services in the state.

The prohibition mirrors the wording of Article 101 of the Treaty on the Functioning of the EU (TFEU).

Since only agreements "between undertakings" are prohibited, section 4 and Article 101 do not, in principle, apply to the agent's selling or purchasing function in the case of "genuine" agency. This is because in the case of a "genuine" agency agreement, the agent acts **on behalf of** the principal, and therefore forms part of the activities of the principal undertaking when it concludes contracts on the principal's behalf. It should be noted that section 4 and

Article 101 continue to apply to any agreements concerning the relationship between the principal and the agent as independent undertakings (for example, non-compete obligations imposed on the agent).

The European Commission's Guidelines on Vertical Restraints (the Guidelines) provide guidance on assessing whether an agreement is a "genuine" agency agreement. As noted in the Irish Competition and Consumer Protection Commission's (CCPC) Notice in Respect of Vertical Agreements, the Guidelines generally reflect the position in Irish law.

The Guidelines note that the key factor in assessing whether an agreement is a "genuine agency agreement" is the degree of risk borne by the agent in relation to contracts concluded on behalf of the principal. The agreement will be considered to be a genuine agency agreement if:

- The goods to which the contract pertains do not vest in the agent.
- The agent does not bear significant risks in relation to contracts concluded on behalf of the principal (other than risks relating to providing agency services in general).

On the other hand, where the agent, for example, contributes to the cost of the contract goods, or maintains stocks of the contract goods at their own risk, the relationship will not be considered to be one of "genuine" agency. It is necessary to carefully consult the Guidelines when assessing whether a relationship is one of agency or not.

In the case of a "genuine" agency agreement, each of the following types of obligation on the agent's part will be deemed to form part of the agency agreement and will not, therefore, fall within the scope of section 4 or Article 101:

- Limitations on the territory into which the agent may sell goods or services.
- Limitations on the customers to whom the agent may sell goods or services.
- Restrictions on the prices and conditions at which the agent may sell or purchase goods or services.

Where the agreement is not a genuine agency agreement, section 4 of the Competition Act and Article 101 TFEU apply. As the agreement is between two operators at different levels of the distribution chain, it is an agreement "between undertakings" within the meaning of those provisions. In this case, obligations such as retail price maintenance (minimum or fixed prices) will almost certainly fall foul of section 4 or Article 101, while other obligations such as territorial restrictions and maximum prices should be assessed for potential anti-competitive effects. These obligations will be compatible with section 4 where their pro-competitive effects outweigh any anti-competitive effects. Minimum sales targets will likely be justifiable, but may cause competition concerns where they amount to "single branding".

The CCPC has adopted a Declaration on Vertical Restraints (the Declaration), which provides that certain categories of vertical agreements (that is, agreements between undertakings at different levels of the distribution chain) are deemed by the CCPC not to be prohibited by section 4. The Declaration largely reflects the European Commission's Vertical Agreements Block Exemption (*Regulation 330/2010*) (the Block Exemption).

It should be noted that the exemption provided by the Declaration and the Block Exemption only applies where:

- The market share of the buyer and the seller are each below 30%.

- The agreement does not fall within the types of agreement specified by both the Declaration and the Block Exemption, which cannot be exempted even where the 30% thresholds are satisfied (for example, the restriction of "passive" sales (such as unsolicited online sales) between exclusive territories).

Competition law may also apply to an agency situation where one of the parties is dominant. Section 5 of the Competition Act and Article 102 TFEU prohibit the abuse of a dominant position. Where an undertaking is dominant (for example, because it has a high market share), a refusal to deal or tied selling may be considered abusive in specific circumstances.

5. Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the agency agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

Restrictive covenants and non-compete obligations may infringe the prohibition on anti-competitive agreements between undertakings in section 4 of the Competition Act and Article 101 TFEU. As noted in [Question 4](#), section 4 applies to agreements between principal and agent which do not directly relate to the contracts concluded on behalf of the principal, but which instead concern the relationship between the agent and the principal. These agreements constitute "agreements between undertakings" within the meaning of section 4.

A non-compete clause that applies during the term of the agency relationship may fall within the Declaration or the Block Exemption, if each of the parties' respective market shares are below 30%. However, the duration of the clause must not exceed five years (clauses which are tacitly renewable beyond five years will be deemed to have an indefinite duration).

A non-compete clause that applies post-termination of the agency relationship will only be exempt under the Declaration and the Block Exemption where the clause:

- Relates to goods or services which compete with the contract goods or services.
- Is limited to the premises and land from which the agent has operated during the contract period.
- Is indispensable to protect know-how transferred by the principal to the agent.
- Is limited to one year following termination.

Where the Declaration and the Block Exemption do not apply, the compatibility of the restriction with section 4 and Article 101 should be considered. Parties should assess whether the restriction may lead to a foreclosure effect on the markets where the contract goods are bought or sold.

The appointment of an exclusive agent by the principal is unlikely to lead to anti-competitive effects, but provisions preventing the agent from acting for other principals, or post-term non-compete provisions, require close examination for compatibility with section 4.

Under the common law, a restraint of trade clause will only be upheld where the geographic and temporal scope of the clause is reasonable (*Ryanair DAC v Bellew* [2019] IEHC 907). Any post-termination non-compete obligations should:

- Be limited to the area in which the agent sold the contract goods.
- Apply only to the types of goods sold by the agent.
- Only apply for as long as is reasonable in the circumstances.

Under Article 20 of the Commercial Agents Directive (as implemented by the Commercial Agents Regulations), a restraint of trade clause that restricts a commercial agent (as defined in the Regulations) following termination of the agency relationship will only be valid if:

- It is in writing.
- It relates to the geographical area or the group of customers and the geographical area entrusted to the agent and to the kinds of goods covered by their agency under the contract.
- Its duration does not exceed two years following termination of the agency contract.

## Employment issues

6. Is there a risk that an agent may be treated as an employee of the principal?

Although a label alone is insufficient to determine the relationship between the parties, genuine agency relationships should not give rise to an employment relationship. This is particularly the case where the agent:

- Operates on their own account and assumes risk in relation to profit and loss.
- Provides their own equipment and insurance.
- Is responsible for their own tax arrangements.

However, in circumstances where an argument arises as to the employment status of a so-called agent, a court or tribunal will look beyond the contractual relationship to assess the reality of the arrangement on the ground. This involves examination of a number of factors and tests (the importance of each factor will depend on the particular circumstances of the case):

- **Mutuality of obligation.** There must be mutuality of obligation between an employer and the employee (meaning an obligation on the employer to give the individual work, and an obligation on the individual to

carry out this work) (see *Minister for Agriculture v Barry* [2009] 1 IR 215; *Henry Denny & Sons Ltd t/a Kerry Foods v Minister for Social Welfare* [1998] 1 IR 34).

- **Control.** An individual will be considered to be an employee if they are subject to the command of the purported employer as to the way in which they do their work (see *Roche v Kelly* [1969] IR 100).
- **Integration.** If the work of the relevant individual is merely accessory to the business and not integrated into it, then the individual will not be deemed to be an employee (see *In Re Sunday Tribune* [1984] IR 505).

The "multi-factorial" test has also been used as a factor to determine an employment relationship. This test says that an employment arrangement arises if all the criteria below are met:

- An individual agrees that in consideration of a wage or other remuneration, they will provide their own work and skill in the performance of some service for another.
- An individual agrees that in the performance of that service they will be subject to the other's control to a sufficient degree to establish an employer/employee relationship.
- The other provisions of the contract are consistent with it being a contract of employment.

(See *Ready Mixed Concrete v Minister for Pensions* [1968] 2 QB 497; *Kirwan v Dart Industries and Leahy* [M1 UD 1/80].)

## Tax

7. Will a foreign principal that appoints an agent directly in the national territory be regarded as carrying on business for tax purposes in that territory?

A foreign principal is not regarded as carrying on a business for tax purposes unless it carries on a trade in Ireland through a branch or agency. The foreign principal will be chargeable for business tax purposes in Ireland where the agent both:

- Carries on a trade on behalf of the foreign principal.
- Is not of independent status acting in the ordinary course of its business.

An example of a situation where this could arise is where a sales agent is given authority to conclude contracts in the name of a foreign principal and the sales agent's activities are performed wholly or almost wholly on behalf of the foreign principal over a long period of time, with the foreign principal exercising significant control over the sales agent.

8. Are any withholding or other taxes levied in the territory on remittance monies? When and by whom are they payable?

Monies remitted by an agent to a foreign principal under most commercial arrangements will not give rise to any Irish withholding taxes.

However, withholding taxes can be levied in Ireland in certain circumstances; for example:

- On the payment of rent to non-resident landlords.
- On the payment of interest on bank deposits (deposit interest retention tax).
- On the disposal of certain capital assets by non-residents.
- On payments made by a principal contractor to a sub-contractor in the construction, forestry or meat processing industries.
- On payment of patent royalties.
- On the making of certain pure-profit annual payments.
- On distributions made by Irish resident companies.
- On payments of employment income.

The liability to account for withholding tax usually arises at the time of payment of the amount to the foreign principal.

9. Will there be any difficulties in a domestic agent making payment to a foreign principal, either in local currency or in the currency of the principal's country? Are there any exchange controls in operation?

There should be no difficulty with a domestic agent paying a foreign principal either in Euro (the local currency in Ireland) or in the currency of the principal's country. There have been no exchange controls in operation in Ireland since their abolition in December 1992. There are also no restrictions on the repatriation of earnings, capital, interest or royalties. Repatriation payments can be made in any currency. Approval is not required for foreign investment or capital importation.

## Duties of the agent

10. What duties does national law impose on an agent?

An agent has numerous common law and equitable duties as well as those that have been imposed by national legislation.

- **Common law implied duties.** These include the duty of the agent to:
  - obey the lawful instructions of the principal;
  - act only within the limits of its authority; and
  - exercise reasonable care (*Chaudhry v Prabhakar* [1988] 3 All ER 718).
- **Fiduciary duties implied by equity.** These include the duty of the agent to:
  - avoid conflicts of interest with those of its principal (*Boardman v Phipps* [1967] 2 AC 46);
  - not make secret profit or accept bribes (*Lister v Stubbs* (1890 45 Ch D 1)); and
  - account for its principal's property under the agent's control (*Yasuda Fire and Marine Insurance Company of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174).

Legislation may also place duties on the agent. The Sale of Goods and Supply of Services Act 1980 implies a duty on an agent to act with reasonable care when acting in the course of business. The Commercial Agents Directive also places a number of duties on a commercial agent similar to those implied under common law, including:

- To look after its principal's interests and to act dutifully and in good faith.
- To make proper efforts to negotiate and to conclude transactions which are authorised by the principal (if appropriate).
- To communicate all necessary information available to the agent to the principal.
- To comply with the reasonable instructions given by the principal.

## Duties of the principal

11. What obligations does national law impose on a principal?

The obligations imposed on a principal depend on the terms of the agency agreement, the type of agency and whether any particular law applies to it. At common law and in equity, the principal is not subject to the same extensive duties as the agent; however, there are a number of implied duties to which the principal must adhere, such as:

- Paying the agent remuneration and/or commission (if applicable).
- Paying all the expenses of the agent properly incurred in discharging its agency obligations.
- Indemnifying the agent against all liabilities incurred by the agent in the performance of the duties which are within the scope of the agent's authority.
- Giving the agent reasonable notice on termination of the contract where no notice period is set.

The Commercial Agents Regulations also place a number of duties on the principals of commercial agents; these include that the principal must:

- Act dutifully and in good faith in its relations with the agent.
- Provide its commercial agent with the necessary documents relating to the goods concerned.
- Obtain for the agent the information necessary for the performance of the agency contract.
- Notify the agent within a reasonable period once it anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could have normally expected.
- Confirm (within a reasonable period) its acceptance, refusal or non-execution of a commercial transaction which the commercial agent has procured for the principal.

These duties cannot be derogated from.

## Remuneration

12. How does national law regulate the payment of remuneration to the agent? Does national law contain any compulsory provisions concerning the level of remuneration?

The payment of remuneration to the agent would largely be dictated by the terms of the contract between the agent and the principal.

At common law, where it has been agreed between the parties that an agent is to be paid but the amount of remuneration has not been expressly agreed, a term is implied into the agreement that a reasonable sum will be due (*Henehan v Courtney (1967) 101 ILTR 25*).

In respect of commercial agency relationships, the Commercial Agents Directive requires that, if there is no agreement on remuneration, a commercial agent will be entitled to the remuneration that commercial agents are customarily paid for the goods forming the subject of the agency contract. In the absence of a customary practice, the agent will be entitled to "reasonable" remuneration.

## **Lien**

There is generally a right of particular lien at common law, and some types of agent may have a right of general lien (see [Question 15](#)).

## **Commission**

There may or may not be an agreement as between the agent and the principal in respect of the payment of commission. Where the agent receives remuneration which varies with the number or value of business transactions, this will be considered a commission under the Commercial Agents Directive. Where the agent earns commission, the manner in which this is paid to the agent is regulated in Ireland, provided the agent is a commercial agent.

A commercial agent is entitled to commission on all commercial transactions concluded in the course of the agency contract where the transaction is concluded either:

- As a result of its actions.
- With a third party whom the agent has previously acquired as a customer for the principal for transactions of a similar kind.

The Commercial Agents Regulations specify that a commercial agent will also be entitled to commission on transactions concluded during the term of the agency contract where the agent has an exclusive right to a specific geographical area or group of customers and the transaction was concluded with a customer in that area or group.

The commercial agent is also entitled to commission on transactions concluded after the termination of the agency contract if:

- The transaction is mainly attributable to the work of the commercial agent during the period of the contract.
- The order of a third party whom the agent had previously acquired as a customer for similar transactions reached the principal or the agent before the agency contract expired.

The commission will become due once the transaction has, or should have, been executed. The commission is to be paid not later than the last day of the month following the quarter in which it became due.

13. How does local law regulate corrupt gifts and secret commissions?

## Corrupt gifts

In Ireland, the principal piece of legislation which deals with corruption and bribery is the Criminal Justice (Corruption Offences) Act 2018. This legislation creates a number of corruption-related offences. These include:

- **Active and passive corruption offences.** It is an offence for any person to corruptly give to, or accept from, a person, a "gift, consideration or advantage" as an inducement or reward for any person doing an act in relation to his or her office, employment, position or business.
- **Facilitating gift, consideration or advantage.** It is an offence to give a gift where it is known or it ought to be known that the gift will be used to facilitate the commission of a corruption offence.
- **Corporate liability offences.** These include strict liability corporate offences in circumstances where an officer, employee, agent or subsidiary of a corporate entity commits an offence with the intention of benefiting the corporate entity.

The Criminal Justice (Corruption Offences) Act 2018 defines acting "corruptly" broadly, including to act with improper purpose or by influencing another person by means of:

- Making a false or misleading statement.
- Withholding, concealing, altering or destroying a document or other information.
- By any other means.

The acceptance of hospitality by public officials is governed by the Ethics in Public Office Act 1995. Public officials are required to disclose all gifts received in excess of EUR650. Any gift exceeding this amount is deemed to vest in the state. However, a number of codes of conduct for public officials advise that no gifts whatsoever should be accepted by public officials if their acceptance may interfere with the honest exercise of official duties.

## Secret commissions

Under the principles of equity, an agent must account to the principal for all profits made from its position (*Boardman v Phipps* [1967] 2 AC 46). This is a strictly applied rule that also applies to unpaid agents. It is irrelevant that the agent acted in good faith or that the principal suffered no loss, or indeed even benefited from the agent's actions: an agent may keep a profit only when it had been disclosed to the principal and the principal consented to the agent keeping it.

This principle also applies to secret commissions. Although the Irish courts have not clarified the position in Ireland, *FHR European Ventures LLP v Cedar Capital Partners LLC* set out the position in the UK that bribes or secret commissions received by an agent give rise to a proprietary right on the part of the principal, not merely a claim for

compensation under equity ([2014] UKSC 45). A proprietary remedy would allow a principal to gain priority over the claims of unsecured creditors. While the decision in *FHR European Ventures* is not binding on an Irish court, it would be of persuasive authority in Ireland.

Under the Commercial Agents Directive, a commercial agent is bound to look after the interests of the principal and act dutifully and in good faith. This duty may not be derogated from.

## Duration

14. What term is commonly agreed for an agency? Does national law regulate the length of notice periods to terminate an agency agreement?

The term of the agency agreement is a matter for the parties to agree between themselves. Generally, an agency agreement is for a fixed term. The Commercial Agents Directive provides that the lapse of a fixed term contract, where both parties continue to perform their obligations under the contract, will give rise to a contract for an indefinite term.

Reasonable notice is required to terminate an agency agreement under common law, in the absence of an express term; however, this will depend on the circumstances of the arrangement (*Alpha Lettings Ltd v Neptune Research & Development Inc* [2003] EWCA Civ 704).

Where a commercial agency agreement has an indefinite term, particular minimum notice periods for termination apply, which must be adhered to and may not be derogated from:

- A contract of one year's duration requires one month's notice.
- A contract of two years requires two months' notice.
- A contract of three years or more requires three months' notice.

(Article 15, Commercial Agents Directive.)

While the Commercial Agents Directive allows EU member states to fix longer notice periods for contracts of four years and longer, this has not been implemented in Ireland by the Commercial Agents Regulations, so the maximum notice period required is three months.

The Commercial Agents Directive also provides that, where the parties agree on notice periods that are longer than those set out in Article 15(2), the period of notice required for the principal may not be shorter than that to be observed by the commercial agent.

## Rights of ownership

15. Where the agent holds stock or money or other property belonging to the principal:

- Can the principal assert its rights of ownership against third parties, in the event of insolvency of the agent and in the event that the agent has dishonestly disposed of them to third parties?
- To what extent do these rights extend to enable the principal to take the proceeds of sale of that property disposed of by the agent, where the sale was authorised by the principal and where the sale was not authorised by the principal?
- Where the agreement states that the agent shall not become the owner of any goods supplied by the principal, are there any local laws which might override this provision (see *Standard document, Agency Agreement: Cross-border: clause 4.5*)?

## Duty to account

As the relationship between an agent and a principal is fiduciary (see [Question 1](#)), the agent is under a duty to account to the principal for all of the principal's property in its possession. Where the agent wrongfully disposes of that property, the principal may trace its property and claim replacement assets.

However, the duty to account is personal, and the agent is not generally considered to be a trustee of the principal's property in Irish law. This will depend on:

- The agreement between the parties.
- The type of goods being sold (and whether particular goods may be easily identified as being owned by the principal).
- Whether the property was mixed with either the agent's own property or those of other principals, such that it is impossible to attribute a particular sale to the agent or the principal.

If this is the case, the principal will only have an unsecured claim against the agent in the event of insolvency. Where a trust arises, the principal's title to the goods will be clear and the principal may claim ownership over these goods in the event of the agent's insolvency.

## Particular lien

At common law, most agents have the right of particular lien over the goods of the principal to secure payment of any remuneration or indemnity that may be owing to them in respect of those goods.

## General lien

Some agents may have a right of general lien, meaning they will have the right to exercise a lien over any goods of the principal in order to secure a particular payment. Those agents entitled to a general lien include bankers, stockbrokers, solicitors and factors (*Martin v Colfer* [2006] 1 IR 622).

## Right to an indemnity

The right to an indemnity is a right that exists under the common law for agents (not to be confused with the right to an indemnity on the termination of a commercial agency contract under the Commercial Agents Directive, which has not been adopted in Ireland) (*Re Famatina Development Corp Ltd* [1914] 2 Ch 271).

This common law right entitles the agent to an indemnity from the principal against any expenses and liabilities necessarily incurred by the agent on behalf of the principal in performance of its duties. Where the agent receives no compensation, the right will be restitutionary.

There are no local laws that would override *Standard document, Agency Agreement: Cross-border: clause 4.5*.

## Termination

16. What events will be regarded in law as justifying termination of the agency agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

An agency agreement may contain express contractual powers for termination as agreed between the parties. These rights may arise where a contractual breach occurs. There will also be an implied right to terminate with reasonable notice (see *Question 14*).

An agency agreement may be reasonably terminated by operation of law or based on the acts of the parties under common law. The law may operate to terminate the contract in the following circumstances:

- **Expiry of the term.** An agency relationship will come to an end automatically at the end of a fixed term as set out in the agreement. However, this is subject to the parties ceasing to perform their duties under the agreement. For agency agreements to which the Commercial Agents Regulations apply, the agreement will be deemed to be converted into an agency contract of indefinite period where both parties continue to perform their duties after the expiry of an agency contract.
- **Performance.** Where the agency agreement is founded on the performance of a particular task by the agent, the contract will come to an end once this task has been completed.
- **Bankruptcy.** Where the principal is adjudicated bankrupt, this deprives the agent of the authority conferred on them by the principal, and so terminates the agency agreement. An agency agreement may also be terminated by the bankruptcy of the agent in circumstances where the agent is not deemed by the principal to be fit to continue to act.

- **Frustration.** The agency agreement may be terminated where a frustrating event occurs which makes the performance of the agreement impossible (or illegal).
- **Rescission.** The agency agreement may be set aside and the parties put back in the position in which they were in before the agreement was entered into, where there was a misrepresentation by one of the parties on entering into the agreement.
- **Mistake.** The agency agreement may be set aside where a mistake relating to it is so fundamental as to affect the valid formation of the contract.
- **Illegality.** If the agency agreement requires the commission of an illegal act at its execution, or if it becomes illegal, it will be set aside.

A commercial agency contract for an indefinite period may be terminated by either party by giving reasonable notice. The applicable notice periods have been set by Article 15(2) of the Commercial Agents Directive, as transposed by the Commercial Agents Regulations (see [Question 14](#)).

17. What rights does the agent have to compensation or indemnity upon termination of the agency agreement or discontinuation of supply of the products? How is compensation or indemnity for termination/discontinuation of supply calculated? Are there any formalities which must be complied with for lodging a claim for compensation or indemnity?

Article 17(1) of the Commercial Agents Directive gives member states discretion as to whether to allow commercial agents, after the termination of an agency contract, to be indemnified or compensated for damage as a result of the termination. The Commercial Agents Regulations provide for compensation in Ireland in accordance with Article 17(3). Compensation may be awarded where the termination:

- Deprived the agent of the commission it would have earned had the agency agreement been properly performed, while also benefiting the principal.
- Has not allowed the agent to amortise the costs and expenses it incurred for the performance of the agency agreement, on the principal's advice.

## Calculation of compensation

While Article 17(3) provides examples as to where it may be appropriate to award compensation, it provides no guidance as to how this compensation should be calculated, and there is currently no Irish legislation or authority which considers the calculation of this compensation.

As there is no Irish case law providing guidance on how compensation is to be calculated, Irish courts are likely to consider decisions of the courts in England and Wales, which would be of persuasive authority in the Irish courts.

The House of Lords, in the leading authority in the UK, *Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd*, held that the correct quantum is the value of the agency ([2007] UKHL 32). Valuing the agency relationship requires the parties to assess what a hypothetical purchaser might reasonably have been willing to pay for the agency contract as at the date of termination. However, it is not necessary that an actual market for dealing in such agencies exists. In carrying out the valuation assessment, parties should have regard to factors such as:

- The likely future earnings of the agent.
- Whether the market for the relevant products was expanding or declining.

The agency should be valued on a net basis, applying appropriate deductions for costs and expenses incurred by the agent.

An agent must notify the principal of their intention to claim compensation within one year following termination of the contract, or the entitlement to compensation will be lost. Where notification is given, the claim will still be subject to the relevant limitation period of six years.

The Commercial Agents Regulations do not specify the manner in which the principal must be notified of the agent's intent to claim.

Compensation will not be payable in the following circumstances:

- Where the principal has terminated due to the default of the agent that would justify immediate termination.
- Where the agent has terminated the contract for reasons other than age, infirmity or illness, as a result of which they cannot reasonably be required to continue the contract.
- Where the agent, with the agreement of the principal, assigns their rights and duties under the agency contract to another person.

## The agency agreement

18. Are any particular formalities required in relation to agency agreements?

The Commercial Agents Regulations specify that a commercial agency contract will not be valid unless it is evidenced in writing.

No specific formalities are required for an agency agreement, other than those for an enforceable contract (which are that, where no consideration is being given, the contract should be executed as a deed).

19. Where the agent is required by the principal to enter into a guarantee of the debts to the principal of customers that it finds for the principal (*del credere* guarantee) or that it concludes contracts with on behalf of the principal, what formalities and documentation are required to ensure that the guarantee is legally binding? Is any special set of words required for such a guarantee?

In Ireland, a guarantee must be evidenced in writing, and must be signed by either:

- The guarantor.
- An authorised agent of the guarantor.

If the guarantee does not have consideration, it must be executed as a deed.

Where the guarantor is a corporate entity, it must have the power to give the guarantee and the guarantee must be for the commercial benefit of the company.

20. What are the parties called in your jurisdiction?

The terms used for the parties in an agency relationship in Ireland is "principal" and "agent". However, the parties may use different terms in an agency agreement, and the agency relationship will still arise.

21. In your jurisdiction, would it be standard practice for an agent to be obliged to:

- Store the principal's products and, if so, to store them separately from other goods at the agent's own cost see *Standard document, Agency Agreement: Cross-border: clause 3.17*)?
- Insure the principal's property at the agent's own cost (see *Standard document, Agency Agreement: Cross-border: clause 3.18*)?
- Give the principal access to the agent's premises to carry out inspections of the agent's books and records or for inspecting or taking stock of the principal's property (see *Standard document, Agency Agreement: Cross-border: clause 3.23*)?

- Contract with customers on the principal's standard terms and conditions? Would the agent receive protection under local law allowing it to deviate from any such requirement (see *Standard document, Agency Agreement: Cross-border: clauses 4.2 and 4.3*)?
- Stock adequate volumes of products and to deliver the products to the customer (see *Standard document, Agency Agreement: Cross-border: clause 4.7*)?

These clauses in *Standard document, Agency agreement: cross-border* would not be considered unusual in Irish law. However, they are not standard, due to the range of agency arrangements that can arise.

22. Are there any obligatory statutory requirements in relation to commission payments to agents in your jurisdiction or the time limits when the commission payments must be made to agents by the principal (see *Standard document, Agency Agreement: Cross-border: clause 6*)?

*Standard document, Agency agreement: cross-border: clause 6* reflects the statutory requirements in Irish law relating to payments of commission to commercial agents (see *Question 12*).

There are no foreign exchange controls or rules in place in Ireland in a situation where there is a local agent and a foreign principal.

23. Would it be possible in your jurisdiction to include a clause which:

- Makes commissions only payable by the principal to the agent in respect of contracts concluded during the term of the agreement only (see *Standard document, Agency Agreement: Cross-border: clause 6.1*)?
- Provides for a different (lower) rate of commission to be payable to the agent where the principal makes a direct sale to certain customers in the agent's territory (see *Standard document, Agency Agreement: Cross-border: clause 6.2*)?
- Excludes payment of commissions for product sales made by previous agents but which are concluded after the current agent's appointment (see *Standard document, Agency Agreement: Cross-border: clause 6.3*)?

- Provides for the principal to send a statement of the commission due to the agent in a specific period? If so, please confirm what the period must be under any applicable legislation (see *Standard document, Agency Agreement: Cross-border: clause 6.10*)?
- Provides a right for the agent to retain commission out of the sale proceeds (see *Standard document, Agency Agreement: Cross-border: clause 6.11*)?
- Provides for each party to keep accounts and records of all transactions and allow the other party to inspect such accounts and records and take copies of them (see *Standard document, Agency Agreement: Cross-border: clause 6.13*)?
- Provides that all records held by either party referred to in previous bullet point belong to the principal (see *Standard document, Agency Agreement: Cross-border: clause 6.13*)?

These clauses are generally permitted under Irish law.

In relation to *clause 6.1*, where a commercial agency relationship arises, Article 8 of the Commercial Agents Directive allows a commercial agent to be entitled to commission on contracts concluded **after** the term of the agency agreement where either:

- The transaction is mainly attributable to the commercial agent's efforts during the term and where the contract was entered into within a reasonable period after the agency agreement terminated.
- Where the order of the third party reached the principal before the agreement terminated.

This entitlement will only arise where the commercial agent is remunerated in whole or in part by commission, and only in the absence of any other agreement made regarding commission payable between the parties.

(See *Question 12*.)

24. In your jurisdiction, would it be permissible to mandate that any dispute on the amount of commission payable must be referred to the principal's auditor for settlement (to the exclusion of the agent having access to the courts)? If so, does the principal's auditor need to be registered in the agent's home jurisdiction? (See *Standard document, Agency Agreement: Cross-border: clause 6.9*.)

This would be permissible under Irish law, and the principal's auditor need not be registered in the agent's home jurisdiction. *Clause 6.9* would be enforceable for disputes relating to the amount of the commission only: the jurisdiction of the courts could not be excluded in respect of any disputes regarding the **interpretation** of any clause relating to the payment of commission.

25. Does the trust concept and the role of "trustee" exist in your jurisdiction? If not, how should the practical matter of separate bank accounts be reflected in clause wording? (See *Standard document, Agency Agreement: Cross-border: clause 6.12.*)

Yes; the concepts of trusts and trustees exist in the Irish jurisdiction, and so *clause 6.12* is enforceable under Irish law.

26. In your jurisdiction, are there competition/anti-trust law implications of an agent agreeing to spend its own money on advertising the principal's products (see *Standard document, Agency Agreement: Cross-border: clause 7.1*)?

Where a genuine agency agreement exists, obligations under *clause 7.1* would fall outside any prohibition under Article 101 of the TFEU (see *Question 4* for the key factors in assessing whether a genuine agency agreement exists).

However, the fact that the agent is under an obligation to spend its own money on advertising may be one factor which suggests that a genuine agency relationship exists. This will be considered in the context of the entire context of the relationship between the parties.

27. Is it common practice in your jurisdiction for the principal to provide the agent with an indemnity in respect of any product liability claim? Does "damage" to property in any indemnity include harm to intangible property such as profits and reputation? (See *Standard document, Agency Agreement: Cross-border: clause 11.1.*)

*Clause 11.1* reflects the position under Irish law in respect to the principal providing the agent with an indemnity. *Clause 11.1* refers to "property", but does not specify whether this is intended to cover tangible property only, or to also extend to intangible property. To avoid ambiguity and the risk that a court might construe this to have a broader or narrower meaning than either party might intend, it would be preferable to be more precise.

28. What limitations and exclusions of liability might be appropriate (see *Standard document, Agency Agreement: Cross-border: clause 12*)?

In Ireland, the parties may not limit liability for death or personal injury caused by negligence, for fraud or for fraudulent misrepresentation. The parties have general freedom to contract in relation to any other limitations on liability.

29. Is the term "exclusive" agency agreement recognised in your jurisdiction? Does local law provide for automatic exclusivity?

Yes, the term exclusivity is recognised in Ireland, and generally is taken to mean that the principal will:

- Refrain from appointing another agent in the territory allocated to an agent.
- Impose a prohibition on the principal itself actively selling in that territory.

Exclusivity is not automatic in Ireland. If it is not expressly stated in an agency agreement whether the agency is on an exclusive or non-exclusive basis, it will be open to interpretation whether it is intended to be exclusive.

30. Is the term "sole" agency agreement recognised in your jurisdiction?

In Ireland, the term "sole" agency agreement is understood to mean that the agent will be the only agent appointed to a particular territory in accordance with the agreement. The principal may actively seek sales in the territory, but will be precluded from appointing any other agents within it.

31. Is the term "non-exclusive" agency agreement recognised in your jurisdiction?

Where an agency agreement is expressed to be non-exclusive in this jurisdiction, this would be understood to mean that the principal is not precluded from appointing further agents in the same territory or from itself actively seeking sales there.

32. Will any customs duties be payable under the agreement for any products that are received by an agent in your jurisdiction?

No customs duties will apply to goods being shipped and received in the EU. If the goods are being shipped from outside the EU, customs duties will be payable and it is advisable that provisions be made for this in the agency agreement.

33. Are there any compliance obligations on either party under your local laws?

A range of compliance obligations may apply to the parties to an agency agreement, depending on the sector or industry in which they are operating, such as standards relating to:

- Healthcare provision.
- Food safety standards.
- Product safety standards.
- The sale of investment products.

More generally, both parties must ensure that they do not commit any corruption-related offences under the Criminal Justice (Corruption Offences) Act 2018 (see [Question 13](#)).

34. In your jurisdiction, to what extent can an agent incur personal liability to a customer?

An agent may become personally liable to the customer in a number of ways, such as where:

- An agent is party to the contract.
- An agent personally executes a deed.
- An agent signs a bill of exchange (the agent should expressly state his representative authority).
- An agent does not disclose to the third party that it is acting in an agency capacity on behalf of a principal.
- An agent warrants that it has proper authority to act on the principal's authority when it does not.
- An agent can be shown to have acted fraudulently when warranting authority it did not have, in which case the agent may be liable for the tort of deceit.

A commercial agent may obtain insurance in Ireland to cover any such personal liability that arises.

35. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the agency agreement (see *Standard document, Agency Agreement: Cross-border: clauses 25 and 26*)?

In general, no. The parties are free to agree as between themselves on choice of law. The Commercial Agents Regulations do not specify that commercial agency agreements to which they apply must be governed by Irish law.

36. Does the agreement need to be in a language other than English to be valid and enforceable (see *Standard document, Agency Agreement: Cross-border: clause 27*)?

No.

37. How does this agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

## Execution formalities

An agency agreement need not generally be executed as a deed, and may be executed as a simple contract. Where an individual is signing on behalf of a company, they must be duly authorised to do so.

## Registration formalities

There are no registration formalities for agency agreements in Ireland.

38. Are there any clauses in *Standard document, Agency agreement: Cross-border* that would not be legally enforceable or not standard practice in your jurisdiction?

No.

39. Are there any other clauses that would be usual to see in an agency agreement and/or that are standard practice in your jurisdiction?

No.

## Brexit

40. From the point of view of your jurisdiction, what issues do you anticipate arising in relation to agency agreements which either: (i) contain an express choice of English law as governing law; or (ii)

have a UK-incorporated principal or agent as a party and are governed by the laws of your jurisdiction, in consequence of the UK ceasing to be a member state of the European Union?

The UK withdrew from the EU on 31 January 2020. The transition period formally began on 1 February 2020 and is due to run until 31 December 2020. The extent to which there will be UK laws post-transition period that are similar to the regime currently provided for by the Commercial Agents Directive is unclear at this stage.

Where a commercial agency agreement provides for English law as the governing law, it may fall outside the scope of the Commercial Agents Directive at the end of the transition period. It seems likely that provisions similar or equivalent to the Commercial Agents Directive will apply in the UK after this time; however, this is still uncertain.

The Commercial Agents Directive governs much of the law relating to agency in Ireland. When the transition period expires, the Commercial Agents Directive will still continue to apply to any agency agreement that specifies Irish law as the governing law.

41. In relation to any points identified in *Question 40*, would you recommend that any adjustment should be made now to *Standard document, Agency agreement: Cross-border* if it were to be used as an agreement governed by the law of your jurisdiction, in order to address those points in advance?

No.

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